PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Acting Chair/Chief Executive Officer

February 27, 2018

Patrick Giles
35 Charles Street
Trenton, New Jersey 08611

Nonee Lee Wagner, DAG
Department of Law & Public Safety
P.O. Box 114
Trenton, New Jersey 08625-0114

Re: *Patrick Giles v. Motor Vehicle Commission* (CSC Docket No. 2017-2756 and OAL Docket No. CSV 11974-17) - **SETTLEMENT**

Dear Mr. Giles and DAG Wagner:

The appeal of Patrick Giles, a Senior Repairer with the Motor Vehicle Commission, of his 10 working day suspension on charges, was before Administrative Law Judge Elaine B. Frick (ALJ), who issued her initial decision on January 4, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on January 8, 2018. Accordingly, the time frame for the Commission to make its final decision expired on February 22, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally have secured an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any

extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective February 23, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Elaine B. Frick, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

IN THE MATTER OF PATRICK GILES, MOTOR VEHICLE COMMISSION.

OAL DKT. NO. CSV 11974-17
AGENCY DKT. NO. 2017-2756

Patrick Giles, appellant, pro se

Nonee Lee Wagner, Deputy Attorney General, for respondent Motor Vehicle Commission (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: January 3, 2018 Decided: January 4, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

Appellant, Patrick Giles, appeals a ten-day working suspension. This matter was transmitted to the Office of Administrative Law (OAL) on August 18, 2017, for determination as contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 4, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 1/8/18

Date Mailed to Parties: 1/9/18

mph

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 114
Trenton, New Jersey 08625-0114
Attorney for Petitioner
State of New Jersey
Motor Vehicle Commission

By: Nonee Lee Wagner
Deputy Attorney General
(609) 292-5936
Attorney ID#: 026612001

2018 JAN -3 P 1:22
2017 DEC 28 RCV'D

OAL DOCKET NO. CSV 11974-2017S
AGENCY REF. NO. 2017-2756
SETTLEMENT AGREEMENT

IN THE MATTER OF	
PATRICK GILES	
AND	
NEW JERSEY MOTOR VEHICLE COMMISSION	

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action, dated February 16, 2017, was for a ten (10) day suspension pursuant to N.J.A.C. 4A:2-2.3(a)6 Conduct Unbecoming a Public Employee, MVC Disciplinary Guidelines, Section III, J.

B. The Appellant Patrick Giles withdraws his appeal and request for hearing.

The parties have agreed that Appellant served a ten (10) day suspension. The Appellant agrees to a reduced

suspension of eight (8) days, resulting in two (2) days of back pay. The parties agree that upon submission of the appropriate affidavit of mitigation forms that Appellant will be paid the amount owed from the two (2) days of back pay.

C. The New Jersey Motor Vehicle Commission (Respondent), shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Motor Vehicle Commission will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent Department with regard to this matter, including any additional award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein in paragraph C.

E. Except for the assessment of Patrick Giles (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, except as to worker's compensation claims. Of this agreement, in law or equity against the State of New Jersey, the New Jersey Department of Transportation, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law

Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation not addressed in paragraph C.4 of this agreement or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

G. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

H. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

I. The parties agree this can be executed in counterparts.

AS TO SIGNATURES:

12-19-2017
DATE

Patrick K. Giles
PATRICK GILES

12-28-17
DATE

Kristina Adams
KRISTINA ADAMS

12-22-17
DATE

APPROVED AS TO FORM:

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY

BY: Nonee Lee Wagner
NONEE LEE WAGNER
DEPUTY ATTORNEY GENERAL

CERTIFICATION

I, Patrick Giles, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12-19-2017
DATE

Patrick L. Giles
PATRICK GILES

2018 JAN 3 P 1:22

1-9-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 12, 2018

Edward A. Berger, Esq.
50 Park Place, 11TH Floor
Newark, New Jersey 07102

Elizabeth A. Davies, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Matilda Ansah v. Greystone Park Psychiatric Hospital, Department of Human Services* (CSC Docket No. 2017-3777; OAL Docket No. CSV 8197-17) - **SETTLEMENT**

Dear Mr. Berger and DAG Davies:

The appeal of Matilda Ansah, a Residential Living Specialist at Greystone Park Psychiatric Hospital, Department of Human Services, of her removal, effective December 23, 2016 on charges, was before Administrative Law Judge Margaret M. Monaco (ALJ), who issued her initial decision on January 9, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on January 11, 2018. Accordingly, the time frame for the Commission to make its final decision expires on February 25, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently there is not a quorum of Commission members available to vote. Until such a quorum is secured, this matter cannot be decided by the Commission. Based on this information, the fact that this matter was settled by the parties, the settlement is in compliance with Civil Service law and rules, and the parties' agreement to proceed, there does not appear to be a basis to further delay a final disposition in this matters. Thus, the Commission has determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective February 26, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Margaret M. Monaco, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08197-17
AGENCY DKT. NO. 2017-3777

IN THE MATTER OF MATILDA ANSAH, DEPARTMENT OF HUMAN SERVICES, GREYSTONE PARK PSYCHIATRIC HOSPITAL.

Edward A. Berger, Esq., for appellant Matilda Ansah

Elizabeth A. Davies, Deputy Attorney General, for Department of Human Services (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: January 8, 2018 Decided: January 9, 2018

BEFORE **MARGARET M. MONACO**, ALJ:

Appellant Matilda Ansah filed an appeal from a Final Notice of Disciplinary Action dated May 23, 2017, issued by respondent Department of Human Services, Greystone Park Psychiatric Hospital. The Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed on June 12, 2017, for determination as a contested case. Prior to the scheduled hearing, the parties reached an amicable

resolution and counsel for respondent submitted the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 9, 2018
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency:

1-11-18

Date Mailed to Parties: JAN 11 2018
jb

Laura Dudley
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. CSV 8197-17

SETTLEMENT AGREEMENT

IN THE MATTER OF
MATILDA ANSAH
AND
GREYSTONE PARK PSYCHIATRIC HOSPITAL, DEPARTMENT OF HUMAN SERVICES, AND DEPARTMENT OF HEALTH

RECEIVED
2018 JAN -8 P 2:36
STATE OF NEW JERSEY
OFFICE OF ATTORNEY LAW

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated May 23, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 C-9 Insubordination Could result in anger to person or property.	Removal	December 23, 2016
2. Admin. Order 4:08 E-1 Violation of a rule, regulation, policy Procedure, order, or administrative Decision.	Removal	December 23, 2016
4. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee.	Removal	December 23, 2016
5. N.J.A.C. 4A:2-2.3(a)12 Other sufficient causes.	Removal	December 23, 2016

B. The parties have agreed to the following:

The Appellant, Matilda Ansah withdraws her appeal for a hearing and the Respondent Appointing Authority, Department of Health and agrees that the following result will occur with regard to each charge:

The Final Notice of Disciplinary Action dated May 23, 2017

Charge	Disposition
1. Admin. Order 4:08 C-9	6 month suspension effective December 23, 2016.
2. Admin. Order 4:08 E-1	6 month suspension effective December 23, 2016.
3. N.J.A.C. 4A:2-2.3(a)6	6 month suspension effective December 23, 2016.
4. N.J.A.C. 4A:2-2.3(a)12	6 month suspension effective December 23, 2016.

C. The parties have agreed to the following:

The Appellant agrees to one 6 month suspension and shall not receive any back pay as a result of this agreement.

1. To date, appellant has served a total of 6 months without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: No back pay .
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: voluntary leave of absence without pay .
4. Appellant will return to the position of Residential Living Specialist Mental Health. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
5. The parties agree that this Settlement Agreement is a "Last Chance Agreement." Any future infractions of conduct unbecoming a public employee that involves arrests and/or charges of shoplifting or any other criminal activity that results in a conviction or guilty plea to a lesser offense or municipal ordinance, shall authorize the Appointing Authority to seek removal.

D. The Department of Human Services and Department of Health (Respondents) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services and the Department of Health will be kept intact. Nothing herein shall preclude the Departments from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, and the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12-20-17
DATE

Matilda Ansah, Appellant

12/20/17
DATE

Edward A. Berger, Esq.
ON BEHALF OF Appellant

12/29/17
DATE

James L. Frey
ON BEHALF OF Respondent

12/29/17
DATE

Elizabeth A. Davies
Deputy Attorney General

CERTIFICATION

I, Matilda Ansah, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12-20-17.
DATE

Matilda Ansah

1-9-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
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DEIRDRE L. WEBSTER COBB
Acting Chairperson

March 1, 2018

Richard M. Pescatore, Esq.
1055 East Landis Avenue
Vineland, New Jersey 08360-4041

Frank L. Corrado, Esq.
Barry, Corrado & Grassi, PC
2700 Pacific Avenue
Wildwood, New Jersey 08260

Re: *Timothy Gay v. City of Cape May* (CSC Docket No. 2017-312; OAL Docket No. CSR 11910-16) – **SETTLEMENT**

Dear Mr. Pescatore and Mr. Corrado:

The appeals of Timothy Gay, a Fire Fighter with the City of Cape May, of his removal effective March 15, 2016, was before Administrative Law Judge Jeffrey Wilson (ALJ), who returned the matter to the Civil Service Commission (Commission) on January 9, 2018 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on February 25, 2018. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that date, the Commission secured a 15-day extension of time to render its final decision no later than March 12, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 13, 2018, as the final decision in this matter per *N.J.S.A.* 40A:14-204.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Jeffrey Wilson, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 11910-16

AGENCY DKT. NO. n/a

IN THE MATTER OF TIMOTHY GAY,
CITY OF CAPE MAY.

Richard M. Pescatore, Esq., for appellant, Timothy Gay

Frank L. Corrado, Esq., for respondent, Cape May (Barry, Corrado & Grassi, attorneys)

Record Closed: December 22, 2017 Decided: January 9, 2018

BEFORE **JEFFREY WILSON,** ALJ:

This matter concerns the appeal of Timothy Gay from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on August 2, 2016, pursuant to N.J.S.A. 40A:14-202(d).

The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 9, 2018
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 1/11/18

Date Mailed to Parties: 1/12/18

JRW/jdw/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on December 22, 2017

Richard M. Pescatore, P.C.
Attorney: Richard M. Pescatore, Esq.
1055 East Landis Avenue
Vineland, New Jersey 08360
(856)-507-1000
NJ Attorney ID: 021841985

IN THE MATTER OF TIMOTHY GAY, CITY OF CAPE MAY.	OFFICE OF ADMINISTRATIVE LAW OAL Docket No. *CSR 11910-16* *CONSENT ORDER FOR TERMS OF SETTLEMENT AND DISMISSAL*

THIS MATTER being open to the Court by Timothy Gay, *Pro Se*, and Richard Pescatore, Esq. having entered an appearance on behalf of Timothy Gay, having represented Timothy Gay in the Superior Court Proceeding for which the Court placed the matter on the inactive list, and Frank Corrado, Esq. appearing on behalf of the City of Cape May, and it appearing to the Court that the parties through counsel have agreed to settle the above matter under the terms and conditions set forth below, and for good cause shown;

IT IS ON THIS 22nd day of Dec., 20 17 ORDERED and adjudged that the matter is hereby dismissed and resolved under the following terms and conditions which shall be made part of the Court's initial decision for review and approval by the Civil Service Commission:

1. The City of Cape May withdraws and rescinds any and all discipline assessed against the appellant- Gay, including but not limited to any removal or discipline which is the subject matter of his appeal;

2. The appellant-Gay shall be considered to have voluntarily resigned, in good standing, from his position as a Firefighter with the City of Cape May and his personnel record modified to reflect same; and

3. Appellant-Gay agrees to withdraw/dismiss the appeal and accepts the consideration negotiated between the parties at the mediation conducted before the Honorable Eugene McCaffrey, PJSC, retired, in the Superior Court matter *Gay v. City of Cape May, Docket #CPM-111-17* as full and adequate consideration herein as to all remaining issues and claims including back pay and attorney's fees.

JEFFREY R. WILSON, A.L.J

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE WITHIN ORDER.

12/22/17
Timothy Gay, Appellant *(Pro Se)*

12/22/17
Richard M. Pescatore, Esq.

12/4/17
Frank L. Corrado, Esq.

1-10-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
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DEIRDRE WEBSTER-COBB
Acting Chair/Chief Executive Officer

February 25, 2018

Arthur G. Margeotes, Esq.
Flanzbaum, Cohen & Raia
P.O. Box 4253
7 Mt. Bethel Road
Warren, New Jersey 07059

Shontae D. Gray, Esq.
Florio, Perrucci, Steinhardt & Fader
218 Route 17 North
Rochelle Park, New Jersey 07662

Re: *Robert Burgess v. Township of Willingboro Police Department* (CSC Docket Nos. 2017-2300; 2299; 2274; 2970; 3044; 3045 and OAL Docket Nos. CSR 2058-17 and 4734-17) - **SETTLEMENTS**

Dear Mr. Margeotes and Ms. Gray:

The appeals of Robert Burgess, a Police Officer with the Township of Willingboro Police Department, of his six removals effective December 19, 2016, were before Administrative Law Judge Dorothy Incarvito-Garrabrant (ALJ), who returned two consolidated initial decisions to the Civil Service Commission (Commission) on January 10, 2018 indicating that the parties had reached settlements regarding all matters.

The time frame for the Commission to make its final decisions expires on February 25, 2018. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that date, the parties were asked whether they wished the Commission to secure a 45-day extension of time to render its final decisions. *See N.J.A.C.* 1:1-18.8. Both parties indicated they did not have any objection to the Commission not securing an additional extension. Based on this information, and since the clarified settlements comply with Civil Service law and rules, the Commission has determined that there is no reason to delay the final disposition of these matters any further by requesting any additional extensions of time. Under these circumstances, the ALJ's recommended decisions will be deemed adopted, effective February 26, 2018, as the final decisions in this matter per *N.J.S.A.* 40A:14-204.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachments

c: The Honorable Dorothy Incarvito-Garrabrant, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 02058-17
AGENCY DKT. NO. n/a

IN THE MATTER OF ROBERT BURGESS,
TOWSNHIP OF WILLINGBORO,
POLICE DEPARTMENT.

Arthur G. Margeotes, Esq., appearing for appellant Robert Burgess (Flanzbaum, Cohen & Raia, LLC, attorneys)

Lester E. Taylor, Esq., appearing for respondent Township of Willingboro, Police Department (Florio, Perrucci, Steinhardt & Fader, LLC, attorneys)

Record Closed: January 8, 2018 Decided: January 10, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

This matter concerns the appeal of Robert Burgess from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on February 3, 2017, pursuant to N.J.S.A. 40A:14-202(d).

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 10, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 1/10/18

Date Mailed to Parties: 1/11/18

/tat/lm

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release (the "Agreement and Release") is made by and between Robert Burgess (hereinafter "Burgess") and Willingboro Township and Willingboro Township Police Department (hereinafter "The Township") and/or collectively "The Parties."

BACKGROUND

WHEREAS, Burgess was employed by the Township in the capacity of a Police Officer and has elected to resign from his position with the Township effective December 8, 2017 ("Effective Date"); and

WHEREAS, the Township has accepted Burgess' resignation as outlined above; and

WHEREAS, the Parties wish to completely release and forever discharge with prejudice any and all claims or potential claims, disputes or causes of action which Burgess has or may have against the Township and/or any other Released Party (as defined in Paragraph 2.3 below);

NOW, THEREFORE, in mutual consideration of the promises and covenants that hereinafter follow, The Parties agree that Burgess' wishes to end and extinguish any existing or potential disputes that Burgess has or may have against the Township which arose on or before the "Effective Date" of this Agreement and Release, in exchange for the valuable Consideration tendered by the Township (as set forth in Paragraph 1.1 below) solely and exclusively on the terms and conditions set forth below.

TERMS

1. Consideration in Exchange for Release

1.1 In exchange for and in consideration of Burgess' promises as set forth above and below, the Township, on behalf of all Released Parties, agrees as follows:

a) The Township shall tender a payment to Burgess in the lump sum of $4,534.54 representing the following: $2,815.40 for 56.5 Compensation Time Hours; $1,719.14 for 34.5 Vacation Time Hours. This represents any and all outstanding compensation which Burgess may be entitled other than retirement/pension eligibility for which is not affected by this agreement. The Township shall issue the appropriate IRS Forms 1099 in connection with this payment. Burgess agrees that, to the extent that any federal, state or local taxes may be or becomes due or payable by him as a result of any of the above

payment, Burgess shall be solely responsible for paying them. Burgess further agrees that he has not relied upon any representation made by the Township or any of its representatives concerning the tax treatment of said payment. Burgess shall indemnify the Township from, and hold it harmless against, any claims made by administrative agencies or courts of competent jurisdiction for such unpaid taxes.

b) The Township and the Willingboro Police Department shall remove from Burgess' Internal Affairs and Personnel files all information related to the charges which are the subject of this agreement. The Township will not initiate contact, ~~confer or meet with~~ initiate conversation or initiate meeting with any agency or prospective employer as it relates to Burgess' references or employment with The Township of Willingboro Police Department, subject to the provisions of Paragraph 4 herein.

c) The Township shall not object to any inquiry regarding an application for a firearm permit by Burgess.

d) Upon request by Burgess, the Township will provide a complete copy of his personnel file. *See* Section 4 of this Agreement.

2. Releases of Burgess' Existing or Potential Disputes

2.1 Burgess agrees that the consideration set forth above is adequate and valuable in exchange for his promises herein. Burgess furthermore acknowledges and expressly agrees that he shall not be entitled to any payment or other benefit from the Township or any of the Released Parties except that which has been outlined above in Section 1 entitled "Consideration in Exchange for Release," including but not limited to any wages, severance pay, benefits or benefit contributions, retirement plans, deferred compensation plans, bonuses, commissions, or any other remuneration, and that neither the Township or any other Released Party shall ever be required to make any further payment or provide any benefit to him or any other person or entity regarding any claim, right or status he may have arising on or before the Effective Date of this Agreement and Release, other than normal pension, as eligible. Burgess expressly warrants and represents that: (1) he has not assigned any interest in any claim or potential claim released by this Agreement and Release (2) he has not filed or caused to be filed or has otherwise participated in any claims, suits, charges, or other proceedings regardless of forum against the Township or any other Released Party other than the action pending before the Office of Administrative Law under OAL Docket

No.'s: CSR - 02058-2017 S; CSR – 04734-2017 S, and (3) he fully indemnifies and holds the Township and the Released Parties harmless from any such claims or damages, including attorney's fees, fines, costs, liquidated or punitive damages, asserted or awarded against the Township or any of the Released Parties where such claim was assigned by him or was otherwise based on his hiring, employment or separation from employment with the Township or any Released Party.

2.2 Burgess acknowledges that he has not been provided any legal or other advice by the Township, the Released Parties or anyone on behalf of the Township and/or the Released Parties including but not limited to legal counsel or advice regarding the tax or withholding consequences of this Agreement or Release, or the consideration he may receive hereunder, pursuant to any federal, state or local tax or withholding laws or regulations. Burgess also agrees to make no individual or class claims against the Township or other Released Party for payment of any taxes, including costs, attorney's fees or applicable interest or penalties.

2.3 In exchange for the benefits described in Section 1.1 above, Burgess, for full consideration as recited above, forever waives, releases, discharges and gives up any claim, demand, cause of action or damage that he, his spouse, family members, heirs, executors, administrators, successors and/or assigns may have against the Township, its employees, its managers, its elected officials, and its appointed officials, as well as all of their employee benefits plans and the trustees other than retirement/pension eligibility for which is not affected by this agreement, fiduciaries, administrators and parties-in-interest of those plans, and any of the present or past employees, managers, elected officials, appointed officials, officers, directors, administrators, shareholders, agents, attorneys, insurance carriers and contractors of each of the foregoing person(s) or entity/entities along with the predecessors, successors, and assigns of each of them and including their families, estates, and executors (together "the Released Parties" as used throughout this Agreement and Release), based upon his recruitment, hiring, employment or separation from that employment, including but not limited to: any waivable claims for salary, bonuses, commissions, severance pay, vacation pay or any benefits under the Fair Labor Standards Act of 1938, 29 U.S.C. 201, *et seq.*, ("FLSA"), the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001, *et seq.* ("ERISA"), the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161 *et seq.*

("COBRA"), the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, *et seq.;* the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, *et seq.;* the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, *et seq.,* the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, *et seq.,* any waivable claims of harassment, discrimination or retaliation based upon, *inter alia,* race, color, ethnicity, national origin, sexual orientation, ancestry, religion, marital status, age, sex, gender, citizenship status, handicap, medical condition or disability under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e), *et seq.* ("Title VII"), the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* ("ADA"), the Sarbanes-Oxley Act of 2001, 15 U.S.C. §§7201, *et seq.,* the Civil Rights Act of 1991, 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988, or any other federal, state, or local law prohibiting discrimination, harassment or retaliation in employment, including but not limited to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, *et seq.* ("NJLAD"); any claims of breach of implied or express contract, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, intentional or negligent infliction of emotional distress, violation of public policy, wrongful or constructive discharge, or any other tort or claim, including but not limited to claims arising under the New Jersey Temporary Disability Benefits Law, N.J.S.A. 43:21-25, *et seq.,* including as amended by the New Jersey Paid Family Leave Act; the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq.,* the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, *et seq.;* the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, N.J.S.A. 34:21-2, *et seq.* and the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, *et seq.,* and any and all other claims for costs, fees or other expenses, specifically including but not limited to attorney's fees, expenses and expert fees; and all claims under any other federal, state, or local law, regulation, ordinance or judicial decision, or under the

United States or New Jersey Constitutions, relating to any alleged violation of public policy, wrongful, retaliatory or constructive discharge, non-payment of wages, retaliation, assault, battery, defamation, or any other statutory, common law, or employment-related claim or tort. Burgess's release expressly includes a waiver of all claims existing on or before the date he signs this Agreement and Release as well as those he may not know about, and specifically includes the unconditional waiver of the right to proceed

with any discovery concerning any such claim in any future litigation or proceeding between Burgess and the Township or other Released Party. Burgess acknowledges and affirms that he has been fully paid any and all wages, including overtime, owed to him as well as all benefits and deferred compensation owed to him other than retirement/pension eligibility for which is not affected by this agreement. Furthermore, he acknowledges and affirms that the payment herein enumerated shall satisfy all earned vacation, sick and/or other paid time off for what he may be entitled.

2.4 Notwithstanding the release and waivers set forth in Paragraph 2.3 above, Burgess acknowledges that this Agreement and Release in no way waives or limits his right to take part in any investigation conducted by a state, federal, or local government agency. Nonetheless, Burgess understands and acknowledges that by signing this Agreement and Release, he has completely waived his right to receive monetary damages or other individual relief in connection with any charge he may file with any administrative agency that relates to a claim waived under this Agreement and Release and, if he is awarded monetary damages, hereby unconditionally assigns to the Township and Released Parties any right or interest he may have to receive such relief or damage.

3. Confidentiality

3.1 Burgess promises and agrees that he has not and will not disclose the terms of this Agreement and Release, that he received any payments from the Township or any allegations of alleged wrongdoing by the Township or any other Released Party, to any person or entity except (1) his attorney, (2) his professional tax advisors, the Internal Revenue Service ("IRS") or other taxing authorities, (3) his spouse and/or immediate family; or (4) in response to a formal order from any judicial, governmental, regulatory, or self-regulatory agency or organization having competent jurisdiction. Burgess further agrees that if he does disclose the terms of this Agreement and Release to his spouse, immediate family, attorney, or to his professional tax advisors, he will insure that they will not further disclose the terms of this Agreement and Release. Burgess understands and agrees that he may, pursuant to subpoena or other legal process, be asked to provide testimony, documents and other information regarding his former employment with the Township. If Burgess receives a subpoena, formal order or other legal process from

any judicial, governmental, regulatory, or self-regulatory agency or other organization as set forth in Paragraph

2.4 above, Burgess agrees to provide the Township, c/o Richard Brevogel – Acting Township Manager, and/or his successor, with prompt notice of any such subpoena or process, hereby consents to the Township's intervention in any such proceeding to prevent the requested disclosure, and to cooperate with the Township in seeking to avoid the disclosure or, if ordered by the court, by giving truthful and complete testimony and information in response to such subpoena or legal process.

3.2 Notwithstanding anything else contained in this Agreement and Release, Burgess understands and agrees that the Township and the Released Parties will remain free to internally communicate, to those with a business or governmental need to know, any and all information concerning his employment history with the Township.

4. Reference-Related Communication

Burgess understands and acknowledges that, should he or any prospective employer wish to make any inquiries of the Township or any other Released Party into his employment history with the Township ("Reference Inquiries"), such Reference Inquiries must be directed exclusively to the Department of Human Resources. Burgess further agrees that the Township retains the absolute right, in its sole discretion, not to respond to Reference Inquiries in any other form. Burgess agrees that in the event the Township responds to Reference Inquiries properly directed to the Department of Human Resources, the Department of Human Resources will provide only Burgess' (1) dates of employment with the Township; and (2) his last position title, unless a waiver is provided by Burgess outlining the specific personnel information outside of (1) and (2) above that may be released by the Township. Upon receipt of said waiver, the Department of Human Resources may release the information specified. Burgess voluntarily consents to the Township's response to Reference Inquiries, and fully indemnifies and holds the Township and the Released Parties harmless from any and all claims, causes of action, damages and attorney's fees/costs in any way related to the Township's proper response to Reference Inquiries as described in this Section.

5. No Admission of Liability

Burgess also agrees that he is barred from seeking to introduce this Agreement and Release into evidence in any federal, state, or administrative proceeding or during any arbitration because this Agreement and Release is not in any way an admission by the Township or the Released Parties that they breached any legal duty owed to him, or are liable to him in any way. Burgess acknowledges that, by settling any and all actual or potential disputes and entering into this Agreement and Release, the Township and the Released Parties do not admit that they owe him any money, breached any duty they owed to him, have done anything wrong, or have treated him unlawfully or unfairly in any way. In fact, Burgess acknowledges that the Township and the Released Parties specifically deny that they have violated or abridged any federal, state, or local law, regulation or ordinance, or any right or obligation that they owe or may have owed to him. No findings of fact have been made or issued by any administrative agency or court of law, and Burgess agrees that he is not the prevailing party in this cause of action involving the Township or the Released Parties.

6. Entire Agreement

6.1 Burgess also warrants and agrees that this Agreement and Release constitutes the entire agreement between himself and the Township or any other Released Party. Burgess understands and acknowledges that no other promise or agreements have been made to or with him or with any other person or entity on his behalf other than those set forth herein, and that there is no written or oral understanding or agreement between Burgess and the Township or any other Released Party which is not specifically recited or referenced herein. In deciding to sign this Agreement and Release, Burgess has not relied on any statement by anyone associated with the Township or any other Released Party that is not specifically and expressly set forth in this Agreement and Release. In fact, Burgess specifically acknowledges that he had the opportunity to review this Agreement and Release with his attorney prior to executing same.

7. Severability and Construction of Terms

Burgess agrees that the terms of this Agreement and Release are severable, and that if any provision of this Agreement and Release (other than the General Releases in Paragraph 2.3 above) is held

to be illegal, invalid or unenforceable, that provision shall not be a part of this Agreement and Release but all other terms shall remain in full force and effect at the sole option of the Township. The legality, validity and enforceability of the remaining provisions of this Agreement and Release shall not be affected by a determination that any provision of this Agreement and Release (other than the General Releases in Paragraph 2.3 above) is illegal, invalid or unenforceable. The parties also agree that because Burgess was given an opportunity to be represented by counsel of his own choosing at his own cost to negotiate this Agreement and Release, the terms of this Agreement and Release shall not be construed against the Township or the Released Parties in any respect.

8. Assignment

This Assignment and Release shall not be assigned by Burgess but it shall be binding upon his heirs, executors, administrators, agents, and legal representatives. This Agreement shall be freely assignable by the Township without restriction, and shall be deemed automatically assigned by the Township with Burgess's consent. This Agreement and Release shall be binding upon, and shall inure to the benefit of, the Township's successors and assigns.

9. Governing Law

This Agreement is governed by, and shall be construed and enforced, in all respects, in accordance with the laws of the State of New Jersey, exclusive of any choice of law rules. Any dispute concerning this Agreement and Release shall be brought in, and the parties hereby consent to the personal jurisdiction of, the Superior Court of New Jersey.

10. Acknowledgement

Burgess acknowledges that (1) he has carefully read this Agreement and Release; (2) he has had the opportunity to have his attorney explain the contents of the terms of this Agreement to him; (3) he fully understands what this Agreement and Release means; (4) he is physically and emotionally competent and of sound mind to execute this Agreement and Release; and (5) he is signing this Agreement and Release knowingly and voluntarily, of his own free will, act and deed.

IN WITNESS WHEREOF, of sound mind and intending to be forever legally bound hereby, the parties have executed this Confidential Settlement Agreement and General Release, being ~~ten~~ nine 9 (~~10~~) pages in length, and on the date(s) set forth below.

Burgess:

Date: 12-08-2017

ROBERT BURGESS

STATE OF NEW JERSEY)
ss.
COUNTY OF SOMERSET)

SWORN TO and SUBSCRIBED before me by Robert Burgess, who is personally known to me or has produced (NJ DRIVER'S LICENSE) as identification.

DATED this 8TH day of DECEMBER, 2017.

NOTARY PUBLIC, State of New Jersey

Signature of Notary Public

JANET WERVER
A Notary Public of New Jersey
My Commission Expires November 5, 2020

Typed or Printed Name of Notary Public

The Township:

Lester G. Taylor III

Date: 1/8/18

Twp Labor Counsel

By:

WILLINGBORO TOWNSHIP

Angiulo, Nicholas

From: Shontae Gray <SGray@fpsflawfirm.com>
Sent: Tuesday, February 6, 2018 11:28 AM
To: Angiulo, Nicholas
Cc: Lester Taylor; Susan Taglieri; Arthur G. Margeotes
Subject: FW: Robert Burgess v. Township of Willingboro - SETTLEMENTS

Importance: High

Mr. Angiulo,

With regard to the characterization of the time period referenced below, it is the Township's position that the time should be recorded as an approved leave of absence without pay.

I have attempted to confer with Mr. Margeotes concerning this matter, but I have not been able to reach him. Feel free to give me a call with any questions or concerns.

Thank you.

Shontae D. Gray, Esq.
Florio Perrucci Steinhardt & Fader, LLC
218 Route 17 North
Rochelle Park, New Jersey 07662
201-843-5858 (office)
201-373-8936 (direct)
201-843-5877 (fax)
sgray@fpsflawfirm.com
www.fpsflawfirm.com

FPSF FLORIO PERRUCCI STEINHARDT & FADER
Attorneys at Law LLC

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Tuesday, January 23, 2018 12:35 PM
To: arthur@flanzbaumcohen.com; Lester Taylor
Subject: Robert Burgess v. Township of Willingboro - SETTLEMENTS
Importance: High

Mr. Margeotes and Mr. Taylor:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlements regarding Robert Burgess from the Office of Administrative Law. However, prior to forwarding them to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlements indicate that Ms. Burgess agrees, *inter alia*, to resign in good standing effective December 8, 2017, the record does not specifically reflect how to record the time period from the original date of removal (December 19, 2016) to the date of resignation. In this regard, before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

Total Control Panel Login

To: ltaylor@fpsflawfirm.com Remove this sender from my allow list
From: nicholas.angiulo@csc.nj.gov

You received this message because the sender is on your allow list.

STATEMENT OF CONFIDENTIALITY: The information contained in this transmission including any attached documentation is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify Florio, Perrucci, Steinhardt, & Fader, LLC immediately by replying to this e-mail. Please delete all copies of this message and any attachments immediately.

IRS CIRCULAR 230 DISCLOSURE: As required by U.S. Treasury Regulations governing tax practice, you are advised that any written tax advice contained herein was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding tax penalties that may be imposed under the Internal Revenue Code.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 04734-17

AGENCY DKT. NO. n/a

IN THE MATTER OF ROBERT BURGESS,
TOWSNHIP OF WILLINGBORO,
POLICE DEPARTMENT.

Arthur G. Margeotes, Esq., appearing for appellant Robert Burgess (Flanzbaum, Cohen & Raia, LLC, attorneys)

Lester E. Taylor, Esq., appearing for respondent Township of Willingboro, Police Department (Florio, Perrucci, Steinhardt & Fader, LLC, attorneys)

Record Closed: January 8, 2018 Decided: January 10, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

This matter concerns the appeal of Robert Burgess from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on April 3, 2017, pursuant to N.J.S.A. 40A:14-202(d).

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 10, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: January 10, 2018

Date Mailed to Parties: 1/11/18

/tat/lam

RECEIVED
2018 JAN -8 A 8:39
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release (the "Agreement and Release") is made by and between Robert Burgess (hereinafter "Burgess") and Willingboro Township and Willingboro Township Police Department (hereinafter "The Township") and/or collectively "The Parties."

BACKGROUND

WHEREAS, Burgess was employed by the Township in the capacity of a Police Officer and has elected to resign from his position with the Township effective December 8, 2017 ("Effective Date"); and

WHEREAS, the Township has accepted Burgess' resignation as outlined above; and

WHEREAS, the Parties wish to completely release and forever discharge with prejudice any and all claims or potential claims, disputes or causes of action which Burgess has or may have against the Township and/or any other Released Party (as defined in Paragraph 2.3 below);

NOW, THEREFORE, in mutual consideration of the promises and covenants that hereinafter follow, The Parties agree that Burgess' wishes to end and extinguish any existing or potential disputes that Burgess has or may have against the Township which arose on or before the "Effective Date" of this Agreement and Release, in exchange for the valuable Consideration tendered by the Township (as set forth in Paragraph 1.1 below) solely and exclusively on the terms and conditions set forth below.

TERMS

1. Consideration in Exchange for Release

1.1 In exchange for and in consideration of Burgess' promises as set forth above and below, the Township, on behalf of all Released Parties, agrees as follows:

a) The Township shall tender a payment to Burgess in the lump sum of $4,534.54 representing the following: $2,815.40 for 56.5 Compensation Time Hours; $1,719.14 for 34.5 Vacation Time Hours. This represents any and all outstanding compensation which Burgess may be entitled other than retirement/pension eligibility for which is not affected by this agreement. The Township shall issue the appropriate IRS Forms 1099 in connection with this payment. Burgess agrees that, to the extent that any federal, state or local taxes may be or becomes due or payable by him as a result of any of the above

payment, Burgess shall be solely responsible for paying them. Burgess further agrees that he has not relied upon any representation made by the Township or any of its representatives concerning the tax treatment of said payment. Burgess shall indemnify the Township from, and hold it harmless against, any claims made by administrative agencies or courts of competent jurisdiction for such unpaid taxes.

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c) The Township shall not object to any inquiry regarding an application for a firearm permit by Burgess.

d) Upon request by Burgess, the Township will provide a complete copy of his personnel file. *See* Section 4 of this Agreement.

2. Releases of Burgess' Existing or Potential Disputes

2.1 Burgess agrees that the consideration set forth above is adequate and valuable in exchange for his promises herein. Burgess furthermore acknowledges and expressly agrees that he shall not be entitled to any payment or other benefit from the Township or any of the Released Parties except that which has been outlined above in Section 1 entitled "Consideration in Exchange for Release," including but not limited to any wages, severance pay, benefits or benefit contributions, retirement plans, deferred compensation plans, bonuses, commissions, or any other remuneration, and that neither the Township or any other Released Party shall ever be required to make any further payment or provide any benefit to him or any other person or entity regarding any claim, right or status he may have arising on or before the Effective Date of this Agreement and Release, other than normal pension, as eligible. Burgess expressly warrants and represents that: (1) he has not assigned any interest in any claim or potential claim released by this Agreement and Release (2) he has not filed or caused to be filed or has otherwise participated in any claims, suits, charges, or other proceedings regardless of forum against the Township or any other Released Party other than the action pending before the Office of Administrative Law under OAL Docket

No.'s: CSR - 02058-2017 S; CSR – 04734-2017 S, and (3) he fully indemnifies and holds the Township and the Released Parties harmless from any such claims or damages, including attorney's fees, fines, costs, liquidated or punitive damages, asserted or awarded against the Township or any of the Released Parties where such claim was assigned by him or was otherwise based on his hiring, employment or separation from employment with the Township or any Released Party.

2.2 Burgess acknowledges that he has not been provided any legal or other advice by the Township, the Released Parties or anyone on behalf of the Township and/or the Released Parties including but not limited to legal counsel or advice regarding the tax or withholding consequences of this Agreement or Release, or the consideration he may receive hereunder, pursuant to any federal, state or local tax or withholding laws or regulations. Burgess also agrees to make no individual or class claims against the Township or other Released Party for payment of any taxes, including costs, attorney's fees or applicable interest or penalties.

2.3 In exchange for the benefits described in Section 1.1 above, Burgess, for full consideration as recited above, forever waives, releases, discharges and gives up any claim, demand, cause of action or damage that he, his spouse, family members, heirs, executors, administrators, successors and/or assigns may have against the Township, its employees, its managers, its elected officials, and its appointed officials, as well as all of their employee benefits plans and the trustees other than retirement/pension eligibility for which is not affected by this agreement, fiduciaries, administrators and parties-in-interest of those plans, and any of the present or past employees, managers, elected officials, appointed officials, officers, directors, administrators, shareholders, agents, attorneys, insurance carriers and contractors of each of the foregoing person(s) or entity/entities along with the predecessors, successors, and assigns of each of them and including their families, estates, and executors (together "the Released Parties" as used throughout this Agreement and Release), based upon his recruitment, hiring, employment or separation from that employment, including but not limited to: any waivable claims for salary, bonuses, commissions, severance pay, vacation pay or any benefits under the Fair Labor Standards Act of 1938, 29 U.S.C. 201, *et seq.*, ("FLSA"), the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001, *et seq.* ("ERISA"), the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161 *et seq.*

("COBRA"), the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, *et seq.;* the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, *et seq.;* the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, *et seq.,* the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, *et seq.,* any waivable claims of harassment, discrimination or retaliation based upon, *inter alia,* race, color, ethnicity, national origin, sexual orientation, ancestry, religion, marital status, age, sex, gender, citizenship status, handicap, medical condition or disability under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e), *et seq.* ("Title VII"), the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* ("ADA"), the Sarbanes-Oxley Act of 2001, 15 U.S.C. §§7201, *et seq.,* the Civil Rights Act of 1991, 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988, or any other federal, state, or local law prohibiting discrimination, harassment or retaliation in employment, including but not limited to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, *et seq.* ("NJLAD"); any claims of breach of implied or express contract, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, intentional or negligent infliction of emotional distress, violation of public policy, wrongful or constructive discharge, or any other tort or claim, including but not limited to claims arising under the New Jersey Temporary Disability Benefits Law, N.J.S.A. 43:21-25, *et seq.,* including as amended by the New Jersey Paid Family Leave Act; the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq.,* the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, *et seq.;* the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, N.J.S.A. 34:21-2, *et seq.* and the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, *et seq.,* and any and all other claims for costs, fees or other expenses, specifically including but not limited to attorney's fees, expenses and expert fees; and all claims under any other federal, state, or local law, regulation, ordinance or judicial decision, or under the

United States or New Jersey Constitutions, relating to any alleged violation of public policy, wrongful, retaliatory or constructive discharge, non-payment of wages, retaliation, assault, battery, defamation, or any other statutory, common law, or employment-related claim or tort. Burgess's release expressly includes a waiver of all claims existing on or before the date he signs this Agreement and Release as well as those he may not know about, and specifically includes the unconditional waiver of the right to proceed

with any discovery concerning any such claim in any future litigation or proceeding between Burgess and the Township or other Released Party. Burgess acknowledges and affirms that he has been fully paid any and all wages, including overtime, owed to him as well as all benefits and deferred compensation owed to him other than retirement/pension eligibility for which is not affected by this agreement. Furthermore, he acknowledges and affirms that the payment herein enumerated shall satisfy all earned vacation, sick and/or other paid time off for what he may be entitled.

2.4 Notwithstanding the release and waivers set forth in Paragraph 2.3 above, Burgess acknowledges that this Agreement and Release in no way waives or limits his right to take part in any investigation conducted by a state, federal, or local government agency. Nonetheless, Burgess understands and acknowledges that by signing this Agreement and Release, he has completely waived his right to receive monetary damages or other individual relief in connection with any charge he may file with any administrative agency that relates to a claim waived under this Agreement and Release and, if he is awarded monetary damages, hereby unconditionally assigns to the Township and Released Parties any right or interest he may have to receive such relief or damage.

3. Confidentiality

3.1 Burgess promises and agrees that he has not and will not disclose the terms of this Agreement and Release, that he received any payments from the Township or any allegations of alleged wrongdoing by the Township or any other Released Party, to any person or entity except (1) his attorney, (2) his professional tax advisors, the Internal Revenue Service ("IRS") or other taxing authorities, (3) his spouse and/or immediate family; or (4) in response to a formal order from any judicial, governmental, regulatory, or self-regulatory agency or organization having competent jurisdiction. Burgess further agrees that if he does disclose the terms of this Agreement and Release to his spouse, immediate family, attorney, or to his professional tax advisors, he will insure that they will not further disclose the terms of this Agreement and Release. Burgess understands and agrees that he may, pursuant to subpoena or other legal process, be asked to provide testimony, documents and other information regarding his former employment with the Township. If Burgess receives a subpoena, formal order or other legal process from

any judicial, governmental, regulatory, or self-regulatory agency or other organization as set forth in Paragraph

2.4 above, Burgess agrees to provide the Township, c/o Richard Brevogel – Acting Township Manager, and/or his successor, with prompt notice of any such subpoena or process, hereby consents to the Township's intervention in any such proceeding to prevent the requested disclosure, and to cooperate with the Township in seeking to avoid the disclosure or, if ordered by the court, by giving truthful and complete testimony and information in response to such subpoena or legal process.

3.2 Notwithstanding anything else contained in this Agreement and Release, Burgess understands and agrees that the Township and the Released Parties will remain free to internally communicate, to those with a business or governmental need to know, any and all information concerning his employment history with the Township.

4. Reference-Related Communication

Burgess understands and acknowledges that, should he or any prospective employer wish to make any inquiries of the Township or any other Released Party into his employment history with the Township ("Reference Inquiries"), such Reference Inquiries must be directed exclusively to the Department of Human Resources. Burgess further agrees that the Township retains the absolute right, in its sole discretion, not to respond to Reference Inquiries in any other form. Burgess agrees that in the event the Township responds to Reference Inquiries properly directed to the Department of Human Resources, the Department of Human Resources will provide only Burgess' (1) dates of employment with the Township; and (2) his last position title, unless a waiver is provided by Burgess outlining the specific personnel information outside of (1) and (2) above that may be released by the Township. Upon receipt of said waiver, the Department of Human Resources may release the information specified. Burgess voluntarily consents to the Township's response to Reference Inquiries, and fully indemnifies and holds the Township and the Released Parties harmless from any and all claims, causes of action, damages and attorney's fees/costs in any way related to the Township's proper response to Reference Inquiries as described in this Section.

5. No Admission of Liability

Burgess also agrees that he is barred from seeking to introduce this Agreement and Release into evidence in any federal, state, or administrative proceeding or during any arbitration because this Agreement and Release is not in any way an admission by the Township or the Released Parties that they breached any legal duty owed to him, or are liable to him in any way. Burgess acknowledges that, by settling any and all actual or potential disputes and entering into this Agreement and Release, the Township and the Released Parties do not admit that they owe him any money, breached any duty they owed to him, have done anything wrong, or have treated him unlawfully or unfairly in any way. In fact, Burgess acknowledges that the Township and the Released Parties specifically deny that they have violated or abridged any federal, state, or local law, regulation or ordinance, or any right or obligation that they owe or may have owed to him. No findings of fact have been made or issued by any administrative agency or court of law, and Burgess agrees that he is not the prevailing party in this cause of action involving the Township or the Released Parties.

6. Entire Agreement

6.1 Burgess also warrants and agrees that this Agreement and Release constitutes the entire agreement between himself and the Township or any other Released Party. Burgess understands and acknowledges that no other promise or agreements have been made to or with him or with any other person or entity on his behalf other than those set forth herein, and that there is no written or oral understanding or agreement between Burgess and the Township or any other Released Party which is not specifically recited or referenced herein. In deciding to sign this Agreement and Release, Burgess has not relied on any statement by anyone associated with the Township or any other Released Party that is not specifically and expressly set forth in this Agreement and Release. In fact, Burgess specifically acknowledges that he had the opportunity to review this Agreement and Release with his attorney prior to executing same.

7. Severability and Construction of Terms

Burgess agrees that the terms of this Agreement and Release are severable, and that if any provision of this Agreement and Release (other than the General Releases in Paragraph 2.3 above) is held

to be illegal, invalid or unenforceable, that provision shall not be a part of this Agreement and Release but all other terms shall remain in full force and effect at the sole option of the Township. The legality, validity and enforceability of the remaining provisions of this Agreement and Release shall not be affected by a determination that any provision of this Agreement and Release (other than the General Releases in Paragraph 2.3 above) is illegal, invalid or unenforceable. The parties also agree that because Burgess was given an opportunity to be represented by counsel of his own choosing at his own cost to negotiate this Agreement and Release, the terms of this Agreement and Release shall not be construed against the Township or the Released Parties in any respect.

8. Assignment

This Assignment and Release shall not be assigned by Burgess but it shall be binding upon his heirs, executors, administrators, agents, and legal representatives. This Agreement shall be freely assignable by the Township without restriction, and shall be deemed automatically assigned by the Township with Burgess's consent. This Agreement and Release shall be binding upon, and shall inure to the benefit of, the Township's successors and assigns.

9. Governing Law

This Agreement is governed by, and shall be construed and enforced, in all respects, in accordance with the laws of the State of New Jersey, exclusive of any choice of law rules. Any dispute concerning this Agreement and Release shall be brought in, and the parties hereby consent to the personal jurisdiction of, the Superior Court of New Jersey.

10. Acknowledgement

Burgess acknowledges that (1) he has carefully read this Agreement and Release; (2) he has had the opportunity to have his attorney explain the contents of the terms of this Agreement to him; (3) he fully understands what this Agreement and Release means; (4) he is physically and emotionally competent and of sound mind to execute this Agreement and Release; and (5) he is signing this Agreement and Release knowingly and voluntarily, of his own free will, act and deed.

IN WITNESS WHEREOF, of sound mind and intending to be forever legally bound hereby, the parties have executed this Confidential Settlement Agreement and General Release, being ~~ten~~ nine (10) pages in length, and on the date(s) set forth below.

Burgess:

_____ Date: 12-08-2017

ROBERT BURGESS

STATE OF NEW JERSEY)
ss.
COUNTY OF SOMERSET)

SWORN TO and SUBSCRIBED before me by Robert Burgess, who is personally known to me or has produced (NJ DRIVER'S LICENSE) as identification.

DATED this 8TH day of DECEMBER, 2017.

NOTARY PUBLIC, State of New Jersey

_____
Signature of Notary Public

JANET WEAVER
A Notary Public of New Jersey
My Commission Expires November 5, 2020

_____
Typed or Printed Name of Notary Public

The Township:

Lester G. Taylor III Date: 1/8/18

Twp Labor Counsel

By: _____

WILLINGBORO TOWNSHIP

Angiulo, Nicholas

From: Shontae Gray <SGray@fpsflawfirm.com>
Sent: Tuesday, February 6, 2018 11:28 AM
To: Angiulo, Nicholas
Cc: Lester Taylor; Susan Taglieri; Arthur G. Margeotes
Subject: FW: Robert Burgess v. Township of Willingboro - SETTLEMENTS

Importance: High

Mr. Angiulo,

With regard to the characterization of the time period referenced below, it is the Township's position that the time should be recorded as an approved leave of absence without pay.

I have attempted to confer with Mr. Margeotes concerning this matter, but I have not been able to reach him. Feel free to give me a call with any questions or concerns.

Thank you.

Shontae D. Gray, Esq.
Florio Perrucci Steinhardt & Fader, LLC
218 Route 17 North
Rochelle Park, New Jersey 07662
201-843-5858 (office)
201-373-8936 (direct)
201-843-5877 (fax)
sgray@fpsflawfirm.com
www.fpsflawfirm.com

FPSF FLORIO PERRUCCI STEINHARDT & FADER LLC
Attorneys at Law

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Tuesday, January 23, 2018 12:35 PM
To: arthur@flanzbaumcohen.com; Lester Taylor
Subject: Robert Burgess v. Township of Willingboro - SETTLEMENTS
Importance: High

Mr. Margeotes and Mr. Taylor:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlements regarding Robert Burgess from the Office of Administrative Law. However, prior to forwarding them to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlements indicate that Ms. Burgess agrees, *inter alia*, to resign in good standing effective December 8, 2017, the record does not specifically reflect how to record the time period from the original date of removal (December 19, 2016) to the date of resignation. In this regard, before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

Total Control Panel Login

To: ltaylor@fpsflawfirm.com Remove this sender from my allow list
From: nicholas.angiulo@csc.nj.gov

You received this message because the sender is on your allow list.

STATEMENT OF CONFIDENTIALITY: The information contained in this transmission including any attached documentation is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify Florio, Perrucci, Steinhardt, & Fader, LLC immediately by replying to this e-mail. Please delete all copies of this message and any attachments immediately.

IRS CIRCULAR 230 DISCLOSURE: As required by U.S. Treasury Regulations governing tax practice, you are advised that any written tax advice contained herein was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding tax penalties that may be imposed under the Internal Revenue Code.

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER-COBB
Acting Chair/Chief Executive Officer

February 26, 2018

Timothy J.P. Quinlan, Esq.
Quinlan & Nigro, LLC
900 Haddon Avenue, Suite 114
Collingswood, New Jersey 08108-2110

Andy Jong, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Melvin Robinson v. Albert C. Wagner Youth Correctional Facility, Department of Corrections* (CSC Docket No. 2017-4074; OAL Docket No. CSR 11236-17)

Dear Mr. Quinlan and DAG Jong:

The appeal of Melvin Robinson, a Senior Correction Officer with the Albert C. Wagner Youth Correctional Facility, Department of Corrections, of his removal effective July 18, 2017 on charges, was before Administrative Law Judge Joseph A. Ascione (ALJ), who rendered his initial decision on January 11, 2018, recommending reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

The time frame for the Commission to make its final decision was to initially expire on February 25, 2018. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that date the Commission secured a 15-day extension of time to render its final decision no later than March 12, 2018. *See N.J.A.C.* 1:1-18.8. However, since the next scheduled meeting is March 21, 2018, it requested consent of the parties, as required, for an additional 15-day extension. However, the appellant did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 40A:14-204, effective March 13, 2018.

Since the appellant's removal has been reversed, he is entitled to be reinstated with back pay, benefits and seniority from the first date of his separation until the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. Proof of income earned and mitigation as well as an affidavit in support of reasonable counsel fees should be submitted to the appointing authority within 30 days of said reinstatement. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or

counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Joseph A. Ascione, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 11236-17
AGENCY DKT. NO. N/A

IN THE MATTER OF MELVIN ROBINSON,
ALBERT C. WAGNER YOUTH
CORRECTIONAL FACILITY.

Timothy J.P. Quinlan, Esq., for appellant Melvin Robinson (Quinlan & Nigro, LLC, attorneys)

Andy Jong, Deputy Attorney General, for respondent Albert C. Wagner Youth Correctional Facility (Christopher S. Porrino, Attorney General, State of New Jersey, attorney)

Record Closed: December 18, 2017 Decided: January 11, 2018

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Senior Correction Officer (SCO) Melvin Robinson (Robinson or appellant), appeals from the July 18, 2017, decision of the Albert C. Wagner Youth Correctional Facility (Wagner Facility) to remove him from his position as a SCO at the Wagner Facility on charges in violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; of HRB 84-17, as

amended, C 11, conduct unbecoming a public employee; of HRB 84-17, as amended, E 1, violation of a rule, regulation, policy, procedure, order or administrative decision; of HRB 84-17, as amended, D 7, violation of administrative procedures and/or regulations involving safety and security; and of HRB 84-17, as amended, D 4, Improper or unauthorized contact with inmate – undue familiarity with inmates, parolees, their families or friends on or about April 25, 2017, ("incident") with inmates.

On June 16, 2017, Wagner Facility served a Preliminary Notice of Disciplinary Action (PNDA), dated June 16, 2017, advising of the removal of appellant on a date to be determined; Weingarten rights were read by appellant and executed at the time of the investigation, the Wagner Facility served a Final Notice of Disciplinary Action (FNDA) removing appellant effective July 18, 2017. On August 7, 2017, appellant timely appealed that removal based upon his denial of the allegations charged. Under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), the matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), where it was received on August 7, 2017, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing commenced on November 15, 2017, and continued December 6, 2017. At the close of the plenary hearing, the record remained open for counsel to present written closing statements and briefs. The record closed on December 18, 2017, after the initial review of the post-hearing submissions.

FACTUAL DISCUSSION

On May 18, 2017, various inmates provided statements to a Correction Sergeant Calero advising of an event that occurred two to three weeks prior thereto. This removal proceeding against SCO Robinson originates from those inmate statements, identified as R-3, 4, and 5. The Wagner Facility served a PNDA on June 16, 2017; and followed with a final notice of disciplinary action on July 17, 2017. The events allegedly occurred when SCO Robinson, transported by van the inmates to the DeptCor detail.

Sgt. Gerardo Calero (Cor. Sgt. Calero)

Cor. Sgt. Calero testified to receipt of the inmate's statements on May 18, 2017. He testified to his question of Williams' credibility due to being forced to close the van window on a return from the warehouse. He provided the blank statements to the inmates and awaited their completion, and received them.

Inmate Alquan Scott (Scott)

Scott testified to his three months stay at the Wagner Facility due to a conviction for possession of a controlled dangerous substance (CDS). He claimed that the relationship with the appellant to be cordial but not friendly. His testimony revealed that appellant drove a van with approximately seven inmates, three which sat caged directly behind the appellant. Scott requested that the radio be turned to a rap station, appellant refused that request, rather appellant played sports radio. Scott then testified that appellant had shared his personal cell phone with him, passing it back behind the caged area, and appellant compelled him to watch a Lil Wayne video. Scott testified he had the phone but was not allowed to make telephone calls. He described the phone as black. Scott also testified that appellant shared personal information with Scott related to appellant's incarceration. Scott also claimed that appellant claimed he had a girlfriend. He did not explain why he waited the three weeks before filing the inmate statement, R-3. Scott testified to four previous incidents with appellant. The first being the deprivation of coffee at the work location. The coffee was contained in a warehouse office where the inmates picked up their work duties. Scott claimed appellant said he could not have coffee, not that he could not go into the office. A second incident involved the transportation back from the warehouse location. The hot weather led to keeping the windows open when the inmates returned to the Wagner Facility, one or more of the inmates whistled or made remarks at women on the street. Appellant then compelled the remainder of the return to be with closed windows, one of the inmates, an Azmera Williams, claimed he suffered from asthma and needed the window open, this request, appellant did not accede to. On return to the Wagner Facility inmate Williams reported to the infirmary and thereafter requested a reassignment to the kitchen area. A

third incident involved a change of strip search procedure instituted by appellant to prevent the inmates from passing things during the search amongst themselves. The procedure took longer than the previous procedure resulting in the inmate's late return and an attendant loss of their recreational period. The final incident involved an off-location assignment to Essex County that the inmates anticipated and knew about a least a day before the assignment. Scott had previously resided in Jersey City, the appellant alerted the Wagner Facility to the fact that the inmates knew they were going to be in the area where they previously resided. The Wagner Facility had a policy against assigning local inmates to the areas where they previously resided. Appellant's actions resulted in Scott's removal from the off-location work detail. Scott only became aware of this removal on the anticipated date of the assignment. Scott filed the inmate statement and provided the names of other inmates and numbers who would corroborate his story.

Inmate Carlos Ortiz (Ortiz)

Ortiz testified to his incarceration to be related to gun and CDS possession charges. Ortiz testified to being in the rear of the van operated by appellant, he testified that he could see through a window that appellant handed his black cell phone and that Williams was holding it. He recalled the time as sometime in May or June, not April as Scott had testified. He also did not recall whether he had taken a medical day that day. He claimed to have no animosity to appellant. He related that on the return they were subjected to a different motivational speaker from the cell phone. He testified to the incident with inmate Williams' asthma, and that the trip was approximately twenty-five minutes. He claimed that appellant shared that he had a girlfriend in the Dominican Republic. He testified that Robinson did not use the GPS function on the cell phone. He claimed that Scott only asked him for his name and number but did not talk about the incident.

Inmate Azmera Williams (Williams)

Williams testified to his incarceration to be related to a robbery, gun and CDS possession. He claimed to have no animosity toward appellant. He described the

phone as black and grey. He testified that the motivational speaker occurred in the morning and the Lil Wayne piece occurred in the afternoon. He claimed Scott held the phone in the afternoon and he held the phone in the morning. He said the appellant did use his GPS function the first time they drove to the warehouse. He testified to the coffee, window and strip search issues. He acknowledged that appellant compelled him to the back of the line when the appellant perceived him attempting to cut the line. He described appellant as "lax" but described SCO Palmer as "strict." He denied he had any animosity toward appellant, and admitted that he had requested a transfer two to three days prior to completing the statement.

Theodis Ratliff (I/O Ratliff)

Investigator Ratliff testified to employment with the Department of Corrections (DOC) at the Wagner Facility for four years, and interviewing the inmates as well as appellant. He testified that he did not check to see if the van used had a window from the rear compartment to the cage/driver area. He acknowledged the inconsistency in the number of times the phone allegedly transferred from appellant to the inmates. He acknowledged that the inmates had motive to complain against appellant. He did not believe Inmate's Scott's claim of no animosity toward appellant to be credible. He did not request appellant's passport or phone records. He testified mandatory annual training addressed undue familiarity. He testified he did not question inmates who did not complete the inmate statements.

Major Daniel Gerdes (Maj. Gerdes)

Maj. Gerdes testified to his twenty years employment with the DOC and three years at the Wagner Facility. He knew of Robinson due to a prior disciple and suspension. He testified that undue familiarity between a correction officer and inmates is discouraged. He identified the DOC Handbook bringing attention to General Principals Page 1 A-1 and Page 2 (c). He identified the General Rules and Regulations Page 5 (1) and Page 11 (x) Discipline. He identified Law Enforcement Rules and Regulations for Custodial Staff Article 1 Section 3 at page 3 and page 9 for Section 4 familiarity with inmates. He identified Robinson's acknowledged receipt of the manuals.

He identified DOC Policy ADM.010.004 Staff/Inmate Over Familiarity revised March 1, 2016. He identified Human Resource Bulletin 84-17 (c) 11 at page 9, as conduct unbecoming, including undue familiarity. He testified that since graduation from the Academy approximately seventeen years before, Robinson received one hour of undue familiarity training in 2010. Once a correction officer does a favor for an inmate, the correction officer toss their career away. Undue familiarity is discretionary in nature, he could not go into specifics. There is no prohibition from talking to an inmate. There is nothing in writing explaining the prohibited conduct.

SCO Otis Palmer (SCO Palmer)

SCO Palmer testified to the knowledge of the four events identified by Inmate Scott and the inmates' complaints regarding SCO Robinson's actions.

CO Sgt. Waymouth Wyche (CO Sgt. Wyche)

CO Sgt. Wyche testified to his thirteen-year employment with the DOC and his service as a sergeant since the year 2013. He testified to his supervision of Robinson. He could not say that the rear of the van had a viewing portal to the front of the vehicle, not all the vans did. He testified to concerns at DeptCor regarding the infiltration of contraband to the Wagner Facility. He accepted Robinson's recommended actions regarding the strip searches as an improvement to the previous conduct of strip searches to reduce the risk of contraband returning to the Wagner Facility. He did not hear of the inmates' complaints directly. He recognized that the inmates were not pleased with Robinson's actions. He testified that Robinson performed what was asked of him, and he trusted Robinson's judgment. Discussions held with inmates were a grey line.

SCO Angelo Butler (SCO Butler)

SCO Butler testified to employment with the DOC for more than nine years. He testified to overhearing the inmates in the kitchen conspiring to get back at SCO Robinson. The inmates were upset and said, "that's why we told on him."

CO Sgt. Tequila Thompson (CO Sgt. Thompson)

CO Sgt. Thompson testified to her eight years of employment with the DOC as a CO Sgt., and her knowledge of Robinson. She testified to Maj. Gerdes upset and annoyed with SCO Robinson over the non-appeals filed by the inmates. Maj. Gerdes believed SCO Robinson supported the inmates. CO Sgt. Thompson believed that Maj. Gerdes did not understand the procedure, that SCO Robinson only gave the inmates a form with their name on it, nothing further.

SCO Melvin Robinson

SCO Robinson testified to employment with the DOC for more than seventeen years. He knew the inmates to be of the same gang, the Bloods. He denied ever discussing Black Lives mattered with the inmates, though they may have overheard him discussing that with others. He denied that he ever let the inmates hold his phone or watch Lil Wayne on it. He claimed the inmates had problems with him. He denied that the van had a window peep hole. He claimed he did not share his incarceration with the inmates, the incarceration occurred in 2015, it was only in 2017 that an inmate Sweeney had mentioned his incarceration. He does not know how inmate Sweeney found out, though Inmate Sweeney worked in the administration's offices. He denied having a girlfriend in the Dominican Republic. He claimed his mother, who lives here, was born in the Dominican Republic. He denied discussing his love life with the inmates. He acknowledged that the witnesses that testified on his behalf were co-workers he considered friends.

The critical analysis of this case depends on the credibility of three convicted inmates who all deny any animus to the appellant. Yet, all had problems with the appellant and bias due to their perception that SCO Robinson's involvement in Wagner Facility actions made their stay less than ideal. This tribunal views all of SCO Robinson's actions involving the inmates to be in furtherance of the objectives of the Wagner Facility to maintain proper security and order. This tribunal cannot accept the testimony or statements of the inmates as credible. The complaints were made two to

three weeks after the alleged incident, the inmates could not remember the date of the incident, some placing it in April, another in May. The inmates gave disparate descriptions of the color of SCO Robinson's phone. The inmates identified different people holding the phone. The inmates identified a different order in what alleged viewing took place. Their testimony has absolutely no semblance of truth to this tribunal. Even accepting their testimony as true, this tribunal has difficulty in determining whether the incident that occurred is proscribed by the "undue familiarity language." It appears from the policies, regulations and rules that the language is designed to address, familial, or intimate sexual relations, or business relations, between a correction officer and an inmate. Such proscribed conduct is not present here.

In weighing SCO Robinson's testimony, this tribunal accounts he is defending his job. However, the testimony of the complaining inmates is incongruous. To think that a correction order who has just returned from an extensive suspension would risk turning his phone over to inmates is a less likely scenario, and does not satisfy this tribunal that this event happened as the inmates related. It is more likely that rumors and overheard discussions between the appellant and other correction officers, account for the inmates limited knowledge of appellant personal affairs.

The testimony of investigators and the administration of the Wagner Facility cannot separately offer reliable testimony to support the charges made. This tribunal recognizes that the administration of the Wagner Facility has grave concerns over the suitability of continued employment by appellant with the Wagner Facility. The acceptable facts of this presentation are insufficient to support the finding sought.

FACTUAL FINDINGS

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. The testimony of the complaining inmates, Scott, Williams, and Ortiz is

rejected as unreliable as it is tainted by bias and inconsistencies. This tribunal does not accept that SCO Robinson committed the complained actions.

2. The testimony of the Wagner Facility administration has provided the pertinent policies, rules and regulations regarding over familiarity between staff and inmates. There are no clear specifics of those policies, rules and regulations that can support a finding that a violation has occurred by the appellant.

3. SCO Robinson committed no violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee.

4. SCO Robinson committed no violations of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

5. SCO Robinson committed no violations of HRB 84-17, as amended, C 11, conduct unbecoming a public employee.

6. SCO Robinson committed no violations of HRB 84-17, as amended, E 1, violation of a rule, regulation, policy, procedure, order or administrative decision.

7. SCO Robinson committed no violations of HRB 84-17, as amended, D 7, violation of administrative procedures and/or regulations involving safety and security.

8. SCO Robinson committed no violations of HRB 84-17, as amended, D 4, Improper or unauthorized contact with inmate – undue familiarity with inmates, parolees, their families or friends.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and

broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the Wagner Facility bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954).

It is well recognized that the State correctional facilities operate through a rigidly hierarchical, almost "paramilitary," structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). In the instant matter, the Wagner Facility charges appellant with violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. "Conduct unbecoming a public employee" has been described as any conduct which adversely affects the morale or efficiency of a department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140–42 (App. Div. 1960); cf. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

The Wagner Facility also charges a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, specifically, violation of HRB 84-17, as amended, C 11, conduct unbecoming a public employee; of HRB 84-17, as amended, E 1, violation of a rule, regulation, policy, procedure, order or administrative decision; of HRB 84-17, as amended, D 7, violation of administrative procedures and/or regulations involving safety and security; and of HRB 84-17, as amended, D 4, Improper or unauthorized contact with inmate – undue familiarity with inmates, parolees, their families or friends on or about April 25, 2017.

As this tribunal has found that the complaining inmates testimony is not credible, I **CONCLUDE** that the preponderance of the competent and credible evidence has not established that appellant violated N.J.A.C. 4A:2-2.3(a)(6); N.J.A.C. 4A:2-2.3(a)(11); HRB 84-17, as amended, C 11, conduct unbecoming a public employee; HRB 84-17, as amended, E 1, violation of a rule, regulation, policy, procedure, order or administrative decision; HRB 84-17, as amended, D 7, violation of administrative procedures and/or regulations involving safety and security; and HRB 84-17, as amended, D 4, Improper or unauthorized contact with inmate – undue familiarity with inmates, parolees, their families or friends on or about April 25, 2017.

For all the reasons set forth above and on the absence of competent proofs, I **CONCLUDE** that respondent has not met its burden on these major disciplinary charges and that the disciplinary charges against appellant must fail.

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action is hereby **DISMISSED**.

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

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

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

January 11, 2018

DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 1/11/18

Mailed to Parties: 1/11/18

lam

APPENDIX

LIST OF WITNESSES

For Appellant:

SCO Otis Palmer, Wagner Facility

CO Sgt. Waymouth Wyche, Correction Sergeant Wagner Facility

SCO Angelo Butler, Wagner Facility

CO Sgt. Tequila Thompson, Correction Sergeant Wagner Facility

SCO Melvin Robinson, appellant

For Respondent:

Inmate Alquan Scott
Inmate Azmera Williams
Inmate Carlos Ortiz
Sgt. Gerardo Calero, Correction Sergeant Wagner Facility
Theodis Ratliff, Investigation Officer, Wagner Facility
Major Daniel Gerdes, Wagner Facility

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1	PNDA, dated August 30, 2016 for SCO David Kampe
A-2	Disciplinary Report for Rodney Glenn
A-3	On the spot Disciplinary Report for Rodney Glenn
A-4	E-mail by Lt. Brian P. Boyle, dated October 25, 2016
A-5	Van drawing
A-6	June 13, 2017, Memo regarding Off Grounds Details
A-7	Disciplinary Report, dated May 15, 2017
A-8	Incident Report, dated May 15, 2017

For Respondent:

R-1	PNDA, dated June 16, 2017, FNDA, dated July 17, 2017
R-2	Post It note reflecting four inmate names and numerical IDs
R-3	Inmate Statement – Alquan Scott, dated May 18, 2017
R-4	Inmate Statement – Carlos Ortiz, dated May 18, 2017
R-5	Inmate Statement – Azmera Williams, dated May 18, 2017
R-6	Preliminary Incident Report of Sgt. Gerardo Calero, dated May 18, 2017,
R-7	Inmate Statement – Thomas Kersei, dated May 18, 2017
R-8	Inmate Statement – Jequele McKenzie, dated May 18, 2017
R-9	Inmate taped interview – Scott, dated May 19, 2017
R-10	Inmate taped interview – Ortiz, dated May 19, 2017
R-11	Inmate taped interview – Williams, dated May 19, 2017
R-12	Not admitted into evidence
R-13	Not admitted into evidence
R-14	Recorded interview with Melvin Robinson
R-15	Investigation Report of SI Theodis Ratliff, dated June 4, 2017
R-16	DOC Handbook
R-17	DOC Rules and Regulations
R-18	New Hire checklist for Melvin Robinson, dated September 5, 2000
R-19	DOC Policy Inmate Familiarity
R-20	Individual Training Summary Report of Melvin Robinson, dated October 16, 2017
R-21	DOC Work History Melvin Robinson
R-22	DOC HRB 84-17

1-19-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Chair/Chief Executive Officer

July 27, 2018

Lynsey Stehling, Esq.
Law Offices of Daniel Zirrith
241 Forsgate Drive – Suite 109
Monroe Township, New Jersey 08831

Cheyne R. Scott, Esq.
Chasan, Lamparello, Mallon & Cappuzzo
300 Lighting Way – Suite 200
Secaucus, New Jersey 07094

Re: *In the Matters of Parveen Arastu, et al.* (CSC Docket Nos. 2011-2422, *et al*; OAL Docket Nos. CSV 1327-11, *et al.*) (Consolidated)

Dear Ms. Stehling and Ms. Scott:

The above-captioned consolidated layoff appeals were before Administrative Law Judge Richard McGill (ALJ), who rendered his initial decision on January 19, 2018, recommending, *inter alia*, reversing the layoffs. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellants.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on March 12, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. As the Commission did not hold a meeting prior to that date, it secured an initial 45-day extension of time to render its final decision no later than April 26, 2018. Subsequently, as one of the Commission members is required to be recused on these matters, the Commission was left without a quorum to vote since there were only the two remaining members. Consequently, the Commission requested consent of the parties, as required, for two additional 45-day extensions of time. *See N.J.A.C.* 1:1-18.8. Those requests were consented to by the parties and the time for the Commission to make its final decision was extended to July 25, 2018. Thereafter, as there continued to not be sufficient Commission members to vote on the matters, the Commission requested further consent of the parties, as required, for another 45-day extension of time. However, the appellants did not provide consent for a further extension. Under these circumstances, the ALJ's

recommended decision is deemed adopted as the final decision in these matters per *N.J.S.A.* 52:14B-10(c), **effective July 26, 2018**.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Richard McGill, ALJ (w/out attachment)
France Casseus, Esq.
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF THE LAYOFF OF PARVEEN A. ARASTU, ET AL., BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 01327-11 AGENCY DKT. NOS. 2011-2422 ET AL.
IN THE MATTER OF THE LAYOFF OF VANCYEE WARREN BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 01330-11 AGENCY DKT. NO. 2011-2627
IN THE MATTER OF PAMELA LEWIS, ET AL., BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 01335-11 AGENCY DKT. NOS. 2011-2645 ET AL.
IN THE MATTER OF THE LAYOFF OF BERNZETTA WILLIAMS BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 01973-11 AGENCY DKT. NO. 2011-2629

IN THE MATTER OF THE LAYOFF OF MIKO ALEXANDER ET AL., BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 02875-11 AGENCY DKT. NO. 2011-3573
IN THE MATTER OF THE LAYOFF OF MAYRA ACOSTA, ET AL., BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 03404-11 AGENCY DKT. NO. 2011-3386
IN THE MATTER OF THE LAYOFF OF EVALDO SEGATTO BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 03408-11 AGENCY DKT. NO. 2011-3355
IN THE MATTER OF THE LAYOFF OF ZAKIA BENYARD ET AL., BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 03481-11 AGENCY DKT. NOS. 2011-3347 ET AL.
IN THE MATTER OF THE LAYOFF OF PARVEEU A. ARASTU, ET AL., BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 03589-11 AGENCY DKT. NO. 2011-3368
IN THE MATTER OF THE LAYOFF OF RENU NAGPAL BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 05961-11 AGENCY DKT. NO. 2011-4168

IN THE MATTER OF THE LAYOFF OF DAISEY BATTLE, ET AL., BY THE CITY OF NEWARK.	OAL DKT. NO. CSV 09305-11 AGENCY DKT. NOS. 2011-3536 ET AL. **(CONSOLIDATED)**

Lynsey A. Stehling, Esq., for appellants (Daniel J. Zirrith, Esq., attorney)

France Casseus, Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel, attorney)

Record Closed: January 19, 2018 Decided: January 19, 2018

BEFORE **RICHARD McGILL**, ALJ:

This consolidated proceeding involves 111 appeals by former employees (hereinafter "appellants") from layoffs by the City of Newark (hereinafter "respondent") in or about 2010. The issue in this proceeding is whether respondent implemented the layoffs in good faith. Appellants now move for a sanction for respondent's failure to comply with orders compelling discovery.

The appeals were transferred to the Office of Administrative Law in eleven separate transmittals between February 4, 2011, and August 8, 2011. The first ten transmittals were consolidated by Order dated July 7, 2011, and the eleventh was added to the consolidated proceeding by Order dated December 9, 2011.[1] Two individuals, Rafael Padilla and Bethzaida Cruz, withdrew their appeals.

[1] The order of consolidation included one other appeal, I/M/O the Layoff of Khadijahy Y. Adams by the City of Newark, OAL Dkt. No. CSV 03432-11, Agency Dkt. Nos. 2011-3415 et al., which was subsequently withdrawn.

On April 30, 2013, appellants filed a notice of motion to compel discovery. Included with the motion was a list of specific deficiencies. Most significantly, appellants sought the specific reasons for the layoffs of the individuals in question. Appellants' motion was granted by Order dated May 31, 2013, and respondent was specifically ordered to provide fully responsive answers to appellants' discovery requests as detailed in appellants' list of deficiencies within fourteen days of receipt of the order. Appellants' request for attorney's fees and costs was denied.

On February 19, 2015, appellants filed a second notice of motion to compel discovery. Appellants maintained that there were still extensive deficiencies in the responses to interrogatories including specific reasons for the layoffs of the individuals in question. Appellants' motion was granted by Order dated September 16, 2015. Respondent was ordered to provide fully responsive answers to appellants' discovery requests as detailed in appellants' list of deficiencies within twenty days of receipt of the Order and to pay appellants' attorney's fees and costs.

On November 25, 2015, appellants filed another motion to compel discovery. Appellants maintained that respondent's answers to discovery requests still did not provide fully responsive answers and requested a sanction in the form of payment of attorney's fees and costs. Appellants' motion was granted by Order dated January 12, 2016, and respondent was ordered to provide full and complete answers to appellants' interrogatories and document demands within twenty days of receipt of the Order and to pay appellants' attorney's fees and all costs associated with the motion.

On August 24, 2017, appellants filed a motion for sanctions against respondent for failure to comply with three discovery orders previously issued in this matter. Appellants assert that respondent failed to provide fully responsive answers to appellants' discovery requests.

Respondent filed papers dated September 20, 2017, in opposition to the motion. Respondent maintained that it provided fully responsive answers to the discovery

requests. In addition, respondent requested a determination as to the responsiveness of its answers to appellants' interrogatories. As a result, an oral argument was conducted on October 2, 2017, in regard to the responsiveness of respondent's answers to interrogatories.

The applicable regulation is N.J.A.C. 1:1-14.14, which provides as follows:

> (a) For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may:
>
> 1. Dismiss or grant the motion or application;
> 2. Suppress a defense or claim;
> 3. Exclude evidence;
> 4. Order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or
> 5. Take other appropriate case-related action.

It is helpful to review the substantive law concerning layoffs in order to understand the significance of the discovery sought by appellants. An appointing authority may institute layoffs for economy, efficiency or other related reasons. N.J.A.C. 4A:8-1.1(a). The action of the appointing must be based in good faith on a desire to achieve economy and efficiency. Schnipper v. Twp. of North Bergen, 13 N.J. Super. 11, 15 (App. Div. 1951). Good faith appeals are based on the contention that the appointing authority implemented the layoff for reasons other than economy, efficiency or related reasons. N.J.A.C. 4A:8-2.6(a)1. "Good faith" is presumed and the burden of proof is on the discharged employee to show otherwise. Pros., Det. Essex Cty. v. Hudson Bd. Freeholders, 130 N.J. Super. 30 (App. Div. 1974), cert. den., 66 N.J. 330 (1974); Schnipper v. Twp. of North Bergen, 13 N.J. Super. at 15; N.J.A.C. 4A:2-1.4; N.J.A.C. 4A:8-2.6(c).

In short, the validity of the layoff is based on the intention, or state of mind, of the appointing authority, and appellants have the burden of proof. As a result, the

appellants need a statement from the appointing authority as to the reasons for the layoffs and in particular for choosing the specific individuals in question.

The first question is whether respondent failed to comply with the three discovery orders. Here, appellants asked for specific details as to the reasons that particular individuals were chosen for the layoffs. Respondent stated in response that the layoffs were done for economy and efficiency and that individuals who were identified as having knowledge of the layoff reviewed their budgets, staffing and attached materials. This response does not give an explanation as to the reasons that specific individuals were chosen for layoff. At the oral argument on October 2, 2017, respondent was given the opportunity to demonstrate that it produced fully responsive answers. Nonetheless, respondent failed to do so. Under the circumstances, the conclusion is warranted that respondent failed to comply with the discovery orders dated May 13, 2013, September 16, 2015, and January 12, 2016.

In regard to unresonableness, appellants' discovery questions are central to the case, and respondent did not offer an adequate explanation for its failure to provide appropriate responses. More than five years have gone by since appellants served their discovery requests. Under the circumstances, respondent's failure to provide fully responsive answers to the discovery requests in question was unreasonable. Therefore, a sanction is warranted under the circumstances of this case.

With respect to the type of sanction, appellants first request is to suppress respondent's answer and separate defenses pursuant to N.J.A.C. 1:1-14.14(a)2. In this case, respondent has failed to produce essential information concerning the reasons for the layoffs. The failure to produce this information substantially hinders appellants' efforts to prove that the layoffs were not done in good faith. Since appellants' have the burden of proof, a lesser sanction such as suppression of respondent's evidence would not be adequate. It follows that appellants' request should be granted. The effect is that a determination that the layoffs in question were not done in good faith should be entered in appellants' favor.

Appellants' second request is a sanction in the form of exclusion of respondent's evidence pursuant to N.J.A.C. 1:1-14.14(a)3. This type of sanction is not really adequate in itself or necessary in view of the above. Nonetheless, it is certainly warranted under the circumstances of this case. Therefore, respondent's testimony and other evidence should be excluded pursuant to N.J.A.C. 1:1-14.14(a)3.

Finally, appellant's request attorney's fees and costs associated with the motion. In view of the meritorious nature of the motion, appellants' request should be granted pursuant to N.J.A.C. 1:1-14.14(a)4.

Based upon the above, I **CONCLUDE** that appellants' request for sanctions should be granted. It is noteworthy that the motion for sanction was made on behalf of most but not all of the appellants. In view of the nature of the first and second sanctions, they should apply to all appellants.

Accordingly, it is **ORDERED** that:

1. Respondent's answer and separate defenses be stricken.
2. A determination be entered in favor of all appellants that the layoffs in question were not made in good faith.
3. All of respondents' testimony and other evidence be excluded.
4. Respondent shall reimburse appellants for attorney's fees and other costs associated with the motion.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Jan. 19, 2018
DATE

Richard McGill
RICHARD McGILL, ALJ

Date Received at Agency:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JAN 23 2018
ljb

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
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Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 12, 2018

Jeffery R. Caccese, Esq.
Comegno Law Group
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Nonee Lee Wagner, DAG
Department of Law & Public Safety
P.O. Box 114
Trenton, New Jersey 08625-0114

Re: *Richard Cramer v. Department of Transportation* (CSC Docket No. 2016-3462 and OAL Docket No. CSV 5173-16) - **SETTLEMENT**

Dear Mr. Caccese and DAG Wagner:

The appeal of Richard Cramer, a Sign Technician 1 with the Department of Transportation, of his 15 working day suspension on charges, was before Administrative Law Judge Elia A. Pelios (ALJ), who issued his initial decision on January 24, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on January 29, 2018. Accordingly, the time frame for the Commission to make its final decision expires on March 15, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective March 16, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Elia A. Pelios, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05173-16

AGENCY DKT. NO. 2016-3462

IN THE MATTER OF RICHARD CRAMER,
STATE OF NEW JERSEY,
DEPARTMENT OF TRANSPORTATION.

Jeffrey R. Caccese, Esq., for appellant (Comengno Law Group, attorneys)

Nonee Lee Wagner, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: January 9, 2018 Decided: January 24, 2018

BEFORE **ELIA A. PELIOS,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 5, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 24, 2018
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 1/29/18

Date Mailed to Parties: 1/29/18

/nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Agreement and Release, dated January 8, 2018

OAL DKT. NO. CSV 05173-2016S
AGENCY DKT. NO. 2016-3462

SETTLEMENT AGREEMENT

IN THE MATTER OF 2018 JAN -9 A 10:15

Richard Cramer

AND

New Jersey Department of Transportation

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated March 17, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-2.3(a)4	15 days	April 4, 2016 - April 22, 2016
2. Chronic or Excessive		
3. Absenteeism or Lateness		
4.		
5.		

B. The Appellant Richard Cramer withdraws his/~~her~~ appeal and request for a hearing, and the Respondent Department of Transportation agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. NJAC 4A:2-2.3(a)4)	7 Days	
2. Chronic or Excessive Absenteeism or Lateness	on the Record sustained	

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of 15 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 15 days.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: n/a.

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Transportation (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Transportation will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Richard Cramer 's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Transportation, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the ~~events, information or disputes~~ absence(s) RLCab giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. ~~This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims~~. RLC

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1/8/18 — DATE — Appellant

1/8/18 — DATE — Respondent

1/8/18 — DATE — Renee Lee Wagner, DAG — ON BEHALF OF Department of Transportation

1/8/18 — DATE — ON BEHALF OF Richard Cuprel

OAL DKT. NO. CSV 05173-2016S

CERTIFICATION

I, Richard CRAMER, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/8/18
DATE

Richard Cramer
NAME

1-24-7

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair Chief Executive Officer

February 2, 2018

Arnold S. Cohen, Esq.
Oxfeld Cohen, P.C.
60 Park Place, 6TH Floor
Newark, New Jersey 07102

Nonee Lee Wagner, DAG
Department of Law & Public Safety
P.O. Box 114
Trenton, New Jersey 08625-0114

Re: *August Fischer v. Department of Transportation* (CSC Docket No. 2017-4037 and OAL Docket No. CSV 9778-17) - **SETTLEMENT**

Dear Mr. Cohen and DAG Wagner:

The appeal of August Fischer, a Highway Operations Technician Trainee with the Department of Transportation, of his removal effective June 5, 2017 on charges, was before Administrative Law Judge Dean J. Buono (ALJ), who issued his initial decision on January 24, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on January 26, 2018. Accordingly, the time frame for the Commission to make its final decision expires on March 12, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective March 13, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Dean J. Buono, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 09778-17

AGENCY DKT. NO. 2017-4037

IN THE MATTER OF AUGUST FISCHER, NEW JERSEY DEPARTMENT OF TRANSPORTATION

Arnold Shep Cohen, Esquire, for appellant (Law Offices of Oxfeld Cohen PC, attorneys)

Nonee Wagner, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 23, 2017 Decided: January 24, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

Appellant, a Highway Operations Technician Trainee, Department of Transportation, appeals a removal effective June 5, 2017. This matter was transmitted to the Office of Administrative Law (OAL) on July 11, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On January 23, 2018, the parties filed a fully executed Settlement Agreement in this matter. The Agreement is attached and fully incorporated herein. (J-1).

FINDINGS OF FACT

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures to J-1.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

January 24, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/26/18

Date Mailed to Parties: 1/26/18

EXHIBITS:

J-1 Settlement Agreement

OAL DKT. NO. CSV 09778-20175
AGENCY DKT. NO. 2017-4037
SETTLEMENT AGREEMENT

IN THE MATTER OF

August Fischer
AND

New Jersey Department of Transportation

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated June 5, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-2.3(a)1	Removal	June 5, 2017
2. Guidelines for		
3. Employee Conduct		
4. and Discipline, Section		
5. IIB Incompetency		
Inefficiency or Failure to Perform Duties		

B. The Appellant August Fischer withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority New Jersey Department of Transportation agrees that the following result will occur with regard to each charge:

J-1

OAL DKT. NO. CSV 09778-2015

Charge	Disposition	New Penalty
1. NJAC 4A:2-2.3(a)1	Resignation In Good Standing	—
2.		—
3.		
4.		
5.		

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, appellant has served a total of 1yr 2 days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 0.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.
4. (Strike if not applicable) The Appellant agrees to a

X resignation in good standing and not to reapply to the NJDOT.

_____ general resignation

which shall be effective January 21, 2017 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. New Jersey Dept of Transportation (Respondent Appointing Authority) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority New Jersey Dpt of Transportation will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of August Fischer 's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, New Jersey Department of Transportation its employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act,

the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1-23-18
DATE

August Tuohy
Appellant

1-23-18
DATE

Darrio Garrett
Respondent

1/23/18
DATE

ON BEHALF OF Arnold Cohen

1/23/18
DATE

Renee Kelly Gorman, DAG
ON BEHALF OF NJDOT

OAL DKT. NO. CSV 09978-2017S

CERTIFICATION

I, August Fischer, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1·23·18
DATE

August Fischer
NAME

1-25-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 9, 2018

Arnold S. Cohen, Esq.
Oxfeld Cohen, P.C.
60 Park Place, 6TH Floor
Newark, New Jersey 07102

Elizabeth A. Davies, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Richard Price v. William Paterson University* (CSC Docket No. 2018-128 and OAL Docket No. CSV 10711-17) - **SETTLEMENT**

Dear Mr. Cohen and DAG Davies:

The appeal of Richard Price, a Senior Building Maintenance Worker with William Paterson University, of his removal effective March 22, 2017 on charges, was before Administrative Law Judge Susana E. Guerrero (ALJ), who issued her initial decision on January 25, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on January 29, 2018. Accordingly, the time frame for the Commission to make its final decision expires on March 15, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective March 16, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Susana E. Guerrero, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 10711-17
AGENCY DKT. NO. 2018-128

IN THE MATTER OF RICHARD PRICE,
WILLIAM PATERSON UNIVERSITY.

Arnold Shep Cohen, Esq., for appellant Richard Price (Oxfeld Cohen, attorneys)

Elizabeth A. Davies, Deputy Attorney General, for respondent William Paterson University (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 24, 2018 Decided: January 25, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

Appellant Richard Price filed an appeal from a Final Notice of Disciplinary Action dated June 28, 2017, issued by respondent William Paterson University. The Civil Service Commission transmitted the matter to the Office of Administrative Law for determination as a contested case. At the request of the parties, the telephone conference scheduled for November 2, 2017, was adjourned to provide additional time toward resolving another pending matter involving appellant. Subsequently, under letter dated January 23, 2018, counsel for respondent submitted the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

1/25/18
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: 1-30-18

Date Mailed to Parties: JAN 30 2018

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Acting Director

RECEIVED
2018 JAN 24 A 11:16
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

January 23, 2018

FAX: 973-648-6124
Honorable Susana E. Guerrero, ALJ
Office of Administrative Law 7TH Floor
33 Washington Street
Newark, NJ 07102

Re: Richard Price v. William Paterson University
OAL Dkt No.: CSV 10711-17

Dear Judge Guerrero:

Attached please find a copy of the settlement agreement in the above referenced matter for your review and decision.

Thank you for your time and consideration.

Respectfully Submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Elizabeth A. Davies
Deputy Attorney General

Arnold Shep Cohen, Esq./E-mail

RECEIVED
2018 JAN 24 A 11:16
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OAL DKT. NO. CSV 10711-17

SETTLEMENT AGREEMENT

IN THE MATTER OF

RICHARD J. PRICE

AND

WILLIAM PATERSON UNIVERSITY

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated June 28, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee.	Removal	March 22, 2017

B. The parties have agreed to the following:

The Appellant agrees to a general resignation which shall be effective March 22, 2017. Appellant agrees not to seek or accept employment with William Paterson University or other State of New Jersey universities or institutes of higher education or any of their contracted affiliates.

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Richard J. Price withdraws his appeal and request for a hearing, and the Respondent Appointing Authority William Paterson University agrees that the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The William Paterson University (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the William Paterson University will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, William Paterson University, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events,

information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims, any contract express or implied and for any claim for attorney fees. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12-19-17
DATE

Richard J Price
Richard J. Price, Appellant

1/3/18
DATE

Arnold Shep Cohen
ON BEHALF OF Appellant

1/19/18
DATE

Denise Robinson Lewis
ON BEHALF OF Respondent

CERTIFICATION

I, Richard J. Price, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12-19-17
DATE

Richard J Price
Richard J. Price

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

May 17, 2018

Arnold Shep Cohen, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Tamara Rudow, Legal Specialist
Department of Corrections
P.O. Box 863
Trenton, New Jersey 08625-0863

Re: *Christina Jackson v. Albert C. Wagner Youth Correctional Facility, Department of Corrections* (CSC Docket No. 2017-2814; OAL Docket No. CSV 4260-17)

Dear Mr. Cohen and Ms. Rudow:

The appeal of Christina Jackson, a Communications Operator with the Albert C. Wagner Youth Correctional Facility, Department of Corrections, of her 90 working day suspension, on charges, was before Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on February 22, 2018, recommending upholding the 90 working day suspension. Exceptions to the initial decision were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The Civil Service Commission (Commission) received this matter on February 22, 2018 and received one 45-day extension of time, as required, to make its final decision no later than May 23, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. However, since one of the Commission members must be recused from this matter, leaving no quorum to vote, it requested consent of the parties, as required, for an additional 45-day extension. However, the appointing authority did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective May 24, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Carl V. Buck, III, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 04260-17
AGENCY DKT. NO. 2017-2814

IMO CHRISTINA JACKSON, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY, DEPARTMENT OF CORRECTIONS.

Arnold Shep Cohen, Esq., for Christina Jackson, appellant (Oxfeld Cohen, P.C., attorneys)

Tama Rudow, Esq. and **Kathleen Krieger**, Esq., Legal Specialists, appearing pursuant to N.J.A.C. 1:1-5.4(a) 2, for Albert C. Wagner Youth Correctional Facility, Department of Corrections, respondent

Record Closed: October 10, 2017 Decided: February 22, 2018

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

Appellant, Christina Jackson (Jackson) appeals from a ninety-day suspension from her position as a communications operator (CO) imposed by respondent Albert C. Wagner Youth Correctional Facility (facility). The suspension resulted from charges of insubordination and conduct unbecoming a public employee.

The charges arise from an incident on November 8, 2016, relating to appellant cleaning her work station. Appellant denies the charges and claims that the incident was instigated by an officer at the facility such that appellant thought she was being attacked. Therefore, appellant argues, no disciplinary action should be imposed.

PROCEDURAL HISTORY

The Preliminary Notice of Disciplinary Action (PNDA) was presented to appellant on December 20, 2016 and charges her with: 1. N.J.A.C. 4A:2-2.3 (a) 6: Conduct unbecoming a public employee and; 2. N.J.A.C. 4A:2-2.3 (a) 2 Insubordination.

A disciplinary hearing was held on February 8, 2017, and the charges were sustained.

On February 23, 2017, the facility served the Final Notice of Disciplinary Action (FNDA), dated February 23, 2017, sustaining charges of 1. N.J.A.C. 4A:2-2.3(a) 2. Insubordination and; 2. N.J.A.C. 4A:2-2.3(a) 6. Conduct unbecoming a public employee. This FNDA imposed a ninety-day working suspension (R-1).

On March 9, 2017, Jackson requested a hearing and on March 27, 2017, the Civil Service Commission transmitted the contested case to the Office of Administrative Law (OAL) where it was filed on March 28, 2017. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. This matter was heard on October 10, 2017 and the record closed on that date. An extension of time for the filing of the Initial Decision was granted.

FACTUAL DISCUSSION

TESTIMONY

Respondent offered five witnesses, three of which testified as to information specific to the November 8, 2016 incident.

Lieutenant Tracey Sparacio[1]

Tracey Sparacio, a Lieutenant with the State of New Jersey, Department of Corrections (DOC), detailed her training, experience and background in approximately twenty-one years working for the DOC. A recording of a SID interview with Sparacio, introduced as R-15, was reviewed subsequent to the hearing. She was assigned to the facility on November 8, 2016, and was working the 2:00 p.m. to 10:00 p.m. shift, as an area lieutenant.

She provided some background information regarding the facility and testified that when she came in to work on November 8, 2016, she was returning to work from being sick with an upper respiratory illness and had been to the doctor the prior day. She stated that she knew that Jackson used an undiluted cleaning spray (spray) to clean her work area. Sparacio had been in Lieutenant Patrick Miller's office. She exited his office and told Jackson that as she (Sparacio) had been sick, Jackson should use the Lysol wipes, which are also used for cleaning. This was phrased by Sparacio as "telling" Jackson rather than phrasing this as an "order."

Jackson's position is a communications operator (CO). Her responsibilities include calling out movements, dealing with emergencies, dealing with bed moves and being responsible for data entry into the communications system.

Sparacio testified that she gave Jackson the wipes (physically putting them in Jackson's hand), then went back in to Miller's office. Sparacio saw Jackson leave her work station and when Jackson returned, Jackson started to use the spray. Sparacio then went over to Jackson and took the spray from Jackson. In testifying, Sparacio stated that she" took" the bottle, but her incident report (R-4) states "I...attempted to remove the spray bottle from the area."

[1] This name is listed in documents alternately as "Sparacio" or "Sporacio" but the correct spelling is "Sparacio" and will be referred to as such.

Sparacio then testified to information regarding the incident and reiterated information contained in the "Special Custody Report" as prepared on November 8, 2016 at 2:40 p.m. (R-4) in which Sparacio memorialized her recollection of the incident. Paraphrasing this report, Sparacio stated that she approached Jackson's work area and attempted to remove the spray bottle from the area. Jackson then turned and swung at Sparacio with an open hand, slapping the spray bottle out of Sparacio's hand. Jackson then jumped into Sparacio's face screaming, "What is your fucking problem? I've fucking had enough of this shit! I've been putting up with this shit for months! We're gonna deal with this shit now!"

Sparacio then walked back to the Shift Commander's area. SCO Nicholas Bunnell and Sergeant Joseph Basham[2] witnessed the incident. Lieutenant Miller heard the incident. Sparacio further stated that Jackson was both verbally and physically threatening in their exchange as well as behaving in an insubordinate manner.

Sparacio stated that she did not yell at Jackson or elevate her voice during this incident. Sparacio testified that after the incident, she prepared the report identified as R-4.

Lieutenant Joseph Basham

Joseph Basham[3], a Lieutenant with the facility, detailed his training, experience and background in approximately nine years working for the DOC. He testified that he was assigned to the facility on the date in question and that he was working the 2:00 p.m. to 10:00 p.m. shift on November 8, 2016.

Basham testified that, at the time in question, he was in the communications office speaking with Officer Nicholas Bunnell, who was a union representative. Basham was approximately six to eight feet from the incident. He stated that there were no communications officers inside the center control area. He stated that when Jackson

[2] Now Lieutenant Basham.
[3] Basham was a Sergeant at the time of the incident.

entered the area she was in a "huff." She started cleaning her work area with a strong or pungent solution contained in a trigger spray bottle. He described it as "not being a normal smell." At that point Sparacio came into the control room from the commander's office and he heard Sparacio say, "I thought we discussed this already. Don't use that," and at that point an altercation occurred. He stated that Jackson seemed abrupt and annoyed.

Basham then testified as to information regarding the incident and reiterated information contained in his "Special Custody Report" he prepared on November 8, 2016, at 16:55 p.m. contemporaneously with the incident (R-6). And it memorialized his recollection of the incident. As set forth in the report, Basham witnessed a verbal exchange between Jackson and Sparacio due to Jackson utilizing a chemical spray. He recalled Sparacio stating, "Can you please not spray that, I thought we talked about this." Basham stated that he heard Jackson respond with statements including, "What is your fucking problem with me?" and "I have been putting up with this for months, we are gonna take care of this shit right now!" He described Jackson shouting and becoming more agitated. Basham testified that Sparacio removed the bottle of cleaning solution from the counter that Jackson was cleaning and Jackson turned around and knocked the bottle out of Sparaco's hands as Jackson reached out towards Sparacio. Sparacio then turned and walked back into the Shift Commander's office.

Basham stated that the slap referenced in the report was violent. He testified that Jackson was the aggressor and referred to her (Jackson) as a petulant child. He also testified that Jackson was insubordinate in this incident.

He further stated that he was a paramedic for eighteen years before becoming a corrections officer and had used wipes or sanitary cloths to wipe up blood and take other actions necessary as a paramedic.

Lieutenant Patrick Miller

Patrick Miller, a Lieutenant with the DOC, detailed his training, experience and background and his approximately eighteen years working for the DOC. He testified that he was assigned to the facility on the date in question and that he was working the 2:00 p.m. to 10:00 p.m. shift on November 8, 2016, as the assigned shift commander.

At the beginning of the shift, Sparacio reported to Miller. Miller then heard Sparacio ask Jackson to use the wipes as Sparacio was sick and that the chemical was bothering her (Sparacio's) breathing. Miller described the request as "polite." He then saw Jackson leave. Jackson then asked Miller if she could go to "ops" (the operations area). When Jackson came back from ops he heard an altercation between Jackson and Sparacio, who then reported to him what had occurred.

Miller testified as to the incident as reported in his "Special Custody Report" as prepared on November 8, 2016, at 20:30 a.m. (R-7). As stated in the report, at 14:00, Jackson reported for duty and began to clean her area, which is a routine practice. Sparacio approached her and instructed her to use cleaning wipes instead of using the spray disinfectant which has a strong odor.

Miller then stated that Jackson came to his office and requested to go to operations. He granted her permission, at which point she reported to operations. Thereafter, he called operations and spoke to Communications Operator Michelle Kano and told her that he needed a communications operator in center and that one of the communications operators needed to report to center immediately. Jackson reported back to center and began using the spray disinfectant, at which point Lieutenant Sparacio went out to address her. From my office, I heard "what the fuck is your problem, I've been putting up with this shit for months, we're gonna deal with this shit now." Lieutenant Sparacio came back to my office and reported the incident to me.

Miller stated that he then logged the report in, attempted to contact the on-call administrator and the central office desk. This was done to follow protocol because there was an allegation of possible workplace violence. There was also an allegation of insubordination as Jackson had not followed the direction of Sparacio in using the wipes. On cross-examination, Miller testified that the spray Jackson used was undiluted and was a strong spray and ordinarily wipes are used.

Investigator Theodis Ratliff

Theodis Ratliff, Senior Investigator with the Correctional Intelligence Center within SID, testified that a SID office is in each facility. Each office is under the supervision of the Commissioner of Corrections office and is not in the chain of command of the institution. He testified that he had been a member of internal affairs on the date in question and was under the supervision of Principal Investigator Nancy Zook, who assigned this investigation to him. They are responsible for investigation of any allegations of workplace violence at the facility.

He testified that they gather information, prepare fact patterns and conduct interviews of parties involved regarding incidents including Special Custody Reports or Preliminary Incident Report packets. He prepared a five-page report on December 9, 2016, based on the reports provided to him (R-2) and the interview(s) he conducted of Sparacio (R-15) and Jackson (R-14).

He further testified as to the internal affairs procedures, the analysis of the information provided to him and the final report issued. He testified that his December 9, 2016, report stated that based on the statements provided by Sparacio, Basham and Jackson, the only person in Center Control who displayed aggressive behavior both physically and verbally was Jackson. He stated that Jackson's allegation that Sparacio approached her aggressively and in a threatening manner was not substantiated in his investigation. Ratliff further testified that when Jackson was interviewed, she admitted to physically attempting to swing at Sparacio and contacting the spray cleaner bottle. Jackson also admitted to using profanity during the exchange.

Major Daniel Gerdes

Daniel Gerdes, a Major with the facility, detailed his training, experience and background in approximately twenty years working for the DOC. He testified that he is responsible for the overall security of the facility. The shift commander(s) report to him and if an incident occurs, he is to be notified.

He testified that based on any investigation he would consult with the Department of Personnel to determine appropriate discipline for any major disciplinary change. He testified to the job of an area lieutenant/area supervisor whose responsibility is for the entire institution, that individual reports to the shift commander who reports to administration. The second shift area lieutenant also has post orders as detailed in R-11.

He also testified to the overall chain of command (R-10). He stated that if a lieutenant told a CO to do something, that should be considered to be an order. He further stated that if a subordinate was asked to do something three times (without doing it) that would be insubordination. He also testified that the use of profanity is "forbidden" per the State of New Jersey, Department of Corrections, Handbook of Information and Rules, For Employees of New Jersey Department of Corrections (R-9), of which appellant acknowledged receipt. Penalties include, but are not limited to, "Suspension under the rules and regulations of the Civil Service Commission and the statutes governing State employment" (R-9).

Communications Operator Christina Jackson

Christina Jackson testified on her own behalf. She has been a communications operator since January 1995. Her job duties as a communications operator include calling out codes, answering the telephone, dealing with bed counts, etc. On the date in question she was assigned to central control. For the prior five days before the incident, she had worked at center control. She stated that she cleaned her work

station with State issued Pine Sol cleaner. This cleaner came from the storeroom of that the facility. She testified as to the number of shifts currently at the facility and the fact that she cleaned her work station as others used the station and she did not want to catch anything at her work station.

She testified that when she entered, she let her into the central control area. She began to clean her work area with the Pine Sol cleaner and as she was doing so, Sparacio came into the center area from the lieutenant's office. After her initial encounter with Sparacio at the beginning of her shift, Jackson asked Miller if she could work in operations. Miller agreed and Jackson went to operations. However, shortly thereafter, Miller called operations and stated that a CO would have to be in the center operation area.

She returned to central control at Miller's direction. After she did so, she saw that Sparacio was speaking with Miller. Jackson was wiping the second phone when Sparacio launched or charged at her and Jackson stated that she (Jackson) thought that Sparacio was going to hit her.

Jackson said she ducked into a defensive posture. By the time Jackson came up, Sparacio was on the opposite side of her. Jackson stated that she cursed in this instance and Sparacio did not – although Jackson stated that Sparacio has cursed in general conversation previously. Jackson stated that Sparacio was yelling at her "I told you not to use that" but Sparacio did not ever previously instruct her to not use the spray bottle. Jackson acknowledged that Sparacio, as a lieutenant, could give her an order at any time.

Jackson stated that she was in the middle of a conversation and may not have heard what Sparacio asked.

Exhibit R-14, an approximately 26:07 recording of an SID interview with Jackson, was reviewed after the hearing.

LEGAL ANALYSIS

A civil service employee who commits a wrongful act related to her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). In this matter, the facility bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Jackson was charged with insubordination and conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(2) and (11).

Prior to conducting a legal analysis and making conclusions, it is necessary to determine the credibility of the testimony. "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . trier of fact, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,

The present matter revolves around "who said what" in a conversation between the appellant and Sparacio and subsequent physical activity. Lieutenant Sparacio,

Lieutenant Basham, and Lieutenant Miller testified credibly that at the time of the incident a verbal altercation occurred that escalated into a physical occurrence whereby a spray bottle, being held by Sparacio, was hit by CO Jackson.

Testimony from Jackson presented an alternate version of the incident, although that an incident occurred was not challenged. There is no apparent reason for Sparacio to lie about Jackson's actions during this event. In fact, the discussion between Sparacio and Jackson was overheard by two other officers. Sparacio's testimony of how the event occurred was bolstered by two other witnesses. This corroboration, the demeanor of the witnesses and the circumstances of the event documents that Sparacio's version of the incident is the more reliable. Further, the request by Sparacio to use wipes versus Pine Sol cleaner seems to have been uncontroversial.

Lieutenant Sparacio, Lieutenant Basham, and Lieutenant Miller testified credibly that at the time of the incident a verbal altercation occurred that escalated into a physical occurrence whereby a spray bottle, held by Sparacio, was hit by CO Jackson. I **FIND** that this incident occurred at a point near the beginning of the 2:00 p.m. to 10:00 p.m. shift.

The testimony from various parties made clear that employees were able to modify assignments, i.e. a CO could be assigned to center control or the ops area. I **FIND** that Jackson was assigned to the center control area. I **FIND** that when Jackson began to clean her work area in the control center, a verbal altercation ensued and from that a physical altercation occurred. During that altercation Jackson displayed physically aggressive behavior toward Sporacio and used profanity toward Sporacio.

Accordingly, I **FIND** the testimony of the respondent's witnesses to be more credible than the testimony of Jackson.

CONCLUSIONS OF LAW

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The respondent has sustained charges of violations of insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) HRB [Human Resources Bulletin] 84-17, as amended; insubordination in violation of N.J.A.C. 4A:2-2.3 C 9; and conduct unbecoming an employee in violation of N.J.A.C. 4A:2-2.3 C 11.

Regarding the charge of insubordination, Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation:

> 'Insubordination' is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

In the present matter, evidence of appellant's insubordination was presented. Sparacio directed her to not use Pine Sol cleaner and to use the approved wipes. Appellant did not comply with that order. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of insubordination. Charges of violations of N.J.A.C. 4A:2-2.3(a)(2) are hereby **AFFIRMED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17, as amended. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. Emmons, 63 N.J. Super. at 140.

In the present matter, the record reflects a determination that appellant did not comply with the directives of Sparacio. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of conduct unbecoming a public employee. Charges of violations of N.J.A.C. 4A:2-2.3(a)(6) and HRB 84-17, as amended, are hereby **AFFIRMED**.

Conduct unbecoming a public employee constitutes grounds for major discipline under N.J.A.C. 4A:2-2.3(a)(6). Although the term is undefined under the New Jersey Administrative Code, the charge has been interpreted to include any conduct that adversely affects the morale or efficiency of the bureau or that "has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted). The employee need not violate the criminal code or a written rule or policy of the employer:

> Nor need a finding of misconduct be predicated upon the violation of any rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.
>
> [Ibid.]

When such conduct creates a hostile and potentially dangerous environment, it also constitutes just cause for major discipline. Perry v. Mercer County Dep't of Pub. Safety, 96 N.J.A.R.2d (CSV) 834, 837.

Insubordination may consist of refusing or failing to follow the instructions of a supervisor. See Eaddy v. Dep't of Transp., 208 N.J. Super. 156, 158-59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986).

The question, therefore, becomes whether the appellant's actions on the date in question amounted to insubordination and conduct unbecoming a public employee.

For reasonable probability to exist, the evidence must be such as to "generate

belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

The fact that an incident occurred is not in question. Having concluded that an incident occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of an employee's potential.

Based upon the facts set forth above, I **CONCLUDE** that the respondent's witnesses were more credible and their testimony was entitled to more weight than the denials of appellant with respect to her conduct on November 9, 2016. The witnesses testified as to what they heard, their opinions of the situation, and the outcome. Lieutenant Sparacio was very precise in her description of the incident, which description was corroborated by Lieutenant Basham and Lieutenant Miller.

Appellant's protestations that she was unaware of Sparacio's directions does not relieve her for her responsibilities concerning either the physical aspect or the verbal aspect of the altercation. Appellant was aware that there were required protocols as evidenced by her statement that she knew she should not have "cussed." Further, the

appellant signed an acknowledgement stating that she had received copies of the rules governing the facility through the DOC as well as being subject to prior discipline. Accordingly, I **CONCLUDE** that appellant was not credible with her excuses.

I **FIND** therefore that the facility's charges of charges of insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) HRB [Human Resources Bulletin] 84-17, as amended; insubordination in violation of N.J.A.C. 4A:2-2.3 C 9; and conduct unbecoming an employee in violation of N.J.A.C. 4A:2-2.3 C 11 are warranted and justified.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

For her actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(2) insubordination, N.J.A.C. 4A:2-2.3(a)(6) "Conduct unbecoming a public employee" and HRB 84-17. Appellant was charged with a ninety-day suspension. This suspension is consistent with the theory of progressive discipline as appellant previously received several suspensions for numerous infractions. Jackson's work history (P-13) shows seven C-9 violations and two C-11 violations. Using the HRB chart, the appropriate penalty for the third infraction of a C-9 violation is removal and the penalty for the second infraction of a C-11 penalty is removal.

After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that this disciplinary action supports the respondent's argument that appellant was appropriately issued a working suspension of ninety days. While a lesser number of days of suspension is available to an appointing agency, I **CONCLUDE** that this incident was egregious enough, particularly considering prior discipline, to warrant that period without being excessive or contrary to a sense of fairness. On balance of all the factors, I **CONCLUDE** that neither a shorter working suspension nor a longer working suspension is warranted.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that the appellant's appeal is **DISMISSED**, and respondent's ninety-day suspension of Jackson is **AFFIRMED** based on appellant's violation of N.J.A.C. 4A:2-2.3(a)(2), insubordination; conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6) HRB [Human Resources Bulletin] 84-17, as amended; insubordination in violation of N.J.A.C. 4A:2-2.3(c)(9); and conduct unbecoming an employee in violation of N.J.A.C. 4A:2-2.3(c)(11).

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

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

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

February 22, 2018
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 2/22/18

Date Mailed to Parties: 2/22/18

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LIST OF EXHIBITS

For appellant:

None

For respondent:

R-1 Preliminary Notice of Disciplinary Action and Final Notice of Disciplinary Action
R-2 Confidential SID Investigation by Theo Ratcliff and Case Summary
R-3 Special Report and Weingarten Rights Christina Jackson, dated November 11, 2016
R-4 Special Report and Weingarten Rights Tracey Sparacio, dated November 8, 2016
R-5 Special Report and Weingarten Rights Nicholas Bunnell, dated November 8, 2016
R-6 Special Report and Weingarten Rights Joseph Basham, dated November 8, 2016
R-7 Special Report Patrick Miller, dated November 8, 2016
R-8 Receipt of Personnel Regulation, dated December 30, 1994
R-9 Handbook of Information and Rules
R-10 Level III, Internal Management Procedure No. 2334 Communication Operators
R-11 Level III, Internal Management Procedure No. 302, Area Lieutenant
R12 HRB 84-17
R-13 Work History
R-14 DVD SID Interview Christina Jackson
R-15 DVD SID Interview Tracey Sparacio

LIST OF WITNESSES

For appellant:

Christina Jackson

For respondent:

Tracey Sparacio
Patrick Miller
Theodis Ratliff
Joseph Basham
Daniel Gerdes

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

March 14, 2018

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Danna Brown, Director
Department of Health
P.O. Box 360
Trenton, New Jersey 08625

Re: *Rasheeda Love v. Ancora Psychiatric Hospital, Department of Health* (CSC Docket No. 2018-1883 and OAL Docket No. CSV 1377-18) - **SETTLEMENT**

Dear Mr. Scorzetti and Ms. Brown:

The appeal of Rasheeda Love, a Senior Building Maintenance Worker at Ancora Psychiatric Hospital, Department of Health, of her removal, effective December 22, 2017 on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on March 1, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on March 1, 2018. Accordingly, the time frame for the Commission to make its final decision expires on April 15, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that this matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition. Thus, the Commission has determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective April 16, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01377-18

AGENCY DKT. NO. 2018-1883

IN THE MATTER OF RASHEEDA LOVE, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

Michael Scorzetti, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director, Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 27, 2018 Decided: March 1, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Rasheeda Love from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case January 24, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 1, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 3/1/18

Date Mailed to Parties: 3/2/18

/cmo

OAL DKT. NO. CSV # 01377-2018 S
AGENCY DKT. NO. 2018-1883

SETTLEMENT AGREEMENT

IN THE MATTER OF

Rasheeda Love

AND

Ancora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 12/21/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A-2.4/A-4.3/E.1.3	Removal	12/22/17
2.			
3.			
4.			
5.			

B. The Appellant Rasheeda Love withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A-2.4/A-4.3/E.1.3	Sustained	Removal
2.			

OAL DKT. NO. CSV # 01377-2018 S

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 12/22/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

✓ general resignation

which shall be effective 2/27/18 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

OAL DKT. NO. CSV * 01377-2018 S

Leave of absence without pay

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Rasheda Love 's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2-27-18
DATE

Rasheeda Jones
Appellant

2/27/18
DATE

Dawn Brown
Respondent DOH

2/27/18
DATE

ON BEHALF OF LOCAL 195

DATE

ON BEHALF OF

OAL DKT. NO. CSV # 01377-2018 S

CERTIFICATION

I, Rasheeda Love, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/27/18
DATE

Rasheeda Love
NAME

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of
Alex Navas
Town of West New York

CSC DKT. NO. 2018-2617

Hearing Denied

ISSUED: MAR 19 2018 BW

The Civil Service Commission considered the request for a hearing concerning Alex Navas, from his appeal of removal from the position of Laborer 1, Town of West New York and made the following findings of fact:

1. The Final Notice of Disciplinary Action sent by certified mail and delivered on October 25, 2017.

2. The letter of appeal was postmarked March 9, 2018.

Since the appeal in this matter was not perfected within 20 days of receipt of the Final Notice of Disciplinary Action, the request for a hearing was denied.

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

RE: Alex Navas

DECISION RENDERED BY THE
DIRECTOR, DIVISION OF APPEALS
AND REGULATORY AFFAIRS
ON MARCH 29, 2018

Christopher S. Myers

CHRISTOPHER S. MYERS
DIRECTOR

Inquiries
And
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
~~Hearings~~ Unit
PO Box 312
Trenton, NJ 08625-0312

c: Alex Navas
CWA Local 1045
Agency Services
Pensions
Town of West New York

3-17-19

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
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DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

June 8, 2018

Arnold Shep Cohen, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Andy Jong, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Marcella Friedman v. Department of Law and Public Safety, Division of State Police* (CSC Docket No. 2017-2819; OAL Docket No. CSV 4258-17)

Dear Mr. Cohen and DAG Jong:

The appeal of Marcella Friedman, a Communications Systems Technician 2 with the Division of State Police, Department of Law and Public Safety, of her removal effective February 17, 2017, on charges, was before Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on March 19, 2018, recommending upholding the removal. Exceptions to the initial decision were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The Civil Service Commission (Commission) received this matter on March 19, 2018 and received one 45-day extension of time, as required, to make its final decision no later than June 17, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. However, since one of the Commission members must be recused from this matter, leaving no quorum to vote, the Commission requested consent of the parties, as required, for an additional 45-day extension. However, the appointing authority did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective June 18, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Jeffrey N. Rabin, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 4258-17
AGENCY DKT. NO. 2017-2819

IN THE MATTER OF MARCELLA FRIEDMAN, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE.

Arnold Shep Cohen, Esq., appearing for appellant, Marcella Friedman (Oxfeld Cohen, P.C., attorneys)

Andy Jong, Deputy Attorney General, appearing for respondent, Department of Law and Public Safety (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record closed: February 2, 2018 Decided: March 19, 2018

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, Marcella Friedman, a Communications Systems Technician at the Department of Law and Public Safety, Division of State Police (the "Department"), appeals the disciplinary action seeking her removal for conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), misuse of public property, in violation

of N.J.A.C. 4A:2-2.3(a)(8), and violation of SOP[1] F-7 Radio Procedures, in violation of N.J.A.C. 4A:2-2.3(a)(12).

The issues are whether the appellant used her position as an employee of the New Jersey State Police to obtain a free power generator for her personal use; whether such action constituted conduct unbecoming a public official, misuse of public property and violation of SOP F-7 Radio Procedures; and whether the Department acted properly in removing appellant from her position as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police, for such violations.

PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action dated January 28, 2013, appellant was charged with conduct unbecoming a public employee, misuse of public property and violation of SOP F-7 Radio Procedures.[2] A departmental hearing was held on September 26, 2016, and on February 17, 2017, a Final Notice of Disciplinary Action was served, removing her from her position. Appellant filed an appeal, and the Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on March 28, 2017. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings were held on August 30, 2017, and September 6, 2017. Post-hearing letter-briefs were received on February 2, 2018, and the record closed on that date.

[1] Standard Operating Procedures.

[2] A second Preliminary Notice of Disciplinary Action was issued on January 28, 2013, suspending appellant without pay pending the disposition of criminal charges. Appellant was acquitted of criminal charges for the within incident on January 27, 2016, in Springfield Township (Burlington County) Municipal Court.

FACTUAL DISCUSSION

Stipulated Facts:

1. Governor Chris Christie declared a statewide emergency at 11:30 a.m. on October 27, 2012. Superstorm Sandy made landfall in New Jersey on October 29, 2012 at approximately 8:00 p.m. as a Category 2 storm. On October 31, 2012, more than two million people in New Jersey were without power.

2. Appellant, Marcella Friedman, was on a Personal Medical Leave of Absence from the State Police from April 23, 2012, until August 1, 2012.

3. Appellant was out on Worker's Compensation from the State Police from August 2, 2012, until January 17, 2013.

4. Appellant, Marcella Friedman, was on another Personal Medical Leave of Absence from the State Police from January 18, 2013, until January 30, 2013.

Undisputed Facts from the Hearing:

1. Appellant, Marcella Friedman, was hired by the State Police in 2003, and worked as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police (the "Department"). She was responsible for maintaining the State Police radio network system.

2. The Department provided appellant with State-owned automobiles, repair equipment, radios, cell phones, computers and pagers. She received a radio maintenance shirt as part of a work uniform, but had to buy her own khaki pants to wear. She was issued cold weather gear such as boots, winter jackets, gloves and raingear. She received many State Police jackets over the years, and had an Office of Emergency Management (OEM) jacket. Jackets with State Police logos are available for purchase at the State Police

gift shop and other shops. There was no State Police policy prohibiting civilian State Police employees from wearing jackets with a State Police logo.

3. Appellant had no responsibilities for monitoring or regulating product sales, generators or roadside sales. She had no authority to review permits, shut down vendor sales, fine vendors, confiscate property, and had no arrest powers. Appellant was on extended Medical Leave in October 2012, and had no official duties at that time on behalf of the State Police.

4. On October 30, 2012, the appellant and Lisa Evanko and Cody Evanko were parked at the parking lot at White Dotte Communications, at the intersection of Route 206 and Route 38 in Southampton, NJ ("White Dotte"). White Dotte is a communications company that sells electronics such as walkie-talkies and CB (citizen band) radios, and is also an ice cream/food stand/restaurant. White Dotte was busy that day with generator vendors and purchasers. Lisa Evanko paid $1,700 for a 9,000-watt generator.

5. On October 31, 2012, appellant returned to the parking lot at the White Dotte, with the intention of procuring a generator. Appellant was wearing khaki pants and a blue windbreaker jacket marked with lettering that indicated that it was a New Jersey State Police/OEM jacket. (Exhibit R-1.) Christopher Green, manager of the White Dotte, was allowing vendors from New Hampshire to sell generators in the White Dotte parking lot in return for the use of one of their generators, until Southampton Township official Jody Mazeall arrived and shut down the generator sales because the vendors lacked proper permits.

6. On October 31, 2012, after leaving the White Dotte, appellant drove approximately three miles north on Route 206, and stopped at a lot near the intersection of Route 206 and County Road 537 in Springfield Township (the "Springfield Lot"), with the intention of procuring a generator. She was still wearing khaki pants and a blue windbreaker jacket marked as New Jersey State Police/OEM jacket. (Exhibit R-2.)

7. State Police Lieutenant Nazzareno Nepi was at the Springfield Lot on October 31, 2012, with the intention of procuring a generator. He was dressed in his Class B Utility Uniform, with a State Police logo, and had driven there in an unmarked State Police vehicle. Nepi paid $1,400 for a generator for himself and received a completed invoice with his name, model and serial numbers for the generator, the price, the method of payment (credit card), and a signature from the vendor. (Exhibit R-4.) Nepi returned later to pick up the generator. Nepi called his then-supervisor, Captain Greaney, to advise him that generators were being sold at the Springfield Lot. Greaney drove to the Springfield Lot and purchased a generator for himself.

8. Thomas Whittle, Anthony Grachus and Bobby Jones, current or former employees of Apex Equipment, were at the Springfield Lot on October 31, 2012, selling 8,500 and 9,000-watt generators.

9. Appellant procured a used 8,500-watt generator from Whittle and Grachus on October 31, 2012, at the Springfield Lot. She began to fill-in an invoice, writing in the date of October 31, 2012, her name, Marcella Friedman, and the word "Donat[e]" or "Donat[ion]," but left with the generator before completing the invoice. The signature of Bobby Jones appears at the bottom of the invoice. The invoice does not contain a model number or any description of the generator, or a price for the generator, or any indication of any payment method (cash, credit card or check). (Exhibit R-3.)

Testimony:

For respondent:

Nazzareno Nepi has worked for the New Jersey State Police for thirty-one years. On October 31, 2012, he was the Assistant Bureau Chief at the Fiscal Control Bureau, charged with handling finances and payroll, monitoring expenditures, and handling grant compliance.

Nepi's superior, Captain Greaney, had called Nepi at home, asking him to find him a generator. On October 31, 2012, Nepi started driving towards a store, but then noticed vendors selling generators at the Springfield Lot. Nepi stopped and spoke with Whittle and Grachus, who indicated they were selling 8,500 and 9,000-watt generators. Nepi phoned Greaney to say he had located generators for sale. Greaney arrived and Nepi left the Springfield Lot. Nepi never inquired as to whether Whittle and Grachus had a permit to sell generators at that location, nor did he report the generator sales to anyone at the State with regulatory authority.

Later, on October 31, 2012, a friend of Nepi's also inquired about generators, and Nepi returned to the Springfield Lot to buy him a generator. He saw appellant Marcella Friedman there, dressed in a blue New Jersey State Police/OEM windbreaker. State Police jackets might be available for purchase in stores, but jackets with "Office of Emergency Management" on them can only be obtained from the Emergency Management section.

One of the patrons shopping for a generator at the Springfield Lot told Nepi that he had just seen appellant at a different location and that she had allegedly shut down generator vendors at that other site, and was now trying to shut down generator vendors at the Springfield Lot. Nepi spoke with Grachus, who said appellant was a State Police representative who was questioning vendors about permits, although appellant did not show any official identification to Grachus.

Nepi approached appellant, and they went into a trailer and had a conversation. She told Nepi her name. Nepi asked what she was doing there, and appellant told Nepi that she was at the Springfield Lot to regulate people selling generators, and that she had just shut down generator vendors at a different location. When Nepi asked if she was concerned for her safety because she was working alone monitoring vendors on the side of a highway, she showed Nepi a State Police-issued Motorola radio to indicate that she was not concerned about being alone. That model of radio was given to State Police employees but could not be purchased by civilians in a regular store.

Nepi then spoke with Whittle and Grachus, who said that appellant had threatened them with $1,000 per day fines and with confiscation of their generators, unless they provided her with a free generator. To avoid problems, they had loaded a generator into her truck. Appellant paid no money for the generator. She started filling-out an invoice before she drove off, but left the invoice incomplete. Whittle and Grachus gave Nepi a copy of the appellant-invoice. (Exhibit R-3.)

Nepi then used a credit card to pay $1,400 for a generator for his friend, received a completed invoice, and left with the generator.

On November 1, 2012, Nepi went into a State Police internet database and saw that appellant was a civilian state employee in the Communications Bureau, working as a radio technician, but who was out on disability leave from her job. Nepi discussed this matter with appellant's supervisor, (then-Lieutenant) David Brady, who turned this matter over to the State Police Official Corruption Bureau. Nepi filed an official report as to appellant's activities on October 31, 2012. (Exhibit R-5.)

Thomas Whittle, currently an unemployed resident of Traveller's Rest, South Carolina, had worked for approximately fifteen years in the generator sales business. He previously worked for Apex Equipment Company.[3]

Whittle drove from his home with a pickup truck and trailer with approximately 40 generators, to sell at a discount in New Jersey due to Superstorm Sandy. On October 31, 2012, Whittle connected with former Apex salesman Anthony Grachus and current Apex salesman Bobby Jones, to sell generators at the Springfield Lot. They had verbal permission from the Springfield Township chief of police, and were also told it was acceptable to sell generators there by State Police Troopers. Whittle did not recall the names of the chief of police or Troopers.

Appellant Friedman approached Whittle and identified herself as a member of the State Police. She was wearing a dark blue State Police jacket, and carried a police-

[3] Whittle and Anthony Grachus, as well as Lt. Gary Sandes, were permitted to testify by telephone.

style radio/walkie-talkie. She said she was there to monitor generator sales. Appellant asked Whittle about his prices. Whittle told appellant his prices, but appellant thought they were too high. Appellant then told Whittle he was not allowed to sell his generators at the Springfield Lot, despite his protestations that he had permission to sell there.

Appellant told Whittle that she could shut down their sales and confiscate their generators, just as she had done earlier that day at a different site. Whittle began to pack up his generators, with the assistance of appellant. Then appellant told Whittle she would let them continue their generator sales if they gave her a free generator. Whittle offered to reduce his price, but this was still unacceptable to appellant and she threatened to have Whittle, Grachus and Jones arrested.

Bobby Jones was present for only the beginning of the conversation between appellant and Whittle before he left. Appellant spoke with Grachus, and it was Grachus who decided to comply with appellant's demand that they "donate" a free generator to the "State Troopers Association." Whittle loaded the generator onto appellant's truck, and asked her to complete an invoice for the transaction. She wrote down her name and started to write the word "donate" or "donation" on the invoice, but then dropped the invoice-clipboard and drove off with the generator before completing the invoice.

A typical invoice would have had the purchaser's name, address, purchase information (cash, or credit card and credit card information and approval number), and the amount of the purchase price. Bobby Jones had pre-signed a pile of blank invoices before he left.

Whittle was the "money guy." He did not receive any payment from appellant for the generator she received from them. Whittle was standing with Grachus and appellant, and never saw appellant give any money to Grachus.

Christopher Green was the manager of White Dotte Communications, and was at White Dotte on October 31, 2012. He worked there for twenty years. The store lost power due to Superstorm Sandy and was using generators to save its food inventory. Vendors from New Hampshire were in the White Dotte parking lot selling generators.

Green told them to obtain permits, but he did not check for the permits when the vendors returned. Green allowed them to sell their generators in return for them allowing Green to use one of their generators for the store.

Green saw appellant Friedman at White Dotte on October 31, 2012, wearing a State Police/OEM jacket (Exhibit R-1), and walking around talking into a professional, high-end Motorola walkie-talkie, not the kind of model that can be bought by someone at a typical electronics store like a Best Buy. He believed appellant was at White Dotte in an official governmental capacity, although he never heard appellant refer to herself as a State Trooper. Appellant told Green she was at White Dotte to obtain a generator for a recreation center or a church. Green heard appellant threaten to arrest the New Hampshire generator vendors at the White Dotte if they did not give her a free generator.

Green advised the vendors to ignore appellant's threats, but nothing came from their encounter with appellant because shortly thereafter, Southampton Township official Jody Mazeall arrived and shut down the generator sales because the vendors lacked a proper permit.

The White Dotte logo appeared on some invoices issued there, but not because White Dotte gave the vendors permission to sell or because they were associated with each other; a generator vendor apparently took Green's business card and photocopied it onto a blank form of invoice.

Anthony Grachus was a self-employed power equipment salesman from North Carolina, and had been selling power generators for over fifteen years. He was a former employee of Bobby Jones at Apex. He drove to New Jersey with approximately thirty or forty generators to be sold at reduced prices due to Superstorm Sandy. He received verbal permission to sell generators at the Springfield Lot from various local law enforcement officers, the local chief of police, and from State Troopers. Receiving only verbal permission is not unusual in emergency/storm situations. He met up with Whittle and Bobby Jones at the Springfield Lot.

On October 31, 2012, shortly after Bobby Jones left on a break, appellant Friedman approached Grachus at the Springfield Lot. She was wearing a State Police jacket and talking into a walkie-talkie just like the other officers and Troopers who had been there, although unlike other law enforcement officers there, appellant was not wearing a gun. Appellant threatened to arrest Grachus for not having a permit to sell, unless he gave her a free generator. She said she had just shut down generator vendors at White Dotte. He believed appellant was a State Trooper, with the authority to arrest him or fine him if he did not give her a generator.

After discussing this with Whittle, Grachus decided he would comply with appellant's request and would give her a free generator just to get rid of her, but would have to treat this as if it were a donation. He gave her a generator, and gave her an invoice form to complete. Appellant did not pay any money to Grachus for the generator, and she left before completely filling out the invoice. She wrote "Marcella Friedman" on the invoice and the word "Donate."

David Brady is a Major with the New Jersey State Police. In 2013 he was the OEM Bureau Chief, that being the unit head of the "radio maintenance unit." Appellant worked in Brady's department, but did not report directly to Brady. Brady never performed or reviewed appellant's employee evaluations.

On October 31, 2012, appellant was a "Communications Technician 2" for the R.E.R.P. (communications systems for nuclear power plants), a civilian position. On that date, appellant was out on Medical Leave. A person on extended Medical Leave would still be considered an "active" but "off-duty" employee and would not have to return the clothes that had been issued to them. Employees who are off-duty, however, are not supposed to be dressed in their work uniform (although it is not strictly prohibited), and are not permitted to use their State-issued radios.

The jacket issued to an employee in the Communications Department would state "Communications" on the jacket, but the custom-designed jackets with the State Police/OEM logos on them were also distributed to some communications workers. Some equipment does get retrieved from employees out on Medical Leave; appellant's

State-issued vehicle and laptop were both retrieved from her because of her Medical Leave. Appellant had been issued a Motorola STX 5000 radio, the same model of radio issued to State Troopers; this radio had not been retrieved from appellant when she went on Medical Leave.

On November 2, 2012, Brady received a call from Nepi, inquiring about the appellant. Brady confirmed that appellant worked for him. Nepi told Brady about the appellant and the generator on October 31, 2012. Brady confirmed that appellant was on Medical Leave. Brady referred this matter to his superior, Captain Mark Muse, and then had nothing more to do with the investigation.

Appellant had filed numerous complaints against many State Police employees. She had been disciplined for a "lack of candor" during investigations of the complaints she had filed.

Gary Sandes is currently a corporate investigator for TD Bank. Before that, he was with the New Jersey State Police for almost twenty-six years, as a State Trooper and a casino detective. He was also assigned to the narcotics and internal affairs departments, and with the Official Corruption Bureau. He was unit leader of the Official Corruption Bureau in October 2012, and conducted the investigation of appellant. He filed two formal written reports on this matter. (Exhibits R-9 and R-10.) These reports included copies of Nepi's report.

Sandes interviewed both Whittle and Grachus. They said that on October 31, 2012, appellant identified herself to Whittle as an inspector for the State Police, at the Springfield Lot. She wore a State Police/OEM jacket and carried a radio. Whittle and Grachus both told Sandes that appellant was "verbal" and "agitated" as she indicated she wanted a generator but did not want to pay for one. She threatened Whittle and Grachus with arrest or fines for violation of ordinances, and claimed to have shut down generator vendors at a separate location. Whittle and Grachus eventually capitulated and gave appellant a free generator. Sandes received a copy of the incomplete appellant-invoice from Nepi, and acknowledged that a proper invoice should have

shown the price, model number and payment method; appellant's invoice had only her name and the word "Donate."

Sandes was unsuccessful in his attempts to schedule a formal interview with appellant. But he reached her on her cellphone. Appellant began to act defensive, and told Sandes that she had purchased a generator for $2,000 and therefore would not have stolen a generator. Sandes asked for a copy of an invoice for the $2,000 generator, but appellant never provided one. She said she never spoke with Nepi.

Hours later, appellant telephoned Sandes at his home. She said on October 31, 2012, she actually purchased a generator for $500 cash that she had taken out of an A.T.M., and would be able to produce a receipt. She said she gave that generator to a church, but would not reveal its name or location. When appellant refused to schedule a formal interview, Sandes ended the conversation.[4]

Sandes had not seen any bank records indicating that appellant had taken $500 out of a bank or A.T.M.

Sandes contacted the Burlington County Department of Consumer Affairs, and was informed by the director, Renee Borstad, that there had been no complaints filed against Whittle and Grachus. She said Southampton Zoning official Jody Mazeall provided her with a photograph of appellant at the White Dotte. Borstad provided the photograph to Sandes; it showed appellant wearing khaki pants and a State Police/OEM windbreaker.

Sandes interviewed White Dotte manager Christopher Green on November 15, 2012. Green saw appellant at White Dotte on October 31, 2012, wearing a State Police jacket, and carrying and speaking into a radio. Green overheard appellant's conversation with the generator vendors at White Dotte in which appellant told the vendors she wanted two free generators, and that the vendors could be arrested by the State Police. Appellant never stated she was a Trooper. Mazeall arrived, dispersed the

[4] Sandes typically records such conversations, but his tape player at home was broken.

vendors, and took a photograph of appellant, who was wearing khakis and a State Police jacket.

Sandes interviewed Jody Mazeall on November 15, 2012. Mazeall saw appellant at White Dotte on October 31, 2012, wearing the State Police/OEM jacket. Mazeall spoke with appellant, who told him that she had been ripped off by being sold a bad generator. Mazeall asked appellant why she didn't report this to her fellow State Police, and she told him that this was a personal issue. Mazeall never told Sandes he had seen appellant with a radio.

Sandes learned that appellant had given a generator to David Palmer as payment for staying in his home while she was between residences.

As part of his investigation, Sandes was made aware of a check for $1,600 made payable to appellant, from Lisa Evanko (daughter of David and Eleanor Palmer). Sandes spoke with Evanko on December 7, 2012, who told him that on October 30, 2012, she and her son Cody travelled with appellant to White Dotte. Evanko wanted to purchase a generator and pay by check, but the vendors were not accepting checks. Appellant then gave Evanko $1,600 in cash towards the $1,700 purchase price, and Evanko's son paid the final $100 in cash. Evanko then reimbursed appellant by writing her a check for $1,600.

Sandes had not seen any bank records indicating that appellant had taken $1,600 out of a bank or A.T.M. on or before October 30, 2012.

Evanko stated that the generator which appellant procured on October 31, 2012, was given by appellant to David Palmer, and that David Palmer then sold it to David Marshall. Sandes spoke with Marshall, who confirmed that he had purchased a generator from David Palmer.

Sandes conducted a formal interview with Evanko on January 8, 2013. Evanko provided an invoice for the generator she purchased from the vendors at the White Dotte on October 30, 2012. It was for a 9,000-watt model, not the same model which

appellant procured on October 31, 2012; appellant gave David Palmer an 8,500-watt model. Evanko knew that Marshall needed a generator, so she arranged for Marshall to buy a generator from David Palmer. The serial number on the generator Marshall bought from David Palmer is the same as the model number of the generator appellant procured from Whittle and Grachus on October 31, 2012. Sandes later obtained a photocopy of a check from Marshall to David Palmer, dated November 5, 2012, in the amount of $1,000.

Sandes did not know any of these State Police employees before he began this investigation, except for Nepi. There was no conspiracy to get appellant fired.

For appellant:

Eric Trout was a police officer with Springfield Township for twenty-four years. He has been Chief of Police since 2011, and served in that capacity during Superstorm Sandy. He never spoke with any generator salesman at Routes 206 and 537 in Springfield. He never gave permission to anyone to sell generators. He was not aware that anyone was selling generators at that location and had not received any complaints about generator sales.

Marcella Friedman, the appellant, was hired in 2001 as a Radio Technician with the New Jersey Department of Corrections before joining the New Jersey State Police in 2003 as a Technician 2. She received a blue radio maintenance shirt as part of a work uniform, and had to buy her own khaki pants to wear. She owned an Office of Emergency Management jacket but could not remember when she obtained it. People in her position wear State Police jackets all the time. There are no restrictions on when and where they can wear State Police jackets.

She purchased a new home on October 22, 2012, in Hamilton, New Jersey, after previously living in Surf City, New Jersey. On that date she was collecting Worker's Compensation. She paid cash at her real estate closing because she could not get a mortgage.

Because repairs were being done to her new home in Hamilton, New Jersey, appellant temporarily moved in with "Aunt Wanda,"[5] and was living out of boxes.

After Superstorm Sandy hit, Lisa Evanko was going to borrow a generator from a friend in Tabernacle, New Jersey. In the mid-afternoon of October 30, 2012, Lisa Evanko, Cody Evanko and appellant drove in appellant's pickup truck towards Tabernacle. They passed White Dotte and saw vendors selling generators there. After picking up the generator from Lisa Evanko's friend in Tabernacle, they drove back north and stopped at White Dotte.

The White Dotte lot was busy with generator vendors and purchasers. Appellant was there for a couple of hours on October 30, 2012. Two lines were set up, one for cash purchases and one for credit card purchases. They were not accepting checks. Appellant did not trust how the vendors were taking credit card information, so she gave Lisa Evanko $1,600 in cash to purchase herself a 9,000-watt generator.

As appellant was living out of boxes and did not have a lot of clothes available, on October 30, 2012, she put on the blue State Police/OEM jacket that was in her car. Appellant had her personal cellphone with her. She was not carrying a work cellphone or a radio. She wore a small black leather fanny pack, which she had worn every day for seven or eight years, because she kept an epi-pen in there in case of any food allergy emergencies. (Exhibit P-2.)

After Evanko chose the model of generator she wished to purchase at White Dotte, appellant, Lisa Evanko and Cody Evanko drove from White Dotte back to Tabernacle, approximately fifteen to twenty minutes, to return the generator they had picked up earlier from Lisa Evanko's friend. They did this to make room in appellant's pickup truck for Evanko's newly purchased generator.

[5] "Aunt Wanda" was referred to as Eleanor Palmer's daughter. She may have been referring to Eleanor's daughter, Lisa Evanko.

No vendors at White Dotte asked her about her State Police/OEM jacket. She never told anyone that she was a State employee. She never asked anyone at White Dotte on October 30, 2012, to give her a free generator.

After returning the borrowed generator to Tabernacle and driving back to White Dotte to pick up Evanko's new generator, they drove back to Aunt Wanda's house, and someone unloaded the generator. Evanko reimbursed appellant for the $1,600 cash she lent her by writing appellant a check for $1,600.

On October 31, 2012, David Palmer told appellant that he wanted a second generator, so he could help his neighbors out. Palmer was especially in need of power, because Aunt Wanda had a pacemaker. Appellant went out, on her own initiative, and drove alone to White Dotte to procure another generator.

When she arrived at White Dotte on October 31, 2012, one of the vendors recognized her, because she had been there the day before and because she purchased a generator with cash. She handed the vendor $1,700 cash to purchase another generator, but did not get a receipt. Just then, Southampton Township inspector Jody Mazeall began shutting down the generator vendors. Later, people just assumed that appellant had shut them down because she was wearing the State Police/OEM jacket; she never told vendors at White Dotte on October 31, 2012, that she could shut them down.

In the craziness of the vendors being shut down by Mazeall, the vendor refused to return her $1,700 cash, and took away the generator she was about to purchase. She walked inside the White Dotte to speak with the manager, Christopher Green, but he would not help her. There were police and township officials around but she did not want to ask for their help in getting back her $1,700 cash because she was embarrassed and this was a personal matter. She then chased the vendor down; he cursed at her, but then gave appellant her $1,700 cash back. Both Mazeall and appellant took photographs of the vendors' trucks, which contained hundreds of generators.

Appellant had $1,600 cash on October 30 and at least $1,700 cash on October 31, 2012, because she had cash left over from her recent real estate purchase. She was unable to get a mortgage because she was receiving Worker's Compensation, so she used cash to buy her new home.

Someone at White Dotte then told appellant that vendors up the road were selling generators. Since this was on her way home, she drove up Route 206 to a vacant lot by Routes 206 and 537 and the Esquire Diner (the Springfield Lot). Those vendors had U-Hauls and only a small number of generators.

Around 3:00 p.m., appellant got out of her vehicle at the Springfield Lot, still wearing the blue State Police/OEM jacket. She had no radio with her. She saw Lieutenant Nepi; she and Nepi had worked together before. Nepi asked her how her knee was doing. Nepi said he was there to purchase a generator, and appellant saw him take possession of two generators.

Appellant chose the 8,500-watt model generator. Bobby Jones told her the cash price would be $500, a discounted price because this was a used generator. She was not aware of what condition this used generator was in or why it had been returned. Jones took the $500 from appellant, and signed his name to her invoice in front of her. She never spoke with Whittle or Grachus. Jones wasn't feeling well and wanted to leave, so he told Whittle and Grachus to load a used 8,500-watt generator into appellant's truck, and to write "Donate" on appellant's invoice. She wrote her name on the invoice, and Jones said to not worry about writing in her address or anything else, because the rest of the details of the generator were included in the warranty paperwork he had given her.

Appellant returned to David Palmer's house, where she was staying, and gave him the generator she had just purchased. But she did not consider this as payment to a relative for staying with them. By the time she gave the generator to Palmer, the electricity in their house was back on. Appellant had no idea Palmer intended on reselling her generator.

When Sandes called to discuss this matter with her, she thought this was some kind of prank. She called Sandes back a few hours later and denied the accusations. She was too busy to schedule a formal interview with Sandes because she was still moving out of her last home on Long Beach Island, and also had to go to the doctor regarding her leg.

Appellant had filed numerous employment complaints against co-workers over a ten-year period. She had previously met with an Officer Ingram and with Major Brady regarding specific employment issues; Ingram pulled out a gun and threatened her and her family, calling them "a bunch of thugs," until Brady had Ingram "stand down." It was after leaving that meeting that appellant went to her doctor, and she has been out on Medical Leave since then. She filed a complaint, resulting in several officers and civilian employees being suspended. She suggested that the within accusations against her are revenge for her having filed complaints against fellow employees. Appellant is a lesbian; she has been called names because of that, and her co-workers created a hostile work environment and did things to her in an attempt to get her to leave her job.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson

v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), *certif. denied*, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

After having the opportunity to review the evidence and observe his testimony, the testimony of **Nazzareno Nepi** is accepted as credible and truthful. He was at the Springfield Lot on the day of the incident in question, and had the opportunity to witness and personally converse with the appellant as well as witnesses Whittle and Grachus, who later corroborated Nepi's testimony. He exhibited no prejudice during his testimony, but rather answered questions clearly and authoritatively.

Accordingly, Nepi's testimony is accepted as truthful and credible, and therefore it is accepted as **FACT** that: State Police jackets are available for purchase in stores, but jackets with "Office of Emergency Management" on them can only be obtained from the Emergency Management section. Appellant showed Nepi her State Police-issued Motorola radio that she was carrying. That model of radio is given to State Police employees but cannot be purchased by citizens in a regular store. Whittle and Grachus told Nepi that appellant threatened them with fines and with confiscation of their generators, unless they provided her with a free generator, and that appellant did not pay for the generator she took from them.

Thomas Whittle, one of the generator vendors at the Springfield Lot, was permitted to testify by telephone by agreement of both parties. I could not visually observe Whittle's testimony, but was able to observe the tone of his voice and facility of

his answers. He directly witnessed appellant at the Springfield Lot on October 31, 2012, and his testimony was corroborated by that of other witnesses. He answered questions quickly and clearly, from the point-of-view expected from a person who was the alleged victim of malfeasance.

Whittle testified that he received verbal permission to sell generators from State troopers and the local chief of police. Springfield Chief of Police Eric Trout testified that he was unaware of generator sales at the Springfield Lot and that he never gave anyone permission to sell generators. Thus, while Whittle may have received permission from other troopers and law enforcement officers, and may have been uncertain as to the ranks of the officers he spoke with, his statement that he received permission from the chief of police does not appear to be correct. The possible illegality of his generator sales did not impact on appellant's actions at the Springfield Lot, however, nor was Whittle's testimony impeached by Trout's testimony.

Accordingly, Whittle's testimony is accepted as truthful and credible, and the following can be accepted as **FACT**: appellant Friedman approached Whittle and identified herself as State Police. Appellant carried a police-style radio/walkie-talkie. Appellant informed Whittle that she was at the Springfield Lot on October 31, 2012, to monitor generator sales. Appellant told Whittle he was not allowed to sell his generators at the Springfield Lot, that she could shut down his vending, confiscate his generators and/or have Whittle and Grachus arrested. Appellant claimed to have shut down generator sales at a different location earlier that day. Appellant told Whittle she would let their generator sales continue if Whittle and Grachus gave her a free generator. Bobby Jones was not present for the entirety of Whittle's conversation with appellant, and left before appellant obtained a generator. It was Grachus who decided to comply with appellant's demand that they "donate" a free generator. Whittle loaded the generator onto appellant's truck. Whittle asked appellant to complete an invoice for the transaction. A typical invoice would have the purchaser's name, address, purchase information (cash, or credit card and credit card information and approval number), and the amount of the purchase price. Bobby Jones pre-signed a pile of blank invoices before he left to take a break. Whittle did not receive any payment from appellant for

the generator she received from them. Whittle was standing with Grachus and appellant, and never saw appellant give any money to Grachus.

The testimony of **Christopher Green** is accepted as credible and truthful. In testifying as to what transpired at White Dotte on October 31, 2012, Green answered questions clearly, without any apparent bias or prejudice.

Accordingly, it is accepted as **FACT** that: Green was at White Dotte on October 31, 2012. Green allowed vendors from New Hampshire to sell generators in the White Dotte parking lot, in return for them allowing Green to use one of their generators for the store. Appellant Friedman was at White Dotte on October 31, 2012, wearing a State Police/OEM jacket, and walking around the lot talking into a professional, high-end Motorola walkie-talkie. Appellant was at White Dotte to obtain a generator. Appellant threatened to arrest the New Hampshire generator vendors at White Dotte if they did not give her a free generator. Southampton Township official Jody Mazeall arrived and shut down the generator sales because the vendors lacked a proper permit.

Anthony Grachus, one of the generator vendors at the Springfield Lot, was permitted to testify by telephone by agreement of both parties. I could not visually observe Grachus' testimony, but was able to observe the tone of his voice and facility of his answers. He directly witnessed appellant at the Springfield Lot on October 31, 2012, and his testimony was corroborated by that of other witnesses. He answered questions clearly and thoughtfully, from the point-of-view expected from a person who was the alleged victim of malfeasance.

As with Whittle, Grachus testified that he received verbal permission to sell generators from State troopers, local law enforcement officers, and the local chief of police. Springfield Chief of Police Eric Trout testified that he was unaware of generator sales at the Springfield Lot and that he never gave anyone permission to sell generators. Thus, while Grachus may have received permission from other troopers and law enforcement officers, and may have been uncertain as to the ranks of the officers he spoke with, his statement that he received permission from the chief of police does not appear to be correct. The possible illegality of his generator sales did not

impact on appellant's actions at the Springfield Lot, however, nor was Grachus' testimony impeached by Trout's testimony.

Accordingly, Grachus' testimony is accepted as truthful and credible, and the following can be accepted as **FACT**: Grachus drove to New Jersey with approximately thirty or forty generators to be sold at reduced prices due to Superstorm Sandy. Grachus met Whittle and Bobby Jones at the Springfield Lot, and all three were present there on October 31, 2012. Appellant Friedman approached Grachus at the Springfield Lot, wearing a State Police jacket and talking into a walkie-talkie. Appellant threatened to arrest Grachus for not having a permit to sell, unless he gave her a free generator. Appellant claimed to have just shut down generator vendors at White Dotte. Grachus believed appellant was a State Trooper, with the authority to arrest him or fine him if he did not give her a generator. Grachus made the decision to give appellant a free generator. Grachus gave her a generator, and gave her an invoice form to complete. Appellant did not pay any money to Grachus for the generator.

David Brady provided reasoned testimony, speaking with authority and displaying a great deal of knowledge as to the workings at the State Police. His testimony is accepted as truthful and credible.

Accordingly, it is accepted as **FACT** that: appellant Friedman's position as a Communications Technician 2 for the State Police is considered a civilian position. A civilian employee on extended Medical Leave would not have to return the clothes that had been issued to them. Jackets with State Police/OEM logos were distributed to some communications workers. Appellant had been issued a Motorola STX 5000 radio, the same model of radio issued to State Troopers. Appellant's Motorola STX 5000 radio had not been retrieved from her when she went on Medical Leave. Off-duty employees are not permitted to use their State-issued radios. Appellant had conflicts with other employees, and had filed numerous complaints. Appellant had been disciplined for a "lack of candor" during investigations of the complaints she had filed.

Gary Sandes was permitted to testify by telephone by agreement of both parties. I could not visually observe Sandes' testimony, but was able to observe the tone of his

voice and facility of his answers. Sandes testified based on his investigation of appellant, and much of his information came from interviews of persons who testified at the within Hearing. His answers appeared unbiased and informed, and his testimony is accepted as truthful and credible.

Accordingly, it is accepted as **FACT** that: Sandes was with the State Police Official Corruption Bureau in October 2012, and conducted the official investigation of appellant Friedman. Sandes was unsuccessful in his attempts to schedule a formal interview with appellant. Sandes spoke with appellant by telephone on November 4, 2012, and she stated that she had purchased a generator for $2,000 and did not steal a generator. Appellant never produced an invoice for the $2,000 generator. Appellant denied speaking with Nepi at the Springfield Lot. Hours after their initial telephone call, appellant telephoned Sandes at his home, and told him that on October 31, 2012, she had actually purchased a generator for $500 cash that she had taken out of an A.T.M., and would be able to produce a receipt. Appellant never produced a receipt for a $500 bank or A.T.M. withdrawal. Appellant told Sandes that she gave the generator to a church, but would not reveal its name or location. When appellant refused to schedule a formal interview, Sandes ended their telephone conversation. Sandes typically recorded investigative conversations but his recorder malfunctioned during this conversation at his home. Sandes received a copy of a photograph of appellant at White Dotte on October 31, 2012, from Renee Borstad at the Burlington County Department of Consumer Affairs, which Borstad had received from Southampton Zoning official Jody Mazeall; that photograph showed appellant wearing khaki pants and a State Police/OEM windbreaker. Appellant gave the 8,500-watt generator she had procured on October 31, 2012, to David Palmer, with whom she had been staying. Sandes spoke with Palmer's daughter, Lisa Evanko, on December 7, 2012, and again on January 8, 2013. Evanko stated that she and her son Cody travelled with appellant to White Dotte on October 30, 2012, so Evanko could purchase a generator. Evanko wanted to pay by check, but the vendors were not accepting checks. Appellant Friedman gave Evanko $1,600 in cash towards the $1,700 purchase price for a 9,000-watt generator, and Cody Evanko gave her the final $100 in cash. Evanko received a completed invoice for her purchase. Evanko later reimbursed appellant by writing her a check for $1,600. There were no bank records indicating that appellant had taken

$1,600 out of a bank or A.T.M. on or before October 30, 2012. David Palmer sold the 8,500-watt generator appellant had given him to David Marshall for $1,000. There was no conspiracy to get appellant fired.

Eric Trout was a credible witness, and therefore it is accepted as **FACT** that: Trout was unaware of generator sales at the Springfield Lot. Nobody ever asked him for permission to sell generators at the Springfield Lot, and Trout neither met with or gave permission to any generator salesmen at the Springfield Lot.

Appellant **Marcella Friedman** was not a credible witness. She appeared defensive at times, and was evasive in much of her testimony. There were many inconsistencies in her testimony.

Appellant told Sandes in a telephone interview that she did not recall speaking with Nepi at the Springfield Lot on October 31, 2012, but Nepi and appellant both testified that they spoke with each other at the Springfield Lot.

Appellant claims to have paid $500 for a generator on October 31, 2012, but there is no proof that she paid for the generator, and neither Whittle nor Grachus received any payment for the generator she took. Appellant told Sandes on the telephone that she gave the generator to a church, without revealing its name or location, when in fact she gave the generator to David Palmer.

Appellant said she gave the generator to David Palmer for free. Despite an assertion in appellant's Post-Hearing Brief that she gave the generator to Palmer as "in kind" payment for allowing her to stay temporarily in his home (Exhibit P-3, page 29), in her testimony appellant denied that she gave Palmer the generator as rent payment. (Transcript September 6, 2017, page 143.) Beyond these contradictory statements, appellant never explained why she gave Palmer a free generator.

There were also contradictions regarding Palmer's need for a second generator. Appellant testified that she went generator shopping again on October 31, 2012, because David Palmer wanted a second generator, to help friends out. But David

Palmer already had access to two generators: the one his daughter Lisa Evanko purchased at the White Dotte on October 30, and the generator that appellant and Evanko borrowed from Evanko's friend in Tabernacle that same date. If David Palmer told appellant on October 30 that he needed two generators, appellant would not have driven back to Tabernacle to return the borrowed generator. If David Palmer told appellant on October 31 that he needed a second generator, appellant could have driven back to Tabernacle to borrow the generator again from Evanko's friend.

Additionally, appellant justified this need for a second generator by testifying that "Aunt Wanda" had a pacemaker. She did not explain a nexus between Wanda's pacemaker and a generator, but pacemakers are battery-driven, and do not get plugged into a source of electricity. There was also something amiss in Palmer selling the generator that appellant gave him for free, receiving $1,000 from Marshall and yet not reimbursing appellant the $500 she claims she paid for it.

Appellant testified that she did not trust the generator vendors at the White Dotte on October 30, 2012; rather than allow Evanko to give her credit card information to what she considered untrustworthy salesmen, appellant gave Evanko $1,600 in cash to enable her to complete her purchase. But appellant later testified that she did trust the salesmen at the White Dotte, because the White Dotte name was imprinted on their invoice form.

This issue of trust arose again on October 31, 2012. Appellant may not have trusted the vendors on October 30, 2012, but she trusted these same vendors enough on October 31, 2012 to hand them $1,700 cash without getting a receipt or invoice. Appellant testified that they took her $1,700 cash on October 31, but then refused to give her that money back after the township shut down their operation. Although surrounded by law enforcement officials, appellant did not ask any of them for help getting back her $1,700; she testified that this would have been embarrassing to her, because this was a personal matter. But there should have been nothing embarrassing in asking a police officer for help with a personal matter if appellant was there in a personal, and not official, capacity. It was fortunate for appellant that the vendors

suddenly changed their minds and returned the $1,700 in cash to her, despite her not having a receipt or invoice for that dollar amount.

Appellant testified that when she arrived at White Dotte on October 31, 2012, one of the vendors recognized her, because she had been there the day before and because she paid with cash. But appellant did not purchase a generator on October 30; Evanko did. Appellant and Evanko's son Cody gave cash to Evanko to make the purchase. None of the vendors at White Dotte on October 31, 2012, should have recognized appellant as a cash purchaser.

There were also inconsistencies regarding the cash appellant had spent on generators. Appellant initially told Sandes she spent $2,000 on a generator. Later she said she really spent only $500 for a generator, and had a receipt to prove it. But appellant produced no receipt or invoice showing she spent either $2,000 or $500 for a generator purchase. Further, appellant testified that she had $1,600 in cash on October 30 (which she gave to Evanko for her generator purchase) and $1,700 cash on October 31, 2012 (which appellant initially gave to the vendors at White Dotte). Yet no bank statements or A.T.M. records were produced to verify that appellant had recently obtained $3,300 in cash.

Appellant explained her source of cash by stating that she had cash left over from a real estate transaction, that being her purchase of property in Hamilton, New Jersey, on October 22, 2012.[6] She had to do a cash closing because she was unable to secure mortgage financing for her purchase because she was on Worker's Compensation.[7] But a "cash closing" does not typically involve actual cash; a "cash closing" is a term of art to describe a transaction other than a mortgage loan-financed purchase. Purchasers bring a check to a closing table, not cash. If a purchaser did in fact show up at a real estate closing with hundreds of thousands of dollars in cash, the title company would be responsible for having the applicable Internal Revenue Service documents completed and submitted. Further, if there was money left over from a real

[6] Land records indicate that the date of appellant's deed was October 18, not October 22, 2012.

[7] Appellant provided no evidence that she applied for a mortgage or was rejected by lenders for mortgage financing.

estate settlement which had to be paid back to the purchaser, a title company would not pay that in the form of cash; they would pay the amount in the form of a check. In the unlikely situation where actual cash was paid, this would be reflected on a HUD-1 Settlement Statement; appellant, however, did not submit such documentary evidence, or a copy of any I.R.S. documents reflecting a cash closing, or bank statements showing the withdrawal of hundreds of thousands of dollars in cash in proximity to her settlement date. Additionally, Sandes testified that appellant told him she had taken money out of the bank to purchase her generator, and that she would produce receipts for said withdrawals, which is different than holding on to thousands of dollars in cash from a real estate closing for two weeks.

Appellant's statements regarding her clothing lacked credibility. She testified that she purchased a new home on October 22, 2012, and that because of repairs to the new home she had to live temporarily with her relatives, the Palmers. Because she was in-between homes, she was living out of boxes, which was why she was wearing the same outfit on both October 30 and October 31, 2012. It seems unlikely that the Palmers could not have lent appellant some clothes to wear. It also raises the question of why appellant would have packed away all her jackets; she was moving during October, a time of cool and wet autumnal weather, and it seems more likely that she would have needed to keep a couple of coats or jackets nearby to wear on an October day. Further, appellant testified that she wore the State Police/OEM windbreaker jacket on October 30 and 31, 2012, because it was in her truck. That means appellant walked out of the Palmer house, during a hurricane like Superstorm Sandy, to conduct business outdoors, with no jacket, coat or cold weather or wet weather gear, and that she then put on the cold State Police/OEM jacket that she happened to have in her truck. Even if that had happened on October 30, it seems unlikely she would have gone out the next day in the same clothes, with the same light jacket, instead of borrowing a coat or heavier jacket from her relatives, or going into her boxes to find a heavier coat, or to find the cold weather clothes that she had been issued at work, which she still had despite being out on Medical Leave.[8] Additionally, if appellant had been wearing the State

[8] Appellant's boxes of clothes were easily accessible; they were stored at her new house in Hamilton, New Jersey, in the same township where she was staying with the Palmers. (Exhibit P-3, page 32.)

Police/OEM jacket on a regular basis, she could have produced photographs of her in the jacket from some time other than October 30 and 31, 2012.

Appellant-counsel stated in his Post-Hearing Brief (Exhibit P-3, page 32) that appellant purchased her new home (in Hamilton, New Jersey) on October 22, 2012, and that when Superstorm Sandy hit seven days later it forced appellant to move out of the house. Yet appellant testified that she was living with the Palmers because she was having repairs done to the new house before moving in.

There are also inconsistencies with regard to Mr. Jones and his presence at the Springfield Lot. Whittle and Grachus stated that Jones was not feeling well, and did not stay for the end of the conversation with appellant, and that Jones had pre-signed a pile of invoices before he left the Springfield Lot. But appellant stated that it was Jones who completed her purchase transaction, and stayed long enough to see the generator loaded into her truck, and that Jones signed her invoice in front of her. She also testified that Jones told her not to complete filling in her information on the invoice because all pertinent information would be in the warranty he was giving her. It is believable that Jones would pre-sign blank forms before leaving a site, but it seems unlikely that an experienced salesperson like Jones would have signed an invoice knowing that it was lacking in standard information, such as price and payment method. The only vital information that would be in a warranty book would be the model and serial number of the generator being purchased; the warranty would not have had the price or payment method. Further, no warranty should have been forthcoming to appellant because she purchased a used generator, not a new model. Jones could have testified as to appellant having paid for the generator she took home, but appellant did not call Jones as a witness. No warranty with appellant's name was offered into evidence by appellant.

Appellant's statements about wearing her black fanny pack at all times due to needing an epi-pen for potential food allergies went unsubstantiated; no evidence was provided that she wore the fanny pack at all times (such as old photographs showing her wearing the fanny pack), and no evidence was provided to confirm that she had any food allergies.

Accordingly, due to appellant's lack of credibility, I cannot accept her version of the events of October 31, 2012.

LEGAL ARGUMENT AND CONCLUSION

The issues are whether the appellant used her position as an employee of the New Jersey State Police to obtain a free power generator for personal use; whether such action constituted conduct unbecoming a public official, misuse of public property and violation of SOP F-7; and whether the Department acted properly in removing appellant from her position as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police, for such violations.

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV) (1996). Progressive discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV) (1994).

I. Conduct unbecoming a public employee

One of the grounds for discipline of public employees is "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental

services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified even where the misconduct occurred while the employee was off duty. Emmons, 63 N.J. Super. at 140.

Appellant Friedman was a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police. While she was employed by the State Police, hers was a civilian position; she did not serve as a State Trooper. She worked in communications, and had no responsibilities for monitoring or regulating product sales, generators or roadside sales. She had no authority to review permits, shut down vendor sales, fine vendors, confiscate property, and had no arrest powers. Appellant was receiving Worker's Compensation and was on extended Medical Leave on the date of October 31, 2012, and had no duties on that date on behalf of the State Police.

Yet on October 31, 2012, appellant dressed as a member of the New Jersey State Police Office of Emergency Management and carried a State-issued radio. She told roadside vendors at two separate locations that she had the authority to shut down their sales unless they gave her a free power generator. Rather than use her time and talents to assist those in need during the crisis that became known as Superstorm Sandy, she used her State-issued jacket and radio to impersonate an employee of the OEM. Not only did she not assist her fellow citizens in need, she used the fact that roadside vendors in an emergency did not have formal sales permits or approvals as the basis for taking a generator without paying for it. Appellant's actions constituted the extortion of property. In addition to this being a criminal act, appellant's behavior

undermined the efficiency of a governmental unit, that being the State Police, and was clearly the type of behavior that can undermine and destroy the public's respect in the delivery of governmental services, and its respect for police in general.[9]

The generator vendors were obviously hoping to make a profit from selling their wares, but were selling them at significant discounts in order to provide help during a crisis. Yet while they were offering help during a crisis situation, appellant was doing nothing but looking out for herself. This is the sort of behavior that offends publicly accepted standards of decency. Rather than wear the State Police/OEM jacket as a paragon of virtue, appellant wore it in a manner so as to violate the implicit standard of good behavior expected from someone who has a public position.

Accordingly, appellant's actions on October 31, 2012, constituted conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6).

II. Misuse of public property

As a Communications Systems Technician 2 at the Department, appellant had been issued State radios, cell phones and pagers. She received a radio maintenance shirt as part of a work uniform. She was issued cold weather gear such as boots, winter jackets, gloves and raingear. She received many State Police jackets over the years, and had an Office of Emergency Management (OEM) jacket. There was no State Police policy prohibiting civilian State Police employees from wearing jackets with a State Police logo.

But appellant was not simply wearing an OEM jacket to stay warm. She wore that jacket to give the impression that she was on-duty, working for the State Police/OEM. She wore that State-issued jacket while telling roadside vendors that she had the authority to fine them or shut down their business for lack of proper permits. Appellant did not purchase the jacket she wore on October 31, 2012; she wore a jacket that had been given to her as an employee of the State Police. Thus, because the

[9] By example, Christopher Green, the White Dotte manager, was so suspicious of appellant's behavior that he told vendors at his site to ignore her.

jacket she wore at the Springfield Lot on October 31, 2012, was a State-issued jacket, her improper actions on that date constituted a misuse of public property.

Similarly, appellant was carrying and speaking into a walkie-talkie, just like other law enforcement officers were doing. Appellant carried and talked into her State-issued walkie-talkie to bolster the image of her as an on-duty member of the OEM. Had appellant merely been wearing a walkie-talkie strapped to her waist, her defense--that what witnesses actually saw was the black fanny pack she always wore--might have had some validity. But appellant was carrying the walkie-talkie and speaking into it, hoping to give the impression that she was on-duty and acting in an official capacity when she was attempting to regulate roadside sales. Further, off-duty employees, like appellant, were not permitted to use their State-issued radios. Accordingly, appellant's use of a State-issued walkie-talkie as part of her extortion of a generator constituted a misuse of public property.

III. Violation of SOP F-7 radio procedures

There are guidelines for use of State-issued radios, that being Standard Operating Procedures F-7 ("SOP F-7"). (Exhibit R-7.) The Department cited SOP F-7, Section III, Radio Transmissions, subsection A, which states, "Personnel shall utilize proper radio procedures with brevity and professionalism at all times . . ." Neither party focused on this charge at the Hearing; it is presumed that appellant's denial that she carried a walkie-talkie or radio was a denial that she violated Standard Operating Procedures.

Appellant carried a State-issued radio, that being a Motorola XTS 5000 radio, and was speaking into it. Being on Medical Leave and not having any official work duties, any speaking into a walkie-talkie by appellant had to have been fake. Appellant's fake use of her radio to create the impression that she was on active duty indicated a lack of professionalism on her part. Accordingly, appellant was in violation of SOP F-7.

Therefore, the State met its burden of showing by the preponderance of the evidence that appellant Friedman did commit conduct unbecoming a public official, did misuse public property and did violate SOP F-7.

PENALTY

When considering removal of an employee, his or her entire prior work/disciplinary record must be considered. In re Stallworth, 208 N.J. 182 (2010). Appellant Friedman had one prior minor disciplinary action against her, a fifteen-day suspension in 2008. The within matter is the first major disciplinary action against her.

Once a determination is made that an employee has violated a statute, regulation or rule concerning his or her employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Id.

Appellant's use of a public position and public property to extort a generator from vendors during a weather emergency is egregious behavior, and therefore progressive discipline is not required. Although this is appellant's first major disciplinary matter, numerous cases have upheld the removal of an employee for a first violation. In re Hermann, 192 N.J. 19 (2007) (in upholding an employee's removal, the court held that while progressive discipline is a worthy principle, it is not subject to universal application); See also Henry v. Rahway State Prison (progressive discipline bypassed by the court where an employee was engaged in severe misconduct, especially where the employee's position involved public safety and the misconduct caused a risk of harm to persons or property); Bowden v. Bayside State Prison, 268 N.J. 469 (App. Div. 1993), *certif. denied* 135 N.J. 469 (1994) (upholding the removal of a corrections officer

for a first major discipline, having taken into consideration the important role that corrections officers play in dealing with inmates).

Appellant offered no mitigating factors for consideration, as she has maintained that she paid for the generator she procured at the Springfield Lot and therefore did not extort the generator obtained from Whittle and Grachus. She has alleged improper actions by others (for instance, that Grachus and Whittle were illegally selling generators, and that Nepi improperly bought generators for personal use while on duty.) These allegations will not be addressed here. Appellant is presumed to have raised these issues to show selective enforcement of rules by the State Police and law enforcement, to the detriment of appellant. Such allegations were taken into consideration in deciding what weight would be given to those witnesses' testimony. Similarly, appellant's accusations of bias against her by those co-workers who testified against her have been taken into consideration in determining how much weight to afford their testimony.

Accordingly, the Department acted properly in removing appellant from her position as a Communications Systems Technician 2 at the Department of Law and Public Safety, Division of State Police, for conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), misuse of public property, in violation of N.J.A.C. 4A:2-2.3(a)(8), and violation of SOP F-7 Radio Procedures, in violation of N.J.A.C. 4A:2-2.3(a)(12).

ORDER

I **ORDER** that the disciplinary action of the Department of Law and Public Safety, Division of State Police, in removing appellant Friedman from her position as a Communications Systems Technician 2 is **AFFIRMED**, and that the appeal is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

March 19, 2018
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: March 19, 2018

Date Mailed to Parties: March 19, 2018

JNR/cb

APPENDIX

WITNESSES

For appellant:

Eric Trout, Springfield Township Chief of Police

Marcella Friedman, appellant

For respondent:

Nazzareno Nepi, New Jersey State Police

Thomas Whittle, vendor

Christopher Green, manager, White Dotte Communications

Anthony Grachus, vendor

David Brady, New Jersey State Police

Gary Sandes, investigator

EXHIBITS

For appellant:

P-1 Bill of Sale, World Wide Power

P-2 Black leather fanny pack

P-3 Letter-brief, dated February 1, 2018

For respondent:

R-1 Respondent binder, Exhibit B (Photograph, dated October 30, 2012)

R-2 Blue jacket with State Police and OEM markings

R-3 Respondent binder, Exhibit C (Receipt, dated November 1, 2012)

R-4 Respondent binder, Exhibit D (Nepi invoice, dated October 31, 2012)

R-5 Respondent binder, Exhibit E (Nepi report)

R-6 Respondent binder, Exhibit F (Performance Evaluation)

R-7 Respondent binder, Exhibit G (Radio Standard Operating Procedures)

R-8 Respondent binder, Exhibit H (Standard Operating Procedures)

R-9 Respondent binder, Exhibit I (Investigation Report, dated January 7, 2013)

R-10 Respondent binder, Exhibit J (Investigation Report, dated January 28, 2013)

R-11 Respondent binder, Exhibit A (Final Notice of Disciplinary Action)

R-12 Letter-brief, dated February 2, 2018

3-27-18

A-2

STATE OF NEW JERSEY

In the Matter of Sakinah Beverett-Llanos
Essex County, Department of Citizen Services

CSC DKT. NO. 2017-1746
OAL DKT. NO. CSV 18431-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Sakinah Beverett-Llanos, Senior Juvenile Detention Officer, Essex County, Department of Citizen Services, removal effective July 19, 2016, on charges, was heard by Administrative Law Judge Leslie Z. Celentano, who rendered her initial decision on December 28, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority. A reply to reply was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Sakinah Beverett-Llanos.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 18431-16
AGENCY DKT. NO. 2017-1746

IN THE MATTER OF SAKINAH BEVERETT-LLANOS, ESSEX COUNTY, DEPARTMENT OF CITIZEN SERVICES.

Paul W. Tyshchenko, Esq., for appellant (Caruso, Smith Picini, attorneys)

Jill Caffrey, Assistant County Counsel, for respondent (Courtney M. Gaccione, County Counsel)

Record Closed: December 20, 2017 Decided: December 28, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Essex County Department of Citizen Services (County), Juvenile Detention Center), respondent, brings a major disciplinary action against Sakinah Beverett-Llanos, appellant. Appellant appeals the substantiated charges and termination by respondent. Respondent alleges that appellant violated N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; Essex County Juvenile Detention Standard of Conduct and Code

of Ethics Order #08-01; and Essex County Juvenile Detention Center Fraternizing Policy #03-13.

On July 22, 2016, respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA) suspending her without pay effective July 19, 2016, and noting the possible disciplinary action of removal. Appellant requested an internal disciplinary hearing, which commenced on October 18, 2016. On November 7, 2016, a Final Notice of Disciplinary Action (FNDA) was issued removing appellant from employment effective July 19, 2016. The FNDA sustained the charges of neglect of duty, conduct unbecoming a public employee, and other sufficient cause as set forth in the Preliminary Notice, as well as violation of Essex County Juvenile Detention Standard of Conduct and Code of Ethics Order #08-01 and Essex County Juvenile Detention Center Fraternizing Policy #03-13. Appellant's removal was upheld. Appellant requested an appeal on November 22, 2017, within twenty days of receiving the FNDA.

On December 7, 2016, the matter was transmitted to the Office of Administrative law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was scheduled for April 21, 2017; however, discovery was not complete, and the hearing was adjourned at the request of respondent. The hearing was then rescheduled for May 22, 2017, and was held on that date. Following receipt of copies of all exhibits, the record was closed.

TESTIMONY

Captain Garfield Isaacs

Captain Isaacs has been employed by the Essex County Juvenile Detention Center since October 2004, and has served as a captain and supervisor for three years. Prior to that he was a sergeant for two or three years, and prior to that served as a juvenile detention officer. As a tour commander, he is responsible for supervising staff and maintaining the security and safety of officers, residents and the facility.

Captain Isaacs worked with appellant when they were both officers, and also when they both served as sergeants. He became aware of her actions within the facility following the graduation ceremony held for juvenile residents on June 20, 2016. The facility provides educational services to residents and holds a graduation ceremony. Captain Isaacs testified that he learned that appellant had attended the ceremony with S.R., the father of one of the juveniles in the facility who participated in the graduation ceremony, and was concerned that she was a family member of the resident. He considered her attendance a breach of security and was extremely concerned, and he contacted Internal Affairs to advise them. He also asked that the policy regarding familiarity be included in a future training session.

Appellant would have received the Fraternization Policy (R-9) on at least two occasions—first, when entering the facility and receiving the training manual, and at least one other time from staff training, when this topic was highlighted after Captain Isaacs learned of her attendance at the ceremony. She also received the Policy and Procedure manual (R-16), as evidenced by her signature during in-service training on May 8, 2002.

The most recent training conducted was attended by appellant, as evidenced by her signature on July 12, 2016 (R-17). After this training, another situation transpired that caused him to write her up, after she was observed getting out of a car driven by S.R., who had been seen visiting his son. After this happened Captain Isaacs reassigned appellant to a different area of the facility, as she had also been observed on multiple occasions on the fourth floor visiting the inmate. Discipline was then initiated because this is an extreme security concern, and he had personally observed appellant going to see the resident on multiple occasions. There are cameras all over the facility and they are monitored by supervisors.

Appellant was a supervisor with unfettered access to the facility, which officers do not have, as they are each assigned to a specific area. His biggest concern was the safety and security of the building, and as a supervisor, appellant was expected to know the rules.

Captain Isaacs testified that appellant also violated the Code of Ethics, in that she gave no prior notice of her relationship with the inmate's father, S.R., who had been coming to the facility for a few years. This was a huge security concern for him, as, among other things, the juvenile was incarcerated for having committed a very serious crime.

The Standards of Conduct within the Code of Ethics, Order 08-01, (R-10) on page 5 notes the prohibited associations and establishments. In particular, paragraph 10A on page 5 of that policy prohibits a social relationship with an immediate family member of people in the custody of the agency, and appellant violated that provision, as well as paragraph B, for her relationship with the juvenile. In law enforcement, personal relationships with those incarcerated or immediate family members can lead to undue pressure or blackmail, and create a serious breach of security.

Captain Isaacs agreed on cross-examination that with prior notification to the facility, relationships are not prohibited with the family of a resident or a resident. He did not know when appellant's relationship with the inmate's father began, but knew that he had been coming there for several years to see his son, and he had been observed on the camera system getting out of appellant's car. While appellant was not restricted from going to the floor that the juvenile was on, she was a supervisor of another floor, yet went up and spoke often to this particular inmate and did not talk to any of the more than forty-four other juveniles on that floor. One of Captain Isaacs's major security concerns was that the inmate in question had been found on multiple occasions with contraband, and it was clear that appellant had a relationship both with the juvenile and with his father. After the disciplinary process was commenced, then appellant provided a report indicating she was in a relationship with the inmate's father, but even if it had not been a romantic relationship it was still an egregious violation of the policy. The appearance of impropriety was a huge concern even before the investigation in terms of the security of the facility, because appellant could have been the one who brought the multiple items of contraband to the inmate that he has been caught with over the years.

Aundrea Williams

Investigator Williams has been employed for twenty-one years at the Essex County Juvenile Detention Center and has previously served as an officer, then a sergeant, a lieutenant, a captain, and an Internal Affairs investigator. He has been in Internal Affairs for nine years conducting investigations. His captain asked him to do an in-service training on the Code of Ethics related to the reporting duty where there are relationships with an inmate or family member. He conducted training on the Code of Ethics policy (R-10) in the Policy and Procedure manual and on the Fraternization Policy (R-9).

Investigator Williams testified that the investigation of appellant began on a Wednesday, a visitation day, after appellant was observed being dropped off by S.R., the father of the inmate. Appellant's vehicle was parked on Dickerson Street and he parked behind her car, a black Mercedes, and waited for S.R. to come out of the facility after visiting his son. Williams knew it was appellant's car because she is in it all of the time. He observed S.R. exit the facility and pull out in appellant's car, and he returned inside to look at the surveillance tape and took still photographs of appellant with S.R. (R-11.)

Within R-11, picture #1 is appellant wanding S.R. on July 13, 2016. Picture #2 is S.R. at 5:00 pm. on the same date. Picture #3 is the appellant checking lockers at 5:07 p.m., and #4 is of appellant swiping at 8:46 p.m. Picture #5 depicts appellant and S.R., who had pulled in to pick up appellant in her car. Picture #6 shows them getting in the car, with S.R. going in the passenger side at 8:51 p.m. Picture #7 shows appellant returning to the facility in her car at 9:39 p.m. and swiping back in, and picture #8, also at 9:39 p.m., shows appellant walking right back out of the building. Picture #9 shows appellant returning to the facility at 10:19 p.m., approximately forty minutes later, after having swiped back in from her break earlier. This is a violation of policy. Investigator Williams also made copies of the visitation log, which revealed that S.R. came to the facility often over three years to see his son, and when Williams compared this information to appellant's work schedule, he learned that S.R.'s visits often coincided with the days she worked. (R-12.)

A year or two earlier, the inmate, S.A., had been released on electronic detention, and when this happens the inmate has to provide his birth certificate; S.A.'s birth certificate shows S.R. as his father. (R-14.)

Investigator Williams testified that he contacted appellant through the union shop steward, Sergeant Lovejoy, and instructed appellant to write a memo regarding the relationship, which appellant did. (R-7.) He indicated that he has received other memos from officers in the past regarding relationships with juveniles at the facility. The purpose of the disclosure is to prevent retaliation, and for safety and security. Other officers have written letters before regarding their own children who were incarcerated, and when an officer has a relationship with someone in a facility they need to make certain they have no contact to prevent collusion.

Superintendent Gina Saunders

Superintendent Saunders has been in her position for almost three years and has been employed at the Essex County Juvenile Detention Center since 1996. She previously served as an assistant superintendent for five or six years, and prior to that as a captain, a lieutenant and a sergeant. Her responsibilities are similar to those of a warden, in that she runs the building, making sure that the facility has the proper amount of officers, medical and health facilities, social-services attention, education, and the like. She is responsible for the care, custody, and control of the residents.

With regard to the work schedule (R-13), it is the captain who determines who attends visitation. Nearly all sergeants have to report, and then the captain may send some back to the various floors. Captain Saunders testified that she is familiar with appellant's disciplinary history, which includes the current charges, which resulted in a removal effective July 9, 2016, and a Final Notice of Disciplinary Action dated November 7, 2016 (R-1) following the initial suspension (R-2). Her prior history included a settlement agreement entered into on November 19, 2015 (R-8), which included a one-year probationary period for compliance with all work standards and all policies and procedures. The superintendent noted that the current infraction is within that one-year probationary period.

Another prior disciplinary matter also resulted in a settlement in June 2013 (R-21), and in that case the charges were neglect of duty, incompetency/inefficiency, insubordination or serious breach of discipline, and willful violation of policies and procedures. Those charges were sustained and a settlement was entered into which resulted in a one-and-a-half-day suspension.

There was also a disciplinary matter in October 2008 (R-20) regarding violation of attendance policies and chronic or excessive absenteeism, as well as charges of inability to perform duties and neglect of duty, the latter two of which were dismissed in the settlement. That settlement resulted in a probationary period from November 1, 2008, to October 31, 2009, and a six-day suspension.

Superintendent Saunders testified that policies are given to all new employees, and any changes or new policies are circulated and need to be signed for. Employees are also trained on new policies and receive in-service training as required. Other employees have disclosed relationships before with inmates, including herself when her own nephew was there.

FACTUAL DISCUSSION

Credibility determinations

Appellant was available to testify, but did not do so. Nevertheless, the trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life

experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and the finder of fact is not bound to believe the testimony of any witness, In re Perrone, 5 N.J. 514, 521–22 (1950).

I found Captain Isaacs, Investigator Williams, and Superintendent Saunders to be extremely credible witnesses offering truthful testimony. Each testified clearly and concisely as to how each was involved in this matter and the steps taken to investigate this matter, and no competent evidence was presented to dispute any of their testimony. Accordingly, I **FIND** and adopt the entirety of the testimony of Captain Isaacs, Investigator Williams, and Superintendent Saunders as **FACT**.

I also **FIND** the following additional **FACTS**:

1. Officer Sakinah Beverett-Llanos has been employed as a juvenile detention officer since September 17, 2001. She is a graduate of the Correction Officer Training Academy.

2. On June 20, 2016, a graduation ceremony was held for the juvenile residents of the facility. The facility provides educational services to residents, and holds a graduation ceremony. Appellant attended the ceremony with S.R., the father of S.A., an inmate in the juvenile-detention facility who participated in the graduation ceremony. Her attendance was considered a breach of security by her superiors and Internal Affairs was contacted.

3. An in-service training session conducted on July 12, 2016, included review of the policy regarding familiarity and fraternization, a policy which appellant received on at least two occasions, including first when entering the facility, and on at least one other occasion during in-service training.

4. On July 13, 2016, the day after the in-service training session that appellant attended which included review of the policy regarding fraternization,

appellant was observed getting out of her own car being driven by S.R., the father of the juvenile S.A. S.R. parked the vehicle after dropping off appellant and went in to visit his son. S.R. was later observed exiting the facility and driving away in appellant's car. On that date, when S.R. entered the facility to visit his inmate son, it was appellant who wanded him at the security checkpoint.

5. Later that date, at 8:46 p.m. appellant swiped out for her break. She then got into her car, with S.R. in the passenger seat, at 8:51 p.m. and pulled away. At 9:39 p.m. appellant returned to the facility and swiped back in, but then walked back out of the facility, a violation of policies and procedures. Appellant did not return to her post until after reentering the facility at 10:19 p.m., approximately one hour and thirty-three minutes after initially swiping out.

6. A review of the visitation log revealed that S.R. had visited his son often over the previous three years. When the information in the log was compared with the facility assignment schedule, it revealed that S.R.'s visits often coincided with dates that appellant worked.

7. S.A. has been caught on multiple occasions with contraband.

8. After these events, appellant was reassigned to a different area of the facility that she had been posted to, as she had also been observed on multiple occasions visiting the juvenile inmate on the fourth floor of the facility. This was considered to be an extreme security concern; a risk to the safety and security of the building; and a violation of the policies and procedures.

9. Appellant at this juncture had still failed to comply with the requirement of the Code of Ethics that she give prior notice of her relationship with an inmate's father. The report was eventually provided by appellant on July 15, 2016.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's, Detectives & Investigators Ass'n v. Hudson Cnty. Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, supra, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended, or removed, the employer must show just cause for its proposed action. The Civil Service Commission is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aims of the civil service program." Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 29 N.J. 178 N.J. 189–90 (1959)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.3. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules, and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In disciplinary cases the appointing authority has the burden of both persuasion and production and must demonstrate by a preponderance of the competent, relevant, and credible evidence that it had just cause to discipline the officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004) (citations omitted), adopted, Merit System Board (April 13, 2004), <http://njlaw.rutgers.edu/collections/oal/>; see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In

re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003) (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), rejected, Merit System Board (March 28, 2004), <http://njlaw.rutgers.edu/collections/oal/>).

Essex County Juvenile Detention Center Standards of Conduct and Code of Ethics and Fraternizing Policy

The Essex County Juvenile Detention Standards of Conduct and Code of Ethics Order #08-01 states, in part:

> 10. Prohibited Associations and Establishments:
>
> b. Officers shall not knowingly commence or maintain a relationship with any person who is under criminal investigation, indictment, arrest or incarceration by this or another police or criminal justice agency, and/or who has an open and notorious criminal reputation in the community (for example, persons whom they know, should know or have reason to believe are involved in felonious activity), except as necessary to the performance of official duties, or where unavoidable because of familial relationships.

The Essex County Juvenile Detention Center Order #03-13, Fraternization, states, in part:

> Employees are [prohibited][1] from fraternizing, or socializing with the current residents and shall not indulge in over familiarity with current residents or socializing with the current residents and shall not indulge in over familiarity with current residents or permit residents to be unduly familiar with them. Fraternizing or socializing shall be identified but not limited to phone contact, U.S. Mail services, etc.

[1] The language in the Order states "permitted" however, as the remainder of the policy uses the word "prohibited" it is clear that this is a typographical error.

. . . .

> Any employee who believes they may have inadvertently established a pattern of fraternizing with a current resident must immediately notify the facility Administrator in writing so the Administrator can determine the appropriate adjustment to work assignment, if warranted.
>
> Failure to comply with the above shall result in disciplinary action, up to and including termination.

In the within matter, respondent asserts, and I agree, that appellant violated the Essex County Juvenile Detention Standards of Conduct and Code of Ethics and the Fraternizing Policy. Appellant failed to disclose her relationship with S.R., the father of S.A., who was incarcerated in the facility. Appellant had training that included discussion about the prohibition against fraternization. There is credible witness testimony that appellant received at least two forms of training that informed her of her obligation to disclose the relationship with an inmate's father. Moreover, she had extended and repeated visits with the inmate, even after having been moved to a different unit, thereby affording him special attention for no reason. The County's significant obligations include the need to maintain safety and discourage preferential treatment, as well as prevent contraband from entering the facility. While appellant ultimately did submit an administrative report on July 15, 2016, acknowledging the relationship with S.R., it was untimely at best, and likely done in anticipation of disciplinary charges being brought. Accordingly, there is sufficient evidence in the record to support the charged violation of the Essex County Juvenile Detention Standards of Conduct and Code of Ethics Order #08-01, and Fraternizing Policy #03-13, and I, therefore, **CONCLUDE** that the charges are sustained.

Conduct Unbecoming a Public Employee

"Conduct unbecoming" a public employee is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136,

140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

Respondent has charged Beverett-Llanos with the willful violation of Essex County Policies and Procedures by continually and consistently fraternizing with the father of an inmate who was incarcerated in the facility, and failing to notify respondent of the nature, extent, and history of their relationship despite the policy requiring her to do so. The testimony also established that on July 13, 2016, one day after an in-service training session which included review of the policy regarding familiarity and fraternization, appellant was seen emerging from her own vehicle, driven by S.R., who then went in to visit his son. As S.R. entered the facility, it was appellant who wanded him. Also later that day, appellant swiped out for her break at 8:46 p.m., got into her car with S.R., swiped back in at 9:39 p.m. and went back out of the facility, returning at 10:19 p.m., one hour and thirty-three minutes after swiping out. I **CONCLUDE** that this conduct amply supports the charge of conduct unbecoming, N.J.A.C. 4A:2-2.3(a)(6).

Neglect of Duty

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

In the within matter, the record reflects that appellant was observed on multiple occasions leaving the floor she was assigned to, and visiting S.A. on another floor. As a supervisor, appellant had access to the entire facility, and was not restricted to her floor; however, her primary responsibility was the safety and security of the floor to which she was assigned. When she visited S.A., she was not performing her duties at her own post. This behavior from a supervisor clearly could adversely affect the morale of the facility and undermine public respect.

Moreover, on July 13, 2016, appellant swiped out for her break at 8:46 p.m., swiped back in at 9:39 p.m., and then left again, returning at 10:19 p.m., one hour and thirty-three minutes after swiping out.

Based upon the foregoing, I **CONCLUDE** that the appointing authority has proven by a preponderance of the credible evidence that the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), should be and hereby is sustained.

Other Sufficient Cause

Having determined that appellant violated the Essex County Juvenile Detention Standards of Conduct and Code of Ethics, as well as the Essex County Juvenile Detention Center Fraternization Policy, I **CONCLUDE** that appellant has given other sufficient cause for disciplinary action, and that the appointing authority has demonstrated by a preponderance of the credible evidence that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, must be and is hereby sustained.

PENALTY

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500, 519 (1962). A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522–24.

In the present case, there are several instances of a prior disciplinary action against appellant. On May 10, 2013, appellant was suspended for 1.5 days following charges of neglect of duty, incompetency or inefficiency, insubordination or serious breach of discipline, and willful violation of policies and procedures (R-21). Appellant was also suspended for six days effective October 21, 2008, and placed on a one-year probationary period for November 1, 2008, through October 31, 2009, following charges of chronic or excessive absenteeism or lateness and violation of County attendance policies and procedures and absent without official leave (R-20). Appellant also entered into an agreement with the County on November 19, 2015, which included another one-year probationary period, to resolve time and attendance issues, and included a

reiteration of appellant's obligation to abide by and adhere to the County policies and procedures.[2]

There is sufficient credible evidence that appellant should have been fully familiar with the policy regarding fraternization, and a more detailed analysis of the appellant's past disciplinary history is unnecessary since it is clear that removal is the proper penalty. Appellant was in a position where she was entrusted with the supervision of juvenile inmates in a secure facility. If there was any question at all regarding the appropriateness of a relationship, it should have been disclosed, as the safety and security of the facility must be maintained. The complete and utter lack of judgment displayed by appellant in wanding S.R. at the security checkpoint on the way in to see his son, a few minutes after he had dropped appellant off and parked her car, is staggering. Appellant placed her friendship with S.R. ahead of her duties as a juvenile detention officer, when her professional responsibilities should have come before the friendship. It is imperative to prevent correction personnel from being manipulated by individuals in the system and risking compromising the safety and security of all those in the system.

Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from her position was justified.

DECISION AND ORDER

The appointing authority has proven by a preponderance of the credible evidence the charges against appellant with violations of N.J.A.C. 4A:2-2.2, N.J.A.C. 4A:2-2.3(a)(6), N.J.A.C. 4A:2-2.3(a)(7), and N.J.A.C. 4A:2-2.3(a)(12), as well as Essex County Juvenile Detention Standard of Conduct and Code of Ethics order #08-01 and Essex County Juvenile Detention Center Fraternization Policy #03-13, and it is **ORDERED** that the charges be and hereby are sustained and the penalty of removal is **AFFIRMED**.

[2] The conduct forming the basis of the current charges violates the one-year probationary period set forth in the November 19, 2015, agreement, which indicates that failure to comply will result in suspension, demotion, or termination.

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

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

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

December 28, 2017 — DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 12-28-17

Date Mailed to Parties: December 29, 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Appellant:

None

For Respondent:

Captain Garfield Isaacs

Aundrea Williams

Superintendent Gina Saunders

Exhibits

Joint Exhibit:

J-1 Transcript

For Appellant:

None

For Respondent:

R-1 Final Notice of Disciplinary Action dated November 7, 2016

R-2 Preliminary Notice of Disciplinary Action dated July 22, 2016

R-3 no exhibit

R-4 Letter dated July 16, 2016 from Captain Garfield Isaacs to Superintendent Saunders re: Code of Ethics Violation

R-5 no exhibit

R-6 no exhibit

R-7 Administrative Report from Beverett-Llanos to Director, ECJDC, dated July 17, 2016

R-8 Settlement Agreement dated November 20, 2015

R-9 Order #03-13, Fraternization Policy

R-10 Order #08-01, Standards of Conduct, Code of Ethics

R-11 Pictures

R-12 Visitor Log

R-13 Tour schedules

R-14 Memorandum from Aundrea Williams to Keisha Clark dated September 13, 2016

R-15 no exhibit

R-16 Signed receipt for In-Service Training on the Policy and Procedures Manual May 8, 2002 and a copy of the Manual

R-17 Signed Registration Form for In-Service Training on July 12, 2016

R-18 no exhibit

R-19 no exhibit

R-20 Final Notice of Disciplinary Action dated October 14, 2008 with Settlement Agreement

R-21 Notice of Minor Disciplinary Action dated May 10, 2013 with Settlement Agreement

3-27-18

STATE OF NEW JERSEY

In the Matter of Panchapagesan Bharathan
Ocean County Library

CSC DKT. NO. 2017-2682
OAL DKT. NO. CSV 03272-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 03272-17
AGENCY DKT. NO. 2017-2682

IN THE MATTER OF
PANCHAPAGESAN BHARATHAN,
OCEAN COUNTY LIBRARY.

Panchapagesan Bharathan, appellant, pro se

Robert A. Greitz, Esq., for respondent (Citta, Holzapfel & Zabarsky, attorneys)

Record Closed: February 6, 2018 Decided: February 8, 2018

BEFORE **KATHLEEN M. CALEMMO,** ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 3, 2017 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement and Separation Agreement and Release (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

February 8, 2018
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: 2/12/18

Date Mailed to Parties: 2/12/18

cmo

APPENDIX

EXHIBITS

Jointly Submitted:

J-1 Settlement and Separation Agreement and Release, received by the Office of Administrative Law on February 6, 2018

RECEIVED

2018 FEB -6 P 12:33

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ROBERT A. GREITZ, ESQ. (ID# 025631999)
Citta, Holzapfel & Zabarsky
248 Washington Street
Toms River, New Jersey 08754
732-349-1600
Attorneys for Ocean County Library

In the matter of **PANCHAPAGESAN BHARATHAN,** **Appellant,** **And** **OCEAN COUNTY LIBRARY,** **Respondent.**	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. CVS 03272-2017S** **AGENCY REF. NO. CSC DK#2017-2682** **SETTLEMENT & SEPARATION AGREEMENT AND RELEASE**

WHEREAS THIS MATTER having been opened to the Civil Service Commission based upon an appeal of the disciplinary charges set forth on the Final Notice of Disciplinary Action (Form 31-B) filed by the **OCEAN COUNTY LIBRARY** ("LIBRARY") against **PANCHAPAGESAN BHARATHAN** ("Bharathan" or "Employee") dated February 17, 2017; and.

WHEREAS THIS MATTER having been transferred to the Office of Administrative Law as a contested case; and

WHEREAS, at the outset of this matter, Bharathan was represented by Carolyne S. Kalson, Esq., but she has resigned from the case and Bharathan has since exercised his right to proceed *pro se*; and

WHEREAS, Library has been represented in this matter by the law firm of Citta, Holzapfel & Zabarsky, Robert A. Greitz, Esq. appearing; and

WHEREAS , the Library and Bharathan have mutually agreed to enter into this Settlement & Separation Agreement and Release ("Agreement") for the purposes of fully disposing of and resolving the outstanding disciplinary charges set forth on the March 3, 2016 Final Notice of Disciplinary Action (Form 31-B):

IT IS THEREFORE on this ___ day of January, 2018 agreed by and between the **Library** and **Panchapagesan Bharathan** to enter into and accept the terms and conditions of this Settlement Agreement and Release which are as follows:

TERMS & CONDITIONS OF SETTLEMENT

I. The disciplinary charges included within the February 17, 2017 FNDA (Form 31-B), as well as those set forth in the November 1, 2017 FNDA, are hereby settled based upon the following terms and conditions.

II. The seven day suspension set forth on the February 17, 2017 FNDA (Form 31-B) shall be rescinded by the Library. Bharathan's personnel record and the records with Civil Service Commission's CAMPS will reflect the rescission of the seven day suspension, and shall indicate he was in good standing during this seven-day time period. As Bharathan had never served the seven-day suspension due to his appeal, there is no back pay or time owed by the Library.

III. Bharathan agrees to resign from the Ocean County Library and has already submitted to the New Jersey Division of Pensions an application for retirement. Bharathan shall tender to the Library an *irrevocable* letter of resignation effective November 2, 2017. In lieu of a formal letter of resignation, execution of this Settlement

Agreement and Release shall constitute and be deemed Bharathan's *irrevocable* letter of resignation effective November 2, 2017.

IV. The Library shall change Bharathan's termination set forth in the November 1, 2017 FNDA, to reflect a Resignation in Good Standing effective November 2, 2017.

V. The Library shall provide to the New Jersey Division of Pensions and Benefits all information and/or documents requested by New Jersey Division of Pensions and Benefits to process any retirement application by Bharathan.

VI. Bharathan waives his right to appeal the February 17, 2017 FNDA further and waives his right to seek further review by the Civil Service Commission and/or Office of Administrative Law.

VII. Bharathan waives his right to appeal the November 1, 2017 FNDA and waives his right to seek further review by the Civil Service Commission and/or Office of Administrative Law of said decision.

VIII. Bharathan hereby waives, releases and withdraws any and all claims, suits, actions, and/or grievances, whether known or unknown, vested or contingent, civil, criminal or administrative, through the date of this Settlement Agreement and Release, which Bharathan has or may have had against the Library, its employees, agents, or assigns, as of the date of the execution of this negotiated Settlement Agreement and Release, including but not limited to any claims for a violation of State or Federal law, common law, contractual right or violation of the collective negotiation agreement.

IX. Bharathan hereby releases, waives and withdraws all claims, suits, actions, and/or grievances, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or in equity against Library, its employees, agents, or

assigns, including but not limited to those which have been made or could have been made at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including but not limited to, all claims under:

a. Title VII of the Civil Rights Act of 1964
b. The Civil Rights Act of 1991
c. The Americans With Disabilities Act
d. The Family Leave Act
e. The Family and Medical Leave Act
f. The New Jersey Law Against Discrimination
g. The Equal Pay Act
h. The Conscientious Employee Protection Act
i. Title 11A (the Civil Service Act)
J. The Older Workers Benefits Protection Act
k. The Occupational Safety and Health Act
l. the Public Employee Occupational Safety and Health Act
m. The New Jersey Smoking Act
n. New Jersey wages and hours law
o. Public works statutes
p. unemployment compensation laws
q. disability benefits laws
r. The United States Constitution
s. The New Jersey Constitution
t. Any rights he may have under the New Jersey Worker's Compensation Law, N.J.S.A. 34: 15-1 *et. seq.*, except this release would not affect any rights that Employee may have with respect to work related injuries, if any, that are not presently known to Employee but are subsequently discovered and determined to be work related.

X. Age Discrimination in Employment Act of 1967 (ADEA) Release: If Employee meets the criteria for protection under the ADEA, it is further acknowledged by Employee that:

i) Employee has the right to take at least twenty-one days to consider this Agreement before signing it;

ii) Employee has the right to revoke this Agreement within seven (7) days after executing it;

iii) This Agreement will not become effective or enforceable until the seven (7) day revocation period set forth in Clause (ii) has expired;

iv) The release set forth herein includes a release and waiver of any rights or claims which Employee may have had under the ADEA arising on or prior to the date of execution of this Agreement, but does not include such rights or claims after the date of this Agreement;

v) In exchange for this Agreement, Employee is to receive the consideration requested and agreed to by the Board as described in this Agreement;

vi) The parties to this Agreement have expressly been advised by their representatives that they have the opportunity to consult with an attorney prior to executing this Agreement.

XI. Both parties are solely responsible for any cost or fees incurred by them individually, including but not limited to filing fees and attorney's fees and costs, and there shall be no sharing of any costs.

XII. If upon entrance into this Settlement Agreement and release the Library is asked by New Jersey Department of Labor and Workforce Development regarding Bharathan's appeal of the denial of his unemployment claim, the Library would advise unemployment Bharathan's termination was changed to a resignation in good standing upon further review. However, this would be contingent upon New Jersey Department of Labor and Workforce Development seeking another response from the Library.

XIII. If any part of this Settlement Agreement and Release is determined to be unenforceable it shall be severable and all other parts, terms and conditions of the Settlement Agreement and Release shall remain in full force and effect.

ACKNOWLEDGEMENTS

By executing this Settlement & Separation Agreement and Release below, **Panchapagesan Bharathan** hereby acknowledges and agrees his entrance into this Settlement & Separation Agreement and Release was knowing and voluntarily.

By executing this Settlement & Separation Agreement and Release below, **Panchapagesan Bharathan** hereby submits this Settlement & Separation Agreement and Release to the Library as his *irrevocable* Letter of Resignation effective November 2, 2017. **Panchapagesan Bharathan** acknowledges and agrees this Settlement & Separation Agreement and Release shall be considered by the Library as Bharathan's *irrevocable* Letter of Resignation effective November 2, 2017, and **Panchapagesan Bharathan** further acknowledges, agrees and understands the Library shall treat this Settlement & Separation Agreement and Release as Bharathan's *irrevocable* Letter of Resignation effective November 2, 2017.

By executing this Settlement & Separation Agreement and Release below, **Panchapagesan Bharathan** further acknowledges he has had sufficient opportunity to review this Settlement & Separation Agreement and Release with an attorney of his own choosing.

By executing this Settlement & Separation Agreement and Release below, both **Panchapagesan Bharathan** and the **Ocean County Library** acknowledge they fully understand the terms and conditions of this Settlement & Separation Agreement and Release, and agree the entrance into same is beneficial to each individual party.

01/16/18

PANCHAPAGESAN BHARATHAN *(dated)*

(Notary)

PATRICIA A GLANCY
Notary Public – State of New Jersey
My Commission Expires Apr 21, 2022

1-23-2018

SUSAN QUINN, DIRECTOR *(dated)*
OCEAN COUNTY LIBRARY

Robert A. Greitz, Esq.

In the Matter of Cole Boykin,
New Jersey State Prison,
Department of Corrections

CSC DKT. NO. 2018-833
OAL DKT. NO. CSR 14085-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 21, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 14085-17
AGENCY DKT. NO. N/A

IN THE MATTER OF COLE BOYKIN,
NEW JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS

Robert M. Perry, Esquire, for appellant, Cole Boykin (Daniel M. Rosenberg & Associates, LLC, attorneys)

Daniel Pierre, Deputy Attorney General, for respondent, New Jersey State Prison, Department of Corrections (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 9, 2018 Decided: January 23, 2018

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

This case concerns the appeal of Cole Boykin from the actions of the respondent, New Jersey State Prison, Department of Corrections. On January 9, 2018,

the parties filed a fully executed Settlement Agreement in this matter. The Settlement Agreement is attached and fully incorporated herein. (J-1).

This matter was transmitted to the Office of Administrative Law (OAL) on September 15, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

FINDINGS OF FACT

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures to J-1.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 23, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/23/18

Date Mailed to Parties: 1/23/18

dw/mph

LIST OF EXHIBITS

J-1 Settlement Agreement

OAL DKT. NO. CSR 14085-2017S
AGENCY DKT. NO. CSC Dkt. 2016-26
SETTLEMENT AGREEMENT

IN THE MATTER OF
COLE BOYKIN,
Appellant,
AND
DEPT. OF CORRECTIONS,
NEW JERSEY STATE PRISON
Respondent.

The parties in this appeal, Appellant Boykin (hereinafter "Appellant"), and Respondent Appointing Authority Department of Corrections (New Jersey State Prison)(hereinafter "Respondent"), have voluntarily resolved all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated August 7, 2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	C.11, Conduct unbecoming a public employee.	Removal	8/7/2017
2.	E.1, Violation of a rule, regulation, policy, procedure, order, or any administrative decision.	Removal	8/7/2017
4.	N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee.	Removal	8/7/2017
5.	N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause.	Removal	8/7/2017

J-1

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent agrees that the following result will occur with regard to each charge as a resolution to the disciplinary appeal:

Charge	Disposition
All charges listed in Section A above	General Resignation, per N.J.A.C. 4A:2-6.3.

C. The parties have agreed to the following:

The Appellant agrees to a General Resignation, pursuant to N.J.A.C. 4A:2-6.3(b) which shall be effective August 7, 2017. Appellant agrees not to seek or accept employment with the New Jersey Department of Corrections or its subsidiaries at any time in the future.

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of back-pay, if any, to be paid by the appointing authority to the Appellant is as follows: Zero (0).
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Respondent regarding Appellant will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

OAL DKT. NO.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This Settlement Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1/8/18
DATE

Appellant

1/8/18
DATE

ON BEHALF OF Appellant
Daniel M. Rosenberg, Esq.

1/9/18
DATE

Respondent

1/9/18
DATE

ON BEHALF OF Respondent
Daniel Pierre, DAG

OAL DKT. NO.

CERTIFICATION

I, COLE BOYKIN, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/8/18
DATE

Cole Boykin

In the Matter of Donald Brad Wiltshire,
City of Ocean City Fire Department

CSC DKT. NO. 2018-698
OAL DKT. NO. CSR 13445-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 21, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 13445-17

AGENCY DKT. NO. N/A 2018-698

IN THE MATTER OF DONALD BRAD WILTSHIRE, CITY OF OCEAN CITY (FIRE DEPARTMENT).

Louis M. Barbone, Esq., for appellant, Donald Brad Wiltshire (Jacobs & Barbone, P.A., attorneys)

Littie E Rau, Esq., for respondent, City of Ocean City (Fire Department) (Ruderman, Horn & Esmerado, P.C., attorneys)

Record Closed: February 8, 2018 Decided: February 12, 2018

BEFORE **JEFFREY WILSON,** ALJ:

This matter concerns the appeal of Donald Brad Wiltshire from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on September 12, 2017, pursuant to N.J.S.A. 40A:14-202(d).

The parties agreed to a settlement of all issues in dispute and the terms of the settlement were placed on the record on November 21, 2017. The parties have prepared a settlement agreement, which was received on February 8, 2018, as Exhibit J-1.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

February 12, 2018
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 2/13/18

Date Mailed to Parties: 2/14/18

JRW/jdw/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on February 8, 2018

Exhibit: J-1
Date: 2-7-18
I:
E:

RECEIVED
2018 FEB 8 P 2:18
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AND RELEASE AGREEMENT

THIS AGREEMENT is made among the City of Ocean City, (the "City"), and Donald Brad Wiltshire ("Mr. Wiltshire").

WHEREAS, the City and Mr. Wiltshire deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations;

WHEREAS, the City brought disciplinary charges against Mr. Wiltshire on or about October 27, 2015, as amended on or about November 12, 2015 (the "Disciplinary Charges"),

WHEREAS, Mr. Wiltshire appealed the decision sustaining the Disciplinary Charges those charges to the Office of Administrative Law, under OAL Docket No. CSR 13445-2017S, entitled In the Matter of Donald Brad Wiltshire and the City of Ocean City (Fire Department) ("OAL Appeal");

WHEREAS the City and Mr. Wiltshire have reached an agreement and desire to set forth all of the terms and conditions of their agreement in this Settlement and Release Agreement (the "Agreement");

WHEREAS, Mr. Wiltshire has been afforded the opportunity to consider the terms of this Agreement with his attorney, Louis M. Barbone, Esq., Jacobs & Barbone,

THEREFORE, in consideration of the promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which each party acknowledges, the City and Mr. Wiltshire agree as follows:

A. TERMS

1. In exchange for Mr. Wiltshire's separation of employment pursuant to this Agreement, the City agrees to withdraw the pending Disciplinary Charges against him and to certify his separation from employment with the City in good standing.

2. Mr. Wiltshire agrees that his last day of employment with the City is November 30, 2017.

3. Mr. Wiltshire agrees to withdraw with prejudice his appeal filed with the Officer of Administration Law under OAL Dkt. No. CSR 1344502917S, entitled IMO Donald Brad Wiltshire and the City of Ocean City (Fire Department).

4. The City agrees to reimburse Mr. Wiltshire the amount of the COBRA premium payment he incurred and paid for September, October and November 2017, if any. If, prior to being enrolled in the City's retiree health benefits plan, Mr. Wiltshire is required to make an additional COBRA payment for December 2017, the City will also reimburse him for that December 2017 payment.

5. The City will pay the premium for Mr. Wiltshire's retiree health benefits (family coverage) less the Chapter 78 contribution calculated on Mr. Wiltshire's pension amount. This will be effective as early as possible based on the completion of necessary paperwork with the City's health insurance carrier. If effectuated by December 1, 2017, the City is not be required to reimburse Mr. Wiltshire for his COBRA payment for that month. If not effectuated until January 1, 2018, the City will reimburse Mr. Wiltshire for his December 2017 COBRA payment. Mr. Wiltshire understands that if he fails to pay his contribution share to the health premium cost, the City will stop payment of his retiree health benefits.

6. Mr. Wiltshire understands that except as specifically provided in the Agreement, he is entitled to nothing further from the City or the Releasees, as defined in Paragraph B1. Except as specifically enumerated in the Agreement, Mr. Wiltshire agrees that he is not entitled to, nor shall he seek, any further compensation from the City or any of the Releasees for any other amounts, damages, costs, disbursements or attorneys' fees in connection with any of the matters encompassed in the Agreement, or for any aspect of Mr. Wiltshire's employment with the City, including, but not limited to, the separation of that employment. Except as provided in this Agreement, no benefits shall continue beyond the Resignation Date. Mr. Wiltshire understands that except as provided in this Agreement, he is entitled to nothing further from the City and acknowledges that he is not entitled to reinstatement by the City. Mr. Wiltshire agrees that he is not owed any wages from the City for work performed, whether salary, overtime or for accrued but unused time off. Mr. Wiltshire understands that he will not receive counsel fees or any monies whatsoever in the resolution of this matter.

7. Mr. Wiltshire agrees that he will not grieve, arbitrate, litigate or otherwise challenge this Agreement.

8. Mr. Wiltshire agrees to execute a Stipulation of Dismissal with Prejudice as to any litigation in the Superior Court of New Jersey pending against the City and/or its Releasees and provide same to the City for filing with the Court.

9. Mr. Wiltshire must direct any inquiries regarding his employment with the City to James V. Mallon, Business Administrator, or his successor, who will respond only with Mr. Wiltshire's dates of employment, salary and title held. The City will release other information as required by law.

10. Mr. Wiltshire agrees that following his resignation, he will not seek any future employment with the City and that if he does, he will withdraw any such interest or application without any consequence to the City.

11. The City acknowledges that it has filed an involuntary ordinary retirement application for Mr. Wiltshire with the Police and Firemen's Retirement System (PFRS) as of February 1, 2018, and has and will complete any necessary paperwork with PFRS in connection with that application. Mr. Wiltshire agrees to cooperate and to complete any necessary forms or paperwork of him in connection with that application. Should the PFRS reject said application, Mr. Wiltshire agrees to immediately file his application for retirement with the PFRS. The City agrees to fully cooperate and support Mr. Wiltshire's pension application and will acknowledge in its employer's certification or other necessary forms to PFRS that Mr. Mr. Wiltshire's last day of employment with the City is November 30, 2017.

B. GENERAL RELEASE

1. As an inducement for the City to enter into this Agreement, Mr. Wiltshire releases and forever discharges the City, its current and former governing body, officers, employees, attorneys, agents, successors and assigns, and all persons acting by, through, under, or in concert with any of them (the City and the foregoing other persons and entities are hereafter defined separately and collectively as the "Releasees") from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, whether known or unknown, suspected or unsuspected, and whether concealed or hidden, which Mr. Wiltshire now holds or has at any time before held against the Releasees, or any of them. The claims covered by this waiver, release and discharge include, but are not limited to,

- Any claims, liabilities, costs, and attorney fees under the Age Discrimination in Employment Act ("ADEA"), as amended; the Older Workers Benefit Protection Act ("OWBPA"); Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; Sections 1981 through 1988 of Title 42 of the United States Code; the Employee Retirement Income Security Act of 1974 ("ERISA") (except for claims with regard to vested benefits under a retirement plan governed by ERISA), the Immigration Reform and Control Act, the Equal Pay Act; the Fair Labor Standards Act; the Family and Medical Leave Act and state or local leave or disability accommodation laws; the Americans With Disabilities Act of 1990; the Americans with Disabilities Amendments Act of 2008; the Vietnam Era Veterans Readjustment Assistance Act; the Fair Credit Reporting Act; the National Labor Relations Act; the Genetic Information Non-Disclosure Act; the Sarbanes-Oxley Act of 2002, and the Worker Adjustment Retraining and Notification Act of 1988;

- Any claims, liabilities, costs and attorney fees under federal, state or local law, ordinance or executive order applicable to you based on the state and/or city in which you were employed by the City; the statutory and common law of New Jersey, including the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; New Jersey Wage and Hour Laws; the New Jersey Conscientious Employee Protection Act;

- Employment discrimination claims including discrimination claims based on sex, pregnancy, sexual orientation, race, color, national origin, religion, age, marital status, domestic partnership status, civil union status, gender identity or expression or physical or mental disability; claims for wrongful termination; whistleblower claims; claims for intentional/negligent infliction of emotional distress, fraud, breach of the implied covenant of good faith and fair dealing, and tortious interference with prospective economic advantage; claims based on violations of occupational health and safety laws;

- Any claims arising under the federal or state constitution;

- Any claims, liabilities, costs and attorney fees for sexual harassment and harassment based on any protected class, such as, for example, race, religion, physical or mental disability, age or ethnic origin; any claims, liabilities, costs and attorney's fees growing out of any legal restrictions on the City's right to terminate employees, such as claims that

may arise under various contract, tort, public policy or wrongful discharge theories; or any other state or federal statute or the common law;

- Any claims, liabilities, costs and attorney fees for wages, bonuses, commissions, employee benefits, vacation, paid time-off, severance and the like.

Mr. Wiltshire waives, releases and forever discharges all claims including those of which he is not aware and those not mentioned in this Agreement. He specifically waives, releases and forever discharges any and all claims arising out of his employment with the City.

He does not waive any rights or claims that may arise in the future or claims that arise out of a breach of this Agreement or for claims for workers compensation benefits.

2. Mr. Wiltshire covenants and agrees that he will not now or at any time in the future commence, maintain, prosecute or participate in as a party, or permit to be filed by any other person on Mr. Wiltshire's behalf or as a member of any alleged class of persons, any action, suit, proceeding, claim or complaint of any kind against any of the City and/or Releasees with respect to any matter which arises from or relates to Mr. Wiltshire's employment with the City or his resignation therefrom or which is encompassed in the release set forth above. Nothing herein shall prevent Mr. Wiltshire from participating in a charge with the Equal Employment Opportunity Commission or other similar regulatory agencies, but Mr. Wiltshire agrees that he will not seek nor shall he be entitled to recover, any monetary damages from any such proceeding.

3. Mr. Wiltshire represents that he has not assigned to any third party any claim that he has, may have or believes that he has against the City or any of the Releasees. Mr. Wiltshire represents that he has no other charge, claim or complaint of any kind pending against the City and he further covenants and represents that he will not file or permit any third-party to file any charge, claim or complaint against the City seeking personal recovery or personal injunctive relief with respect to any matter in any way arising out of or relating to his employment with the City.

4. The City covenants and agrees that it will not now or at any time in the future commence, maintain, prosecute or participate in as a party, or permit to be filed by any other person on the City's behalf or as a member of any alleged class of persons, any action, suit, proceeding, claim or complaint of any kind against Mr. Wiltshire with respect to any matter which arises from or relates to Mr. Wiltshire's employment with the City or his separation therefrom or which is encompassed in the release set forth above. This paragraph also shall not operate to bar any claim that may arise in the future or claims that arise out of a breach of this Agreement.

5. Mr. Wiltshire acknowledges and agrees that the City's withdrawal of the pending Disciplinary Charges against Mr. Wiltshire are not required by any policy, plan or prior agreement and constitute adequate consideration to support the General Release in Paragraph B.1.

6. Mr. Wiltshire agrees that he will not voluntarily assist in any claims or litigation that may be filed by anyone which may be pending or filed in the future against the City, providing such refusal does not violate some legal obligation to the contrary. Mr. Wiltshire agrees that if he is compelled to testify through a valid subpoena or order of a court of competent jurisdiction in any pending or future matter filed by anyone other than Mr. Wiltshire, he will immediately notify the City in a writing directed to the City Manager.

7. Mr. Wiltshire affirms that he has no known workplace injuries or occupational diseases.

8. Mr. Wiltshire affirms that he has been granted any leave to which he was entitled under the Family and Medical Leave Act or the New Jersey Family Leave Act or local leave laws or disability accommodation laws.

C. KNOWING AND VOLUNTARY WAIVER

Mr. Wiltshire acknowledges that in the execution of this Agreement he is effecting a knowing and voluntary waiver of any claims, liabilities or causes of action against the City and any of its members of the governing body, employees, agents, successors and assigns of the City, which Mr. Wiltshire now has or may have. Mr. Wiltshire further acknowledges that he is advised to consult with an attorney regarding this Agreement and has had the opportunity to discuss the terms of this Agreement with his attorney, Louis M. Barbone, Esq.

D. TIME TO EXECUTE/REVOKE

Mr. Wiltshire understands that to accept the terms of this Agreement he must sign and return this Agreement to Littie E. Rau, Esq., Ruderman, Horn & Esmerado, P.C. Mr. Wiltshire acknowledges that he has at least twenty-one (21) days to execute this Agreement and understands that he has seven (7) days thereafter to revoke his acceptance. Mr. Wiltshire may accept and return the Agreement prior to the twenty-first day, but if he does, he waives the right to the full twenty-one (21) days. Mr. Wiltshire understands that, after he signs this Agreement, he will have seven (7) days in which he may revoke his acceptance. Should Mr. Wiltshire elect to revoke his acceptance, he or his attorney should direct his written revocation to Littie E. Rau, Esq., Ruderman, Horn & Esmerado, P.C., via fax at (973) 467-8891. To be effective, Ruderman, Horn & Esmerado, P.C. must receive the written revocation within the seven day period. The City and Mr. Wiltshire agree and Mr. Wiltshire understands that he does not waive any rights or claims that may arise after the date he executes this Agreement. Any modifications to this Agreement, whether material or immaterial, do not restart the running of the twenty-one (21) day period.

E. BREACH

If Mr. Wiltshire breaches this Agreement, he will be liable to the City for the reasonable legal fees and costs the City incurs to enforce the Agreement.

F. CONFIDENTIALITY

Mr. Wiltshire understands that this Agreement is confidential. Accordingly, Mr. Wiltshire will not disclose its terms to any third party, other than his immediate family, attorney, union representative or tax advisor, and except as may be required by law or court order.

G. NO DISPARAGING REMARKS

Mr. Wiltshire agrees that he will make no disparaging, negative or derogatory remarks, written, oral or otherwise, regarding the City or any part or phase of the employment relationship, except as may be required by law or court order. This provision shall not affect his obligation to testify truthfully.

H. MODIFICATION

This Agreement may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

I. ENTIRE AGREEMENT

This Agreement supersedes all prior agreements and understandings between the parties. It contains the full understanding of the parties with respect to this subject matter and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement.

J. CONTROLLING LAW

This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

K. NON-ADMISSION

Mr. Wiltshire acknowledges that this Agreement does not constitute and shall not be construed as an admission, violation of any law, rule or regulation, breach of any contract or commitment of any wrongdoing whatsoever on the part of the City. This Agreement shall not constitute a precedent in matters involving other employees.

L. BINDING ON SUCCESSORS

This Agreement is binding upon Mr. Wiltshire and his successors, assigns, heirs, executors, administrator and legal representatives.

M. SEVERABILITY

Should any of the provisions of this Agreement be declared or determined by a court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected

thereby and the illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

N. BINDING AGREEMENT

The parties agree that faxed or PDF scanned counterpart signatures render this Agreement binding.

MR. WILTSHIRE ACKNOWLEDGES THAT HE HAS BEEN ADVISED TO CONSULT WITH COUNSEL BEFORE SIGNING THIS AGREEMENT, HE HAS CONSULTED WITH COUNSEL, HE IS SATISFIED BY THE REPRESENTATION COUNSEL PROVIDED TO HIM, HE HAS READ THIS AGREEMENT IN ITS ENTIRETY, HE UNDERSTANDS ALL OF ITS TERMS AND THAT HE SIGNS IT OF HIS OWN FREE WILL AND ACCORD. ACCORDINGLY, HE HAS NOT BEEN COERCED IN ANY MANNER TO EXECUTE THE AGREEMENT.

DONALD BRAD WILTSHIRE — DATED January 31, 2018

CITY OF OCEAN CITY

BY: _____ — DATED 2/7/18

JAMES V. MALLON
Business Administrator

Angiulo, Nicholas

From: Littie Rau (lrau@rhelaborlaw.com) <lrau@rhelaborlaw.com>
Sent: Wednesday, February 28, 2018 2:22 PM
To: Angiulo, Nicholas; lbarbone@jacobsbarbone.law
Cc: Messina, JoAnn
Subject: RE: IMO Donald Brad Wiltshire, City of Ocean City - OAL Docket No. CSR 13445-17 and CSC Docket No. 2018-698 - SETTLEMENT

The City of Ocean City considers this time period as ADMINISTRATIVE LEAVE WITHOUT PAY. If Mr. Barbone has a problem with that, then let's have a conference call. By the way, do you have a phone number that you can provide to me, Mr. Angiulo? Thank you.

Littie E. Rau, Esq.
Ruderman, Horn & Esmerado
675 Morris Avenue – Suite 100
Springfield, New Jersey 07081
(973) 467-5111

PLEASE SEND ALL EMAILS TO ME WITH A READ RECEIPT TO CONFIRM THAT I HAVE RECEIVED YOUR EMAIL.

NOTICE: The information contained in this electronic message is legal, privileged and confidential information. It is intended only for the use of the individual named above. If the reader of the mssage is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this electronic message is prohibited. If you received this message in error, please immediately notify us, return the original message to us and delete the message from your computer system.

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Wednesday, February 28, 2018 9:34 AM
To: lbarbone@jacobsbarbone.law; Littie Rau (lrau@rhelaborlaw.com) <lrau@rhelaborlaw.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: IMO Donald Brad Wiltshire, City of Ocean City - OAL Docket No. CSR 13445-17 and CSC Docket No. 2018-698 - SETTLEMENT
Importance: High

Mr. Barbone and Ms. Rau:

I have not received clarification as requested on the above matter. Please respond as soon as possible.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Wednesday, February 21, 2018 11:36 AM
To: 'lbarbone@jacobsbarbone.law' <lbarbone@jacobsbarbone.law>; 'lrau@rhelaborlaw.com' <lrau@rhelaborlaw.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: IMO Donald Brad Wiltshire, City of Ocean City - OAL Docket No. CSR 13445-17 and CSC Docket No. 2018-698 - SETTLEMENT
Importance: High

Sorry, this is a resend as the original went to an incorrect e-mail address for Mr. Barbone.

From: Angiulo, Nicholas
Sent: Wednesday, February 21, 2018 11:25 AM
To: 'lbarbone@jacobsbarbonelaw.com' <lbarbone@jacobsbarbonelaw.com>; 'lrau@rhelaborlaw.com' <lrau@rhelaborlaw.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: IMO Donald Brad Wiltshire, City of Ocean City - OAL Docket No. CSR 13445-17 and CSC Docket No. 2018-698 - SETTLEMENT
Importance: High

Mr. Barbone and Ms. Rau:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Donald Brad Wiltshire from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Mr. Wiltshire agrees, inter alia, to resign in good standing effective November 30, 2017. However, the settlement does not specifically reflect how to record the time period from the original date of removal (August 15, 2017) to the date of resignation. In this regard, before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be specifically accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

Angiulo, Nicholas

From: Louis Barbone <lbarbone@jacobsbarbone.law>
Sent: Thursday, March 1, 2018 2:40 PM
To: Angiulo, Nicholas
Subject: Re: IMO Donald Brad Wiltshire, City of Ocean City - OAL Docket No. CSR 13445-17 and CSC Docket No. 2018-698 - SETTLEMENT

Sir I agree, administrative w/o pay. Thanks for your help. Lou

On Wed, Feb 28, 2018 at 9:33 AM, Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov> wrote:

Mr. Barbone and Ms. Rau:

I have not received clarification as requested on the above matter. Please respond as soon as possible.

Sincerely,

Nicholas F. Angiulo

Deputy Director

Division of Appeals & Regulatory Affairs

New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Wednesday, February 21, 2018 11:36 AM
To: 'lbarbone@jacobsbarbone.law' <lbarbone@jacobsbarbone.law>; 'lrau@rhelaborlaw.com' <lrau@rhelaborlaw.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: IMO Donald Brad Wiltshire, City of Ocean City - OAL Docket No. CSR 13445-17 and CSC Docket No. 2018-698 - SETTLEMENT
Importance: High

3-27-18

B-023

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of Paul Dzialo,
Camden County Police Department

CSC Docket No. 2016-4333
OAL Docket No. CSV 09072-16

ISSUED: April 20, 2018 (WR)

The appeal of Paul Dzialo, a County Police Officer, Camden County Police Department, of his 20 working day suspension, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo (ALJ), who rendered her initial decision on December 21, 2017. Exceptions were filed on behalf of the appellant, and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 27, 2018, did not adopt the ALJ's recommendation to uphold the 20 working day suspension. Rather, the Commission modified the penalty to a 10 working day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee; incompetency, inefficiency or failure to preform duties; insubordination; neglect of duty; other sufficient cause; and violation of various departmental rules and regulations. Specifically, the appointing authority asserted that on November 12, 2015, the appellant failed to follow its canine policy, which resulted in the appellant firing a shotgun without regard to his residential surroundings. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law as a contested case.

In the initial decision, the ALJ found that, on November 12, 2015, the appellant was called to aid an officer searching for a loose dog which was reported as aggressive. The officer and the appellant located the dog rummaging through trash, but soon lost sight of it. The officers searched for the dog with their weapons drawn; the appellant was armed with a shotgun. Thereafter, the dog charged at the officers through a partially-opened gate and the officers killed the dog with their firearms. The appellant fired his shotgun at least three times. Curtis May, a Detective with the Internal Affairs Unit of the Camden County Police Department, testified that he investigated the November 12, 2015 incident and obtained a video recording of the incident recorded from private cameras. His investigation revealed that the dog that was killed was known to residents and shot in its own backyard. The investigation also revealed that a shotgun pellet marking on the top of a fence indicated that the appellant "was not staying down on the target when firing," in contradiction to departmental policy, which requires that the shotgun be pointed in a downward direction when fired to prevent the gun from recoiling upward when discharged. He also testified that a pellet fired from the appellant's shotgun had struck the window of a residence, but did not penetrate it. May further testified that the appointing authority's canine policy mandates deadly force as a last resort if a hostile dog is encountered and concluded that the appellant violated the policy because he did not use other options to control the dog other than deadly force.

Lieutenant Kevin Lutz, the commander of the appointing authority's training bureau testified that the appellant required training after the internal affairs' investigation concluded. After completing the training, Lutz testified that the appellant was reluctant to acknowledge any wrongdoing or mistakes on his part and was not receptive to the training. He also testified that the appellant had better options to counter the dog's threat other than deadly force. The appellant testified that the dog was aggressive towards him. The appellant indicated that he believed that he was in danger despite having distance between himself and the dog. When the dog lunged at him, he tried to retreat but the dog approached him so quickly that he had no choice but to shoot it. He felt that the training was more akin to an internal affairs investigation than remedial action. Given the circumstances as they existed at the time of the incident, the appellant testified that he made the correct choice to use deadly force.

As set forth in detail in her determination, the ALJ found all three witnesses credible. The appellant's arming of the shotgun made him less capable of employing non-lethal means of dealing with the dog. The ALJ also found that the appellant searched for the dog with his weapon drawn when there were no alarms or signs of an emergent situation. The dog lunged at the officers, which gave them no choice but to discharge their weapons. One pellet fired from the appellant's shotgun struck the window of an occupied house. The appellant was not receptive to the mandatory training.

Based on her findings, the ALJ upheld the charges of conduct unbecoming a public employee; incompetency, inefficiency or failure to preform duties; neglect of duty; and other sufficient cause. However, the ALJ dismissed the insubordination charge, finding that there was no testimony to support the charge. The ALJ similarly dismissed departmental charges relating to code of ethics, standards of conduct, general responsibilities, work expectations, prohibited activity on duty, use of force and all other conduct because there was no testimony that supported the charges. In consideration of the possible consequences of discharging a shotgun in a residential neighborhood and the appellant's disregard for his training, the ALJ concluded that the imposition of a 20 working day suspension was an appropriate penalty.

In his exceptions, the appellant argues that he exercised due care during the incident and his conduct did not violate any rule or regulations. He contends that his use of a shotgun during the incident was justified and he operated the weapon properly. The appellant reiterates that his possession of the shotgun, which must be held with two hands, limited the non-lethal options he could have employed. He also argues that he followed the departmental canine policy as best as the circumstances permitted. Furthermore, the appellant asserts that a 20 working day suspension is unreasonable and not commensurate with the circumstances of the incident. The appellant states that he believed that his actions during the incident were justified and he should not be punished "for standing up for what he believed." Accordingly, the appellant requests that the charges against him be dismissed and the penalty disregarded.[1]

In its reply, the appointing authority argues that the ALJ correctly concluded that the appellant violated its canine policy. Moreover, the appointing authority states that the appellant fired his shotgun, which "hit occupied houses and a fence" and contends that it was the appellant's responsibility to keep the public safe. Thus, the appointing authority argues that the charges against the appellant were appropriate. Finally, the appointing authority contends that the ALJ correctly upheld the 20 working day suspension.

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[1] In the initial decision, the ALJ dismissed the appellant's argument that alleged violation of the appointing authority's internal rules and regulations violated the 45 day rule. *See N.J.S.A.* 40A:14-147. The ALJ found that because the November 12, 2015 incident involved a firearm, it was automatically forwarded to the Camden County Prosecutor's Office for review, which remanded it back to the appointing authority on December 28, 2015. Due to the appellant's unavailability, the appointing authority's internal affairs bureau was not able to interview the appellant until February 10, 2017. The ALJ found that the appointing authority did not have sufficient information to charge the appellant until after his interview. As noted above, the PNDA was issued on March 10, 2017, which was within the 45 day limit. The appellant raises the same objection in his exceptions. However, the Commission finds that the appointing authority did not violate the 45 day rule for the reasons set forth by the ALJ in the initial decision.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination of the charges. In this case, there is nothing in the record or in the parties' exceptions which convinces the Commission that the ALJ's factual findings regarding the incident and the appellant's subsequent training were not based on the evidence or were otherwise in error.

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* 463, 465 (CSV) 1996. Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway,* 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not "a fixed and immutable rule to be followed without question." In the instant matter, the record reflects that the appellant has no prior discipline. However, the appellant is a law enforcement officer, and as such, is held to a higher standard of public duty. This standard includes upholding an image of utmost confidence and trust, since county Police Officers hold highly visible and sensitive positions within the community. The public expects and demands Police Officers to follow orders and exhibit a respect for rules, regulations, procedures, and policies. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). Thus, the appellant's conduct in public with a deadly weapon should be beyond reproach. Moreover, it is particularly worrisome that the appellant failed to see any wrongdoing with his conduct. However, based on the dismissal of the charge of insubordination and many of the departmental charges as well as the appellant's lack of a prior disciplinary record, the Commission finds that a 10 working day suspension is appropriate under the circumstances. This major discipline should serve as a sufficient reminder that any future infractions may lead to further disciplinary action, up to and including removal.

Since the penalty has been reduced, the appellant is entitled to back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super,* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB,

decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, the Commission has sustained charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. *See In the Matter of Bazyt Bergus* (MSB, decided December 19, 2000), *aff'd, Bazyt Bergus v. City of Newark,* Docekt No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). *See also, In the Matter of Mario Simmons* (MSB, decided October 26, 1999). *See also, In the Matter of Kathleen Rhoads* (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

ORDER

The Commission finds that the appointing authority's action in suspending Paul Dzialo for 20 working days was not justified. Therefore, the Commission modifies the 20 working day suspension to a 10 working day suspension. The Commission further orders that the appellant be granted 10 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27th DAY OF MARCH, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher Myers
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09072-16
AGENCY DKT. NO. 2016-4333

IN THE MATTER OF
PAUL DZIALO, CAMDEN COUNTY
POLICE DEPARTMENT.

Jeffrey S. Ziegelheim, Esq., for appellant Paul Dzialo (Alterman & Associates, LLC, attorneys)

Emeshe Arzon, Esq., for respondent Camden County Police Department (Office of Camden County Counsel, attorneys)

Howard L. Goldberg, Esq., for respondent Camden County Police Department (Office of Camden County Counsel, attorneys)

Record Closed: November 6, 2017 Decided: December 21, 2017

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Appellant, Paul S. Dzialo, Jr. (Dzialo), a Police Officer with the Camden County Police Department (Department), appeals a twenty-day suspension he received as major discipline for his failure to follow the canine policy that resulted in the use of

deadly force; for firing a shotgun without regard to the residential background and the potential for ricochet; and the subsequent Internal Affairs investigation surrounding same. The Department sustained the following charges: Incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); Neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The Department also determined that Dzialo violated the following Rules and Regulations: 1:5 code of ethics; 3:1.1 standards of conduct; 3:1.5(f) general responsibilities; 3:1.6 neglect of duty; 3:1.10 obedience to rules and regulations; 3:1.32 work expectation; 3.2.1(k) prohibited activity on duty; 3.2.20 use of force; and 3.2.21 all other conduct. Dzialo maintained that his use of deadly force comported with the Department's regulations; specifically, the use of force policy because an officer may use a firearm to destroy an animal when the animal poses an imminent threat of significant bodily harm to human life. Dzialo believed that lethal force against the pit bull was his only alternative to protect his life, Officer Levy's life, and the lives of those around him.

PROCEDURAL HISTORY

On March 9, 2016, the Department issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against Dzialo. (J-1.) Following the departmental hearing held on May 4, 2016, the Department issued a Final Notice of Disciplinary Action (FNDA) on June 7, 2016, sustaining the charges in the Preliminary Notice and suspending Dzialo from employment for twenty working days. (J-2.) Appellant appealed on June 9, 2016. The matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on June 17, 2016 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearing scheduled for December 12, 2016 was adjourned at the request of the appellant with the consent of the Department. The hearings were held on May 2, 2017 and July 19, 2017. The record remained open to allow the parties to submit post-hearing submissions. The record closed on November 6, 2017.

FACTUAL DISCUSSIONS AND FINDINGS

The following facts are not disputed. At approximately 7:00 a.m. on November 12, 2015, Officer Levy was stationed at Yorkship Square in Camden. He was approached by a mother walking with her child who said that a pit bull was loose. Levy radioed for animal control to be dispatched to the location because the dog was reported as aggressive. Levy also contacted the command center, Real Time Tactical Information Operations Center, (RT-TIOC) to determine whether surveillance cameras could be positioned in the courtyard where the dog was seen. He then radioed for assistance from an officer with a shotgun.

Dzialo, who was patrolling in the vicinity and assigned to carry a shotgun, responded to Levy's call for assistance. Dzialo parked his patrol car, retrieved his shotgun, and walked over towards Levy. Levy showed Dzialo where the dog was rummaging through trash next to a sidewalk where pedestrians were walking. The officers kept the dog in their line of vision and maintained a safe distance. While the dog rummaged in the trash, it did not make any aggressive moves. After approximately six minutes, the dog lost interest in the trash, and noticed Dzialo. Dzialo backed up away from the dog, whom he described as snarling and menacing. The dog wandered off and the officers lost sight of him. As they searched for the dog, the officers had their weapons drawn and ready. Dzialo was holding his shotgun with both hands. The dog darted out from behind a fence with a partially opened gate towards the two officers, who immediately discharged their weapons. The dog was killed. The initial investigation showed that Dzialo was carrying a department issued shotgun and Levy was armed with a department issued handgun. Dzialo discharged his shotgun at least three times and Levy discharged his handgun nine times.

TESTIMONY

Detective Curtis A. May (May) is assigned to the Internal Affairs Unit of the Camden County Police Department. As part of standard operating procedures, Internal Affairs was assigned to investigate the November 12, 2015, incident because the officers involved discharged their weapons. May was assigned to investigate. His

investigation was summarized in an Investigation Summary dated November 17, 2015. (R-1.) Although the memorandum was dated November 17, 2015, the report was not fully completed until March 17, 2016, as noted by the dates of entry for subsequent events. At 7:45 a.m. on the morning of the incident, May was informed by the RT-TOIC Commander that Dzialo and Levy discharged their weapons while responding to a complaint about a loose canine. May arrived at the scene approximately ten minutes after the canine had been killed; the area had been cordoned off and secured. With his team of investigators, May canvased the area of the shooting, and conducted interviews with nearby residents. From the interviews, May learned that the pit bull was known to the residents and that it was shot in its own backyard. The Department had no cameras in this area, but the detectives found private cameras in the secured area. One video was obtained from the building manager for 1201 and 1185 Yorkship Square apartments, who had installed cameras on the outside of the buildings facing the area where the incident occurred. (R-2.) The other video was retrieved by May from a home owner whose home was equipped with a camera connected to his laptop. He allowed May to copy his video for any relevant footage. (R-3.)

As the video from the Yorkship Square apartments was played at the hearing, May offered testimony. (R-2.) The video opened with the dog rummaging through some trash at approximately 7:00 a.m. Levy is shown to arrive on the scene. The dog remained within the sight of Levy. The video showed Levy as he approached Dzialo, who arrived with his shotgun. The dog remained occupied with the trash until approximately 7:30 a.m. when the dog started to run down the alley. In the next scene both officers appear to be looking down around the corner of the building. On cross-examination, it was established that 1185 Yorkship is an apartment building that has an archway cut through to Yorkship Square.

The second video viewed at the hearing was secured from a private resident who lived close to where the dog resided. (R-3.) The video's angle was directed towards fencing that was later determined to be the dog's backyard. The video depicted the dog walking down the right side of a truck then disappearing behind a fence at 7:27 a.m. May learned by canvassing the neighborhood after the shooting that the dog had entered the back yard of its residence. At 7:28 a.m., Levy and Dzialo appear on the

video to be checking under a vehicle and then moving towards the fence. The dog suddenly emerged from a partially open gate and the officers step backward and simultaneously discharged their weapons. Levy appeared to be making a radio transmission as the officers walked toward the fence when the dog charged again and the officers discharged their weapons for a second time. After the shooting, the video showed that the officers stayed on the scene until the investigative unit arrived.

As part of the investigation, the Crime Scene Unit photographed the area where the incident occurred. (R. 6.) The photographs showed green markers that were placed by the investigating officers marking where the shell casings from the handgun and shotgun wadding from the shotgun had fallen. (R -6 at 20-55, 94-100, and 103-108.) The picture of a wooden fence is marked where the shotgun rounds struck the fence. (R-6 at 56, 68, 69, 72-83, 90-93.) May testified that the shotgun marking on the top of the fence indicated that Dzialo was not staying down on the target when firing. To explain his testimony, May demonstrated how to properly hold a shotgun. He explained that a shotgun when fired discharges twelve pellets that spread, protocol requires that the shotgun be pointed in a downward direction. The downward trajectory is also important because it allows the shooter to use his weight to balance the "kick" from the shotgun and prevent the gun from popping upward when discharged. The pictures of the deceased canine were taken in his yard where he died. (R-6 at 57-66.) A picture of a residence located behind the fence showed taping where a shotgun pellet had struck the window but did not go through into the residence. (R-6 at 67, 73-82.)

May testified about his familiarity with the Department's canine policy. (R-7.) If a hostile dog is encountered, the policy is as follows:

1. Remain still and face the animal if it advances;
2. Use voice commands;
3. Spray the department-authorized oleoresin capsicum (OC) spray in the dog's face;
4. Utilize the department-authorized baton;
5. Strike the dog using the baton;
6. Hold the baton straight out as distraction;
7. Use a CED (Taser);
8. Kick at the dog; and
9. Deadly force.

May testified that Dzialo did not properly follow the canine encounters policy (R-7) because no verbal commands were given to the dog; no OC spray was used; and the baton was never engaged. The only option utilized was deadly force.

May further testified that Dzialo violated the specific charges enumerated on the PNDA (J-1) by not following the canine policy and the Rules and Regulations regarding the "use of force." Specifically, he did not use verbal commands, discuss less lethal options, and fired into a backdrop with occupied houses. May testified that according to what he saw on the video, the dog was not aggressive by the trash; there were no civilians in the area; and no one was seeking assistance; therefore, the officers should have waited for animal control.

When asked on cross-examination how Dzialo could have utilized the techniques of the canine policy with both his hands on the shotgun, May responded that he could still use time and distance. However, between the two officers, Levy was in a better position to use OC spray or the baton because a handgun can be operated with one hand. In responding to the questions, May stated that even after they lost sight of the dog, there was no reason for the officers to put themselves in harm's way by looking for the dog because there was no immediate emergency. It was established on cross-examination that use of force is justified when an officer reasonably believes such action is immediately necessary to protect himself against imminent danger or death or serious bodily harm. May testified that when interviewing Levy and Dzialo, both officers stated they believed their lives or the life of their partner was in imminent danger. However, May testified that the officers were responsible for the whole continuum of events, and should not have put themselves in a position where their only option was deadly force. As recorded by May in his Investigation Summary, the officers stated that they did not discuss the use of less lethal options. (R-1.)

Lieutenant Kevin Lutz (Lutz) is the commander of the CCPD's Training Bureau and the Deputy Director of the Camden County College Police Academy. Lutz testified that after Internal Affairs concluded its investigation, he was notified by May that Levy and Dzialo required training. Prior to the first training session, Lutz was given a

summary of the incident but had not reviewed the video recordings. He testified that from his informal conversation with both officers at the training, he was given the impression that the dog was a threat to the public. Following the training session, he watched the video and had a completely different impression about the aggressiveness of the canine.

After meeting with his superiors to discuss his concerns, the outcome was to conduct a second training session. Lutz testified that he would have conducted the first training session differently had he viewed the video first. He testified that he wanted to make sure that the officers understood what they did wrong. Lutz testified on cross-examination that he encountered hundreds of loose pit bulls in Camden over the course of his career and the goal is always containment not putting yourself in harm's way. At the second training, Lutz played the video to Levy and Dzialo in the presence of the union president. According to Lutz, Dzialo was reluctant to acknowledge any wrongdoing or mistakes. This was problematic for Lutz because he testified that he was not imposing discipline but trying to prevent an incident like this from happening again. He further testified that the training is not optional. Training is required after a determination is made that an officer violated department policy. Lutz testified that it is his job to make sure the violation is corrected.

Following the training session, Lutz prepared a Performance Notice dated March 16, 2016. (R-10.) Lutz wrote that Dzialo was not receptive to training because he did not accept that he did anything wrong. While Lutz believed that the actions of the officers caused the exigency of the circumstances that resulted in lethal force. Lutz took the greatest exception to the firing of the rounds into the backdrop of the houses. As interpreted by Lutz, the video showed that the last round fired by Dzialo was done while the shotgun was being held in an upward position towards an occupied house. (R-10.) He felt obligated to impress upon Dzialo that there was a better course of action. Namely, slow down, create a perimeter, and have less lethal options ready if they were to encounter the dog. Lutz testified that he equated the officers' action to be akin to hunting the dog so when they encountered the dog in the backyard they had no other choice but to shoot.

According to Lutz, Dzialo violated the Department's Rules and Regulations pertaining to the use of force in dealing with canines. He determined there was no imminent threat because the dog was not menacing the public. On cross-examination, Lutz acknowledged that the videos he watched were from stationary cameras without audio so there could have been interactions between the officers and the canine that were not captured. Dzialo told Lutz during the training that the dog acted aggressive towards him.

Paul S. Dzialo, Jr. (Dzialo) was a police officer, employed for two and one-half years by CCPD. On November 12, 2015, Dzialo responded to Levy's radio call for assistance. When he arrived at the scene with his shotgun, as directed, he saw Levy standing in the archway. Levy directed him to where the dog was rummaging through trash. Levy also told him that he had called animal control. Dzialo understood that for an immediate response from animal control, the policy required that the animal be kept within your line of sight. Initially, Dzialo kept distance from the dog as his barrier. After the dog lost interest in the trash, he noticed Dzialo and showed aggression by snarling and growling and its hair was sticking up in an intimidating manner. Dzialo stood his ground while the dog stared at him. It appeared that the dog lost interest in Dzialo, but he came back, snarling and growling. At this point, Dzialo had enough distance between himself and the dog, but he still felt that he was in danger. He stated that there were no civilians around, but he had kept about three people away from the area. Dzialo stated that when he left his position, people started walking through the archway. The video showed a young man walking with his backpack. Dzialo described the area where the dog went as a "U" shaped courtyard. Most of the buildings are connected but there is a section where the houses are detached. The officers lost sight of the dog as it went behind some parked vehicles in the courtyard. Dzialo bent down and looked underneath a parked vehicle. He stated he was carrying his shotgun at the "low ready" meaning that it was pointed at the ground. When they could not locate the dog, Dzialo believed the dog may have broken the perimeter and gone back out onto the street. They walked passed the fence without realizing that the dog was behind it. He testified that the dog came out from behind the fence and lunged at them. They started to back up and create distance, but the dog was rapidly approaching so they had no choice but to shoot. At the time, Dzialo discharged his shotgun, he believed he did not have the

ability to use less lethal means to protect himself or Levy. He was in fear for his life and the life of his partner.

Dzialo testified that the first training consisted of nothing more than reviewing the policies and procedures to make sure that he understood them. The next day, he was told of the need for a second training because Lutz watched the videos and wanted to go over things. The second training was completely different. Dzialo stated that this training felt like an Internal Affairs interrogation and not a training session. Dzialo testified that hindsight is "twenty-twenty," but when on the street, split second decisions are required. He felt that given the circumstances, his decision was the right one. There was no way of knowing that the dog had returned to its home. He testified that he believed the dog had left the area and posed a threat to the community. The video did not accurately portray the entire situation because it only captured a single angle. On cross-examination, Dzialo stated that he did not recall telling Lutz at the first training that it was his intention to walk through the back yard to Octagon Avenue and he did not put that information in his statements. Dzialo prepared a narrative of the event for Detective May and a Firearms Discharge Report. (R-1 and R-11.) However, the February 10, 2016, entry in Detective May's Investigation Summary, taken from a recorded interview with Dzialo, contained language that Dzialo believed the dog had walked along a path out of the court yard on to another street. (R-1.)

FINDINGS OF FACT

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
> [Ibid. at 522]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In the present matter, the Department witnesses, May and Levy, gave detailed, concise informative testimony regarding the policies and procedures governing the situation and training of employees. Their testimony was consistent with the documentary evidence of the incident. Appellant Dzialo testified about his observations on the scene and his sense of aggression directed towards him by the canine.

In reviewing the record, and after having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

1. At approximately 7:00 a.m. in the morning on November 12, 2015, Dzialo responded to a radio call for assistance from Levy with instructions to bring a shotgun due to a loose aggressive canine.

2. Levy and Dzialo are of equal rank, but, Levy made the call for assistance, requested the shotgun, notified animal control, and reported the need for cameras.

3. Dzialo carried the shotgun which limited his options to employ less lethal force.

4. Dzialo initially used distance and sight to contain the canine.

5. Dzialo and Levy did not have any discussions about the canine policy or the use of less lethal methods.

6. There was only one complaint about an aggressive loose dog that occurred prior to Dzialo's arrival on the scene.

7. Dzialo never conducted interviews in the neighborhood or questioned any of the people in the area about information relating to the dog while he was observing the dog rummage through the trash.

8. Dzialo and Levy went searching for the canine with weapons drawn when there were no alarms or any other signs of an emergent situation.

9. When Dzialo and Levy approached the fence, the dog startled them and lunged at them, giving them no choice but to discharge their weapons.

10. Dzialo discharged his shotgun at least three times at the charging canine against a backdrop of houses and one of the pellets from his shotgun struck the window of an occupied house.

11. Dzialo was not receptive to the training mandated after the November 12, 2015 incident.

LEGAL DISCUSSION

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20, and N.J.A.C. 4A:2-2.2.

Appellant raises the issue that the alleged violation of the internal rules and regulations should be dismissed because the Department failed to comply with N.J.S.A. 40A:14-147. The statute provides in pertinent part that a complaint charging a violation of internal rules and regulations "shall be filed no later than the 45th day after the date

on which the person filing the complaint obtained **sufficient information** to file the matter upon which the complaint is based." Id. (emphasis added.) However, the rule contains an exception when there is a concurrent criminal investigation:

> The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation." Id.

The November 12, 2015 incident involved the discharge of a firearm, consequently, it was automatically forwarded to the Camden County Prosecutor's Office for review. On December 28, 2015, Camden County Prosecutor's Office remanded it back to CCPD. However, due to Dzialo's unavailability, CCPD's Internal Affairs was unable to interview him until February 10, 2016. Dzialo was out of work due to a back injury from January 6, 2016 through January 30, 2016. Once he returned to duty, he was interviewed on February 10, 2016. Dzialo was served with a PNDA on March 10, 2016. I **FIND** that CCPD did not have sufficient information until after the February 10, 2016 interview to file the complaint. Furthermore, since there was no appeal to the Commissioner for interim relief at the time the charges were brought pursuant to N.J.A.C. 4A:2-2.5(e), procedural irregularities are deemed waived. Therefore, I **CONCLUDE** that because CCPD did not have "sufficient information" until Dzialo's interview on February 10, 2016, the PNDA filed on March 10, 2016 was within the forty-five-day time limit. In addition, any objections to the timeliness of the internal charges are waived.

Appellant also maintains that the mandatory training constituted a punishment so the suspension for the same violations arising from the same incident is barred by the Double Jeopardy Clause of the United States and New Jersey Constitutions. In support of his argument, appellant relies on State v. Eisenman, 153 N.J. 462, 468 (1997). In Eisenman, the New Jersey Supreme Court held that if an act is remedial and rehabilitative in both its essential purpose and its essential effect, it cannot be viewed as punishment triggering the protections against double jeopardy of the state and federal

constitutions. See, State v. Black, 153 N.J. 438, 451 (1998). After the New Jersey Supreme Court heard oral argument in Eisenman and Black, the United States Supreme Court decided Hudson v. United States, 522 U.S. 93, 99 (1997) wherein the majority "reestablished the traditional rule that whether a sanction is subject to double jeopardy restraints depends on whether that sanction essentially constitutes a criminal penalty." The mandatory training required by CCPD was not a criminal penalty. As supported by the testimony of Lutz and May, its purpose was remedial and rehabilitative. Therefore, I **CONCLUDE** that the training herein did not trigger the protections against double jeopardy.

The appointing authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

In the present case, Dzialo was charged with incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The Department also determined that Dzialo violated Camden County Police Department Rules and Regulations as follows: 1:5 code of ethics; 3:1.1 standards of conduct; 3:1.5(f) general responsibilities; 3:1.6 neglect of duty; 3:1.10 obedience to rules and regulations; 3:1.32 work expectation; 3.2.1(k) prohibited activity on duty; 3.2.20 use of force: and 3.2.21 all other conduct. Although the same specifications support each of the charges and they are not compartmentalized, I will discuss each charge in turn.

Dzialo was charged with violating N.J.S.A. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties. There is no definition in the New Jersey Administrative Code for incompetency, inefficiency or failure to perform duties. N.J.S.A.

4A:2-2.3(a)(1) is written in the disjunctive; therefore, a finding that Dzialo failed to perform his duties would be enough to sustain the charge. As specifically prescribed, it was Dzialo's duty to observe and obey all laws and ordinances, all rules and regulations, and orders of the Department. In his Performance Notice, Lutz wrote that Dzialo violated the canine encounters and use of force directives. (R-7.) In this case, there was one civilian complaint about a loose pit bull over a period of approximately forty minutes. In assessing any situation in the field, Dzialo must be able to recognize an appropriate sense of urgency and respond accordingly. In encountering a hostile dog, the Department's witnesses both testified that containment is the favored policy until animal control arrives. Dzialo admitted to Lutz and May that he never had any discussions with Levy on the scene about employing the defensive tactics set forth in the policy. In addition, before utilizing deadly force, consideration must be given to the possibility of critically injuring an officer or bystander by a missed shot. Consideration must also be given to the background and the possibility of ricochet. In his interview with May, Dzialo stated that he considered the backdrop but did not take ricochet from the shotgun into account. (R-1.) From the testimony and the video, Dzialo's focus was fixed on finding the canine, without consideration of the above components of the canine policy. He fired his shotgun into a backdrop of residential buildings and a round struck a window of an occupied home. Therefore, I **CONCLUDE** that the Department has proven by a preponderance of the credible evidence that Dzialo violated the Canine Encounters directive dated October 9, 2015 (R-7); and Rule 3.2.20 use of force and its corresponding directive dated January 28, 2013 (R-8), and therefore, proved the charge of failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1).

Dzialo was also charged with violating N.J.A.C. 4A:2-2.3(a)(2), insubordination. Insubordination can be defined as intentional disobedience or refusal to accept reasonable orders, assaulting or resisting authority, disrespect or use of insulting or abusive language to a supervisor. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971). There was no testimony to support this charge. I **CONCLUDE** that the charge of N.J.A.C. 4A:2-2.3(a)(2) does not apply to the facts of the present case. The charge of violation of N.J.A.C. 4A:2-2.3(a)(2) is hereby **DISMISSED**.

Dzialo was charged with "conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The New Jersey Supreme Court, in In re Phillips, 117 N.J. 567, 576-77 (1980), recognized that the obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official:

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public, particularly in a small community (quoting Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)).

Dzialo testified that there were civilians in the area, but he never questioned anyone about the dog. If Dzialo had asked a few questions, he might have learned that the dog lived in the neighborhood. The primary concern from the testimony of May and Lutz was that Dzialo did not consider a less lethal option during the entire continuum of events. The judgment of both officers to look for the dog with weapons drawn when no emergency existed showed a disregard for policy and poor judgment. Lutz testified that searching for the dog with weapons drawn was akin to hunting. Anytime an officer is carrying a weapon at "low ready" as was Dzialo, he must exercise good judgment and be conscious of his surroundings. Accordingly, I **CONCLUDE** that Dzialo's conduct rose to the level of conduct unbecoming a public employee, and that CCPD has met its burden of proof on this issue.

Dzialo was also charged with neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7). There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee failed to perform

an act required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "negligent" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). Neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). The stated purpose of the canine policy was "to present officers with tactical options for dealing with a hostile animal." Dzialo was duty bound to obey the rules and regulations of CCPD. His failure to implement the policies found in the Canine Encounter directive caused a fatal encounter with the canine that could have been avoided by practicing containment, space, and time. Dzialo searched for the dog while holding a shotgun with both hands against a backdrop of occupied housing without due consideration of the consequences. Therefore, I **CONCLUDE** that CCPD has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted neglect of duty.

Dzialo was also charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Specifically, Dzialo is charged with the following violations of the CCPD General Rules and Regulations: 1:5 code of ethics; 3:1.1 standards of conduct; 3:1.5(f) general responsibilities; 3:1.6 neglect of duty; 3:1.10 obedience to rules and regulations; 3:1.32 work expectation; 3.2.1(k) prohibited activity on duty; 3.2.20 use of force: and 3.2.21 all other conduct.

Rule 1:5 is the code of ethics that generally states that a law enforcement officer is duty bound to serve the community and safeguard the lives and property of its people. Dzialo testified that he was motivated to find the dog and protect the lives of the people in the community. Therefore, I **CONCLUDE** that the violation of Rule 1:5 is hereby **DISMISSED**.

Rule 3:1.1 requires officer to "conduct their private and professional lives in such a manner as avoid bringing the department into disrepute." There was no testimony to support this violation; therefore, I **CONCLUDE** that the charge of violation of Rule 3:1.1 is hereby **DISMISSED**.

Rule 3:1.5(f) comprises general responsibilities consistent with the oath of office, responsiveness to lawful orders of supervisors, and responsibility for effective police action. This is a very broad rule and regulation. Based upon my findings of fact, Dzialo violated the canine encounters policy. His conduct does not fall within the parameters of this general rule. Therefore, I **CONCLUDE** that the charge of violation of Rule 3:1.5(f) is hereby **DISMISSED**.

Rule 3:1.6 states that officers shall not commit any act that would constitute neglect of duty as defined under these Rules and Regulations and recognized by New Jersey law. The same analysis set forth above for Dzialo's violation of N.J.A.C. 4A:2-2.3(a)(7) is relevant here. Therefore, I **CONCLUDE** that the Department has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted a violation of R. 3:1.6

Rule 3:1.10 requires officers to obey all rules and regulations and orders of the Department. As set forth above, because it was Dzialo's responsibility to utilize the canine encounters policy when dealing with a hostile animal and exercise good judgment in accordance with that policy. Therefore, I **CONCLUDE** that the Department has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted a violation of R. 3:1.10.

Rule 3:1.32 requires an officer to "perform their duties to the best of their abilities." There was no testimony to support this violation; therefore, I **CONCLUDE** that the charge of violation of Rule 3:1.32 is hereby **DISMISSED**.

Rule 3:2.1(k) refers to activity deemed inappropriate to the Chief of Police. There was no testimony to support this violation, therefore, I **CONCLUDE** that the charge of violation of Rule of Rule 3:2.1(k) is hereby **DISMISSED.**

Rule 3:2.20 refers to use of force. For the same reasons as set forth above regarding Dzialo's violation of N.J.A.C. 4A:2-2.3(a)(1), I **CONCLUDE** that the

Department has met its burden of proving by a preponderance of the credible evidence that Dzialo's conduct constituted a violation of R. 3:2.20.

Rule 3:2.21 refers to all other conduct not specifically addressed herein. This is a very broad rule and regulation. Based upon my findings of fact, Dzialo violated the canine encounters policy. His conduct does not fall within the parameters of the general rule. Therefore, I **CONCLUDE** that the charge of violation of Rule 3:2.21 is hereby **DISMISSED**.

I **CONCLUDE** that the Department has met its burden in demonstrating a violation of Camden County Police Department General Rules and Regulations: R. 3:1.6; R. 3:1.10; and R. 3:2.20. Accordingly, I **CONCLUDE** that, after consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) as limited to the specific rules and regulations enumerated in the FNDA except for Rules: 1.5; 3:1.1; 3;1.5(f); 3:1.32; 3:2.1(k); and 3.2.21 that are dismissed, the Department has met it burden of proving by a preponderance of the credible evidence the charge of other sufficient cause.

PENALTY

A civil service employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. "Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be

considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In the present case, I was not presented with any other major disciplinary actions involving Dzialo. Progressive discipline is intended to give the employee notice and an opportunity to correct the improper behavior. I note that Dzialo was only a police officer for two and one-half years on November 12, 2015. Lutz reported that Dzialo was less than receptive to the first day of training and reluctant to answer direct questions on the second day of training. (R-10.) Dzialo was not receptive to the training as noted by his testimony that "hindsight is twenty-twenty." He did not appear to recognize the importance of following the procedures established in the canine encounter policy or the expertise of his training officer. After having considered all the proofs offered in this matter and the possible consequences from discharging a shotgun in a residential neighborhood, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that Dzialo's violations are significant to warrant a penalty of a twenty-day suspension. Therefore, I **CONCLUDE** that the imposition of a twenty-day suspension was an appropriate penalty.

ORDER

I **CONCLUDE** that the Department has sustained its burden of proof as to the charges of violating N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, that includes the Department's Rules and Regulations R. 3:1.6, R. 3:1.10, and R. 3:2.20.

Accordingly, I **ORDER** that the action of the Department in suspending Appellant for twenty days is **AFFIRMED.**

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

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

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

December 21, 2017 — Kathleen M Calemmo
DATE — **KATHLEEN M. CALEMMO**, ALJ

Date Received at Agency: 12/21/17

Date Mailed to Parties: 12/21/17

mph

APPENDIX

WITNESSES

For Appellant:

Officer Paul S. Dzialo, Jr.

For Respondent:

Detective Curtis A. May

Lieutenant Kevin Lutz

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Investigative Memorandum of Detective May

R-2 Dog Video – Yorkship Square 1185

R-3 Video of Dog Shooting

R-4 Administrative Advisement Form

R-5 Audio Statement of Officer Dzialo

R-6 Photographs - #1-108

R-7 CCPD Rules regarding Canine Encounters

R-8 CCPD Rules and Regulations

R-9 Audio of Training Video

R-10 Performance Notice

R-11 Firearm Discharge Report

Joint:

J-1 Amended PNDA

J-2 FNDA

3-27-18

A-4

STATE OF NEW JERSEY

In the Matter of Gerald J. Ebner
Bayside State Prison, Department of Corrections

CSC DKT. NO. 2018-7
OAL DKT. NO. CSR 09618-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Gerald J. Ebner, Senior Correction Officer, Bayside State Prison, Department of Corrections, removal effective June 13, 2017, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo, who rendered her initial decision on January 31, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Gerald J. Ebner.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 09618-17
AGENCY DKT. NO. N/A
2018-7

IN THE MATTER OF GERALD J. EBNER,
BAYSIDE STATE PRISON,
DEPARTMENT OF CORRECTIONS.

Michael L. Testa, Esq., for appellant (Testa, Heck, Testa and White, attorneys)

Andy Jong, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 19, 2018 Decided: January 31, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Senior Corrections Officer (SCO) Gerald J. Ebner (appellant) appeals the decision of the Department of Corrections (DOC), Bayside State Prison (respondent) to remove him from employment. Respondent charged Ebner with the following violations: N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause; and DOC Human Resource Bulletin (HRB) 84-17, including: C1, reporting to work unfit for duty; C2, reporting to work for duty while under the influence of

intoxicating liquors or drugs; C11, conduct unbecoming an employee; and E1, violation of a rule, regulation, policy, procedure, order or administrative decision.

PROCEDURAL HISTORY

Bayside issued a Preliminary Notice of Disciplinary Action (PNDA) dated March 9, 2017, notifying Ebner of the charges against him. (R-20.) After a departmental hearing held on March 25, 2017, Bayside sustained the following charges and incorporated them into a Final Notice of Disciplinary Action (FNDA) dated June 13, 2017, with a proposed penalty of removal from employment: N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause; and the following violations of DOC Human Resource Bulletin (HRB) 84-17: C1, reporting to work unfit for duty; C2, reporting to work for duty while under the influence of intoxicating liquors or drugs; C11, conduct unbecoming an employee; and E1, violation of a rule, regulation, policy, procedure, order or administrative decision. (R-10.) The appellant requested a hearing and the matter was transferred to the Office of Administrative Law (OAL), where it was filed on July 5, 2017, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. I heard the matter on December 4, 2017 but kept the record open for post-hearing submissions. After receipt of the post-hearing submissions, I closed the record on January 19, 2018.

FACTUAL DISCUSSION

On March 9, 2017, Ebner reported to duty at Bayside State Prison for his 6:00 a.m. shift where he was assigned to A-Unit. At approximately 9:45 a.m., Lieutenant McCarthy was notified by SCO Meyers[1] that she suspected Ebner of being intoxicated. Myers recorded her observations on an Special Custody Report form dated March 9, 2017 with a time of incident as 9:45 a.m. (R-1.) McCarthy contacted his supervisor, Lieutenant Barnes, and reported to A-Unit to evaluate Barnes for himself. McCarthy's observations of possible signs of intoxication, including slurred speech, glassy eyes, and a strong smell

[1] Senior Corrections Officer Meyers unfortunately passed away prior to the hearing.

of alcohol, were noted on his incident report. (R-2.) Upon notification from McCarthy, Barnes also reported to A-Unit and prepared a report indicating that he perceived Ebner to smell like alcohol and slur his speech. (R-3.) Ebner was relieved of duty, his union representative was contacted, and he was escorted to the Special Investigations Division (SID). Per departmental policy, Ebner was subjected to a breathalyzer test. Deputy Chief Naughton administered the test to Ebner using a machine known as the Draeger Alcotest 6810, serial number ARDF-0273. As instructed, Ebner provided two breath samples. The result of the first sample was 0.174% and the result of the second sample was 0.167%. (R-7.) Both results were higher than the DOC's threshold limit of 0.04% for a positive alcohol test result. (R-14.) Ebner signed and dated the DOC testing form. (R-7.) Thereafter, respondent issued a PNDA dated March 9, 2015 to Ebner seeking his removal. After a hearing was held, respondent issued a FNDA dated June 13, 2016 upholding the removal. (R-20.)

There is no material dispute concerning the foregoing, which I **FIND** as **FACT**.

TESTIMONY

For Respondent:

Lieutenant Timothy McCarthy (McCarthy) was Ebner's supervisor at Bayside. He testified that after receiving the report about a suspicion of intoxication from SCO Meyers, he contacted Lieutenant Barnes and went to Unit A to meet with Ebner. Upon encountering Ebner and detecting the smell of alcohol, slurred speech, and red glassy eyes, McCarthy asked Ebner if he had been drinking. According to McCarthy, Ebner told him that he was drinking the previous night.

On cross-examination, McCarthy stated that he did a visual inspection of Ebner's work area and found no evidence of alcohol in the area.

Investigator Ruben Baca (Baca) is an Investigator for the DOC assigned to the SID at Bayside. Baca was present when Ebner was brought in for his breathalyzer test and remained in the room while Investigator Naughton administered the Alcotest. Baca testified that he had no contact with Ebner but even from a standing distance of approximately five feet, he could smell alcohol. The test process was video recorded. (R-9.) Baca recorded his observations in the incident report that was used at the department hearing. (R-4.)

On cross-examination, Baca could not recall what time Ebner's shift started but he knew that no alcohol had been found in Ebner's work area and that Ebner denied consuming any alcoholic beverages after 9:00 p.m. the previous night. He also stated that a fresh breathing tube is provided for every test but he did not put that information into his report.

Deputy Chief James Naughton (Naughton) administered the Alcotest to Ebner. On March 9, 2017, Naughton was at South Woods State Prison when he was contacted by Baca to come to Bayside to administer the Alcotest to Ebner. Walking into the interview room to meet with Ebner, he stated he could smell alcohol from the doorway, about six feet away. Naughton is trained and certified by Draeger, the manufacturer of the device. He received in-person training from a Draeger representative when the device was purchased and has taken on-line refresher courses. His Certificate dated August 13, 2012 qualified him to train and certify operators in the proper use and operation on the Draeger Alcotest 6810. (R-5.) His Certificate dated July 8, 2016 signified the completion of additional on-line course work to use and operate the devices. (R-6.)

Before administering the Alcotest, an accuracy test using a dry gas cylinder provided by Draeger is performed. The acceptable limit range for the accuracy test is 0.035% to 0.045%. Naughton performed the accuracy test and recorded the result of .036% in the log book. (R-8.) After the accuracy test, Naughton performed a screening test. Naughton testified that the machine must test to zero to proceed. The screening test registered a 0.0% allowing Naughton to proceed with the test. After clearing, Ebner

was provided a new mouthpiece and told to breathe into the device. Ebner's first breathing sample result was 0.173%. Because the result was above the limit of 0.04%, a confirmation test is required after a fifteen-minute waiting period between tests. After waiting the allotted time, Naughton instructed Ebner to provide another sample. The confirmation sample result was 0.167%. After the confirmation test, Naughton performed another accuracy test and received a reading of 0.039%, within the acceptable limits. Naughton recorded the test results and attached the printed test results from the machine to his report. (R-7.)

Naughton testified that the clock on the machine was approximately nineteen minutes fast. He documented that information on the testing forms (R-7) and Baca's report (R-4). He testified that the timer did not affect the accuracy of the test because the readings of the first and last accuracy tests were within the acceptable range, and the screening test reading recorded the required 0.0% needed to start the test.

The videotape of the process of administering the Alcotest to Ebner was played during Naughton's testimony at the hearing. It was noted that Ebner followed the directions. He was given a new mouthpiece for each test. He sat and calmly waited during the fifteen-minutes between each test. Naughton completed the testing form and Ebner signed the form certifying that the results were accurately recorded on the form. (R-7.)

Senior Investigator Randy Valentin (Valentin) is a certified Operator and Trainer in the proper use and operation of the Draeger Alcotest 6810. (R-10, R-11.) He trains new investigators on the machine and he is responsible for performing the calibrations. He testified that there is no separate certification for performing calibrations, just training. Over the course of six years, Valentin performed eighty to one-hundred Alcotests and at least forty calibrations on the machines. A Certification of Calibration was given by Draeger for the machine used on Ebner on August 9, 2012. (R-12.) Since then, the yearly calibrations are performed by qualified operators and the results of the calibrations are kept on the log book stored with the machine. (R-8.) In addition, accuracy tests are

performed once per month if the machine is not used. If the results are over the guidelines, a Draeger representative must be contacted.

On cross-examination, Valentin testified that only a select few investigators perform the calibrations on the machine. The DOC Internal Management Procedure #012, Titled: Prevention of Employee Alcohol Impairment and Related Testing, Chapter IV, Section C, Subsection B states:

> ATD[2] Calibration – The ATD is required to receive calibration once per calendar year. Designated SID personnel trained and certified in the calibration process will perform the calibration at relevant intervals. (R-13.)

The log shows that Valentin performed the calibration on September 13, 2017. Before that it shows that a calibration was performed on September 9, 2016 by Eugene Johnson. (R-8.) Valentin testified that the canisters used for calibration are supplied by Draeger and the process is similar to the accuracy test. He also testified that the machine must be successfully calibrated each year or it will be locked. Officer Johnson did not testify and no Certifications of his training was presented. Valentin stated that Johnson retired from SID. According to Valentin, a select few members of SID are picked to perform the yearly calibration tests. The training received is the same as the Operator Trainer certificate.

Associate Administrator James Stigliano (Stigliano) testified about the reasons for the DOC policy against employee alcohol impairment. While the primary reason is safety, he also mentioned the emergent nature of the job, and the handling of fire arms. He referred to the DOC policy that states that an employee with a law enforcement title who has an alcohol test reading from 0.04% to 0.079% is deemed unavailable for work. Under the policy, if the officer's test is 0.08% or above, for a first offense, the officer is given the opportunity to enter and successfully complete an alcohol treatment program. A second offense is removal from office. (R-13 and R-16.) Stigliano testified that Ebner

[2] Alcohol Testing Device (ATD)

was provided with the policy regarding alcohol impairment and he signed the form acknowledging that he was given a copy of the policy, a pamphlet for services, and that the perimeters of his employment were explained to him. (R-15.)

FINDINGS OF FACTS

After carefully reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter:

Ebner was aware of the Level I Policy PSM.001.023 referencing Alcohol Impairment and Related Testing. (R-14 and R-15.) Under the policy, an employee with a law enforcement title is deemed unavailable for work with an alcohol test result of 0.04% to 0.079%. In addition, the policy requires that an individual with an alcohol test result of 0.08% or higher shall be removed unless the employee successfully completes a thirty-day alcohol treatment program for the first offense. For a second offense, the employee is removed. By his signature on the form, I **FIND** as **FACT** that Ebner was provided a copy of the alcohol policy that set forth the perimeters of his employment and the consequences for violations.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is

overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Naughton and Valentin testified credibly about their knowledge of the Draeger Alcotest 6810. They are both certified as Operator Trainer which qualifies them to train and certify other Operators in the proper use and operation of the Draeger Alcotest 6810. Naughton described the process and testified that the accuracy readings were within the acceptable range before and after the testing. He also testified that the machine recorded the required zero before the test was administered to Ebner. Valentin testified about the calibration process and the log book (R-8) showed that this machine received the required yearly calibrations by designated SID personnel. Therefore, I **FIND** that the Draeger Alcotest 6810 was an adequate means of testing Ebner and such results are reliable and worthy of acceptance as testified to by Naughton and Valentin.

LEGAL DISCUSSION AND CONCLUSION

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The first charge against Ebner is conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a

governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting, In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellant's status as a senior correction officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). A corrections officer represents "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."
>
> [Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

In the present case, McCarthy testified credibly that after having received a report of suspected intoxication, he observed the smell of alcohol from Ebner, and observed red glassy eyes and slurred speech. Those observations were all noted in the reports generated because of the incident. (R-1 through R-4.) Baca and Naughton both testified that they could smell alcohol within five feet of Ebner's presence. Ebner contends that Bayside failed to meet its burden of proving that he violated a valid alcohol screening because there was no testimony offered or documents presented regarding the certification of Eugene Johnson who performed the calibration test on September 9, 2016. Valentin testified that he performed the calibration for September 13, 2017, after the machine was used on Ebner. Therefore, Ebner argues, Bayside failed to show that the calibration was performed in accordance with DOC's procedures that require a calibration test once per calendar year by a designated SID personnel "trained and certified in the calibration process." (R-13.) Valentin testified that there are no separate certifications for the SID personnel who are designated to calibrate the Draeger Alcotest 6810. He testified that designated investigators received training from Draeger on how to calibrate the machine. This particular machine received a Certification of Calibration from Draeger in 2012 and since that date it receives its yearly calibration from the Draeger trained designated SID personnel. (R-12.) Valentin testified that the calibration test is similar to the accuracy test with the only difference being the type of canister used. As with the accuracy test, the canister is supplied by Draeger. The log book, kept with the device, indicated that the machine was calibrated by Eugene Johnson on September 9, 2016. (R-8.) Valentin testified that Johnson was retired from SID. The actual machine was brought to the hearing and presented. There is also a computer log on the machine that records the calibration. Valentin testified that the machine must be calibrated successfully each year or it will lock.

Ebner seeks to impose a higher standard than what is required in the OAL. Bayside must prove by a preponderance of the credible evidence that Ebner was under the influence of intoxicating liquors while on duty. Bayside presented testimony and business reports that Ebner exhibited signs of intoxication and smelled of alcohol. Naughton testified that the accuracy tests for the Draeger Alcotest 6810 were within the

acceptable range. He received the required zero reading before the first sample. The first test reading was .173% and his second test reading was .167%. The log book showed that the machine was calibrated on a yearly basis.

Therefore, I **CONCLUDE** that Bayside proved by a preponderance of the credible evidence that Ebner's conduct was unbecoming a public employee by reporting for duty while under the influence of alcohol.

Appellant has further been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Specifically, Ebner is charged with violating DOC Human Resource Bulletin (HRB) 84-17, including: C1, reporting to work unfit for duty; C2, reporting to work for duty while under the influence of intoxicating liquors or drugs; C11, conduct unbecoming an employee; and E1, violation of a rule, regulation, policy, procedure, order or administrative decision. (R-16.) Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant's conduct was such that he violated this standard of good behavior. I deemed that the testimony showed that Ebner reported to duty smelling of alcohol, slurring his speech, and with red glassy eyes giving rise to a reasonable suspicion of alcohol use. Per department policy he was subjected to a breathalyzer test for alcohol. His initial reading and confirmation tests were positive. His initial reading of 0.173% and his confirmation test of 0.167% were significantly higher than the 0.04% allowable reading under the policy. As such, I **CONCLUDE** that Bayside proved by a preponderance of the credible evidence that Ebner violated Bayside's alcohol policy.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock,

supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. 523-24.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Brock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The question to be resolved is whether the discipline imposed in this case is appropriate.

This is Ebner's second violation of the following sections of HRB 84-17: C1 – reporting to work unfit for duty; C2- reporting for duty under the influence of intoxicating liquors or drugs; and C11- conduct unbecoming a public employee. On March 24, 2016, Bayside issued a FNDA to Ebner, stemming from a February 2, 2016 incident of suspected intoxication. At that time, Ebner's Alcotest results were 0.118% and 0.105%. (R-18.) Ebner accepted a settlement agreement involving his attendance at an alcohol treatment program and thirty-day suspension. (R-17.) As set forth in HRB 84-17 – Table of Offenses and Penalties, a second violation of C2 and C11 is removal. There is no doubt that Ebner understood the policy regarding alcohol impairment while on duty. (R-15.) The Associate Administer of Bayside, Stigliano, credibly testified about the alcohol policy and its justifications. Accordingly, I **CONCLUDE** that Bayside's action in removing Ebner from his position was justified.

DECISION AND ORDER

Respondent Bayside has proven by a preponderance of credible evidence the following charges against Ebner: N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause; and the following violations of DOC Human Resource Bulletin (HRB) 84-17: C1, reporting to work unfit for duty; C2, reporting to work for duty while under the influence of intoxicating liquors or drugs; C11, conduct unbecoming an employee; and E1, violation of a rule, regulation, policy, procedure, order or administrative decision. Accordingly, I **ORDER** that these charges be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that the penalty of removal is hereby **AFFIRMED**.

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

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

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

January 31, 2018
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: January 31, 2018

Date Mailed to Parties: January 31, 2018

cmo

APPENDIX
WITNESSES

For Appellant:

None

For Respondent:

Lieutenant Timothy McCarthy
SID Investigator Ruben Baca
Deputy Chief James Naughton
SID Investigator Randy Valentin
Associate Administrator James Stigliano

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Special Custody Report of SCO Meyers – 3/9/2017
R-2 Special Custody Report of Sgt. McCarthy – 3/9/2017
R-3 Special Custody Report of Lt. Barnes – 3/9/2017
R-4 Investigation Report of Inv. Baca – 3/13/2017
R-5 Draeger Operator Trainer Certificate of Naughton – 8/13/2012
R-6 Draeger Operator Certificate of Naughton – 7/8/2016
R-7 Alcotest Forms of Ebner – 3/9/2017
R-8 Log of Draeger Alcotest 6810

R-9 DVD of Ebner being administered the Alcotest

R-10 Draeger Operator Trainer Certificate of Valentin – 9/14/2017

R-11 Draeger Operator Certificate of Valentin – 7/12/2016

R-12 Draeger Certificate of Calibration for Alcotest Device 6810 – 8/9/2012

R-13 Special Investigations Division Management Procedure #102

R-14 DOC Policy Number PSM.001.023

R-15 Ebner's receipt of Policy Number PSM.001.023

R-16 DOC HRB 84-17

R-17 Ebner Settlement Agreement

R-18 FNDA – 3/24/2016

R-19 Work History of Ebner

R-20 FNDA – 6/13/2017 and PNDA (These documents were marked for identification as Exhibit A and moved into evidence as R-10. However, during the hearing, R-10 was inadvertently used for Exhibit J – Draeger Operator Trainer Certificate for Valentin. To avoid confusion of these documents, I changed the designation of the FNDA – 6/13/2017 and PNDA to R-20.)

STATE OF NEW JERSEY

In the Matter of Denise Farley
City of Millville School District

CSC DKT. NO. 2017-2921
OAL DKT. NO. CSV 05279-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 05279-17
AGENCY DKT. NO. 2017-2921

IN THE MATTER OF DENISE FARLEY,
CITY OF MILLVILLE SCHOOL DISTRICT.

Kathleen Kirvan, Esq., for appellant, Denise Farley (Selikoff and Cohen, PA, attorneys)

Joseph F. Betley, Esq., for respondent, City of Millville School District (Capehart and Scatchard, PA, attorneys)

Record Closed: October 23, 2017 Decided: November 29, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on April 19, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

November 29, 2017
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 12/1/17

Date Mailed to Parties: 12/4/17

JRW/jdw/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on October 23, 2017

RECEIVED
OCT 23 A 11:45
E OF NEW JERSEY
CE OF ADMIN. LAW

SEPARATION/RESIGNATION AGREEMENT AND GENERAL RELEASE

This Separation/Resignation Agreement and General Release ("Agreement") is made on this ___th day of August, 2017, by and between Denise Farley ("Ms. Farley") and the Millville Board of Education, Cumberland County, New Jersey ("Board") (hereinafter collectively referred to as the "Parties").

WHEREAS, Ms. Farley was employed as a Food Service employee for the Board; and

WHEREAS, on February 27, 2017, the Board issued a Final Notice of Disciplinary Action ("FNDA") against Ms. Farley; and

WHEREAS, effective February 27, 2017, pursuant to the FNDA, the Board removed Ms. Farley from her position as a Food Service employee; and

WHEREAS, thereafter, Ms. Farley appealed the Board's issuance of the FNDA and her removal from employment by filing an appeal with the New Jersey Civil Service Commission; and

WHEREAS, Ms. Farley's Civil Service appeal was transferred to the Office of Administrative Law, docketed as OAL Dkt. No. CSV 05279-17, Agency Ref. No. CSC Dkt. #2017-2921, and scheduled for hearing on August 7, 2017; and

WHEREAS, after good faith negotiations, the Board and Ms. Farley desire to resolve amicably all matters and issues arising out of Ms. Farley's employment relationship with the Board and separation therefrom; and

WHEREAS, the Board and Ms. Farley have concluded that, effective the date this Agreement is signed by both parties, their employer-employee relationship shall terminate via the resignation of Ms. Farley; and

WHEREAS, this Agreement, and the execution and implementation of same, shall not be construed or considered an admission of liability and/or wrongdoing by the Board, its present and former board members, officers, employees, agents and servants, said liability and/or wrongdoing being expressly denied.

NOW, THEREFORE, in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Ms. Farley and the Board agree as follows:

1. Ms. Farley hereby submits her irrevocable letter of resignation with the Board, and the Board hereby accepts such resignation, which the parties have agreed will be considered a general resignation pursuant to N.J.A.C. 4A:2-6.3. The irrevocable letter of resignation is attached as Exhibit "A" to this Agreement. Effective at the close of business on August__, 2017, Ms. Farley's employment with the Board shall, in all respects, cease.

2. In consideration of Ms. Farley's irrevocable resignation and General Release set forth in Paragraph 4 below, the Board will send a letter to the Civil Service Commission withdrawing the February 27, 2017 FNDA. Additionally, the Board will pay Ms. Farley for back wages in the amount of $3,521.02 (11 payments of back pay for the pay periods of January 30, 2017 through June 30, 2017), less normal payroll deductions. Payment to Ms. Farley shall be delivered to Kathleen Kirvan, Esquire of Selikoff & Cohen, P.A. Said payment will be made within 30 days of Board approval of this Agreement. The Board shall also provide Ms. Farley with a neutral reference to future employers which shall only disclose Ms. Farley's dates of employment with the Board, positions/titles held during dates of employ and salary.

3. Ms. Farley's resignation shall extinguish all employment rights, and she shall have no re-employment rights.

4. Ms. Farley, her executors, heirs and assigns, **RELEASES AND DISCHARGES** the Board and any and all of its former and current members, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, from any and all liability, claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which she may have had, now has, or may hereafter have for any reason whatsoever on account, arising out of or in consequence of Ms. Farley's employment relationship and/or separation of employment from the Board, including, but not limited to:

(a) All federal and state statutory claims and any amendments to such statutes, including but not limited to claims arising under the New Jersey Law Against Discrimination, the New Jersey Civil Rights Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, Title VII of the Civil Rights Act of 1964, Sections 1981 through 1988 of Title 42 of the United States Code, the Age Discrimination in Employment Act of 1967, including the Older Workers' Benefit Protection Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act, the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the National Labor Relations

Act, the Federal Warn Act, the Family and Medical Leave Act of 1993, the Occupational Safety and Health Act, the Equal Pay Act, the New Jersey Minimum Wage Law, the New Jersey Wage and Hour Law, Equal Pay Law for New Jersey, the New Jersey Worker Health and Safety Act and the Labor Management Relations Act;

(b) All claims arising under the United States or New Jersey Constitutions;

(b) All claims arising under any Executive Order or derived from or based upon any state or federal regulations;

(c) All common law claims, including but not limited to any and all rights to discovery, breach of contract, tort claims, claims for wrongful discharge, constructive discharge, violation of public policy, breach of an express or implied contract, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, hostile work environment, defamation, conspiracy, tortious interference with contract or prospective economic advantage, promissory estoppel, equitable estoppel, fraud, misrepresentation, detrimental reliance, retaliation and negligence;

(d) Excluding the payment set forth in this Agreement, all claims for any compensation including, back wages, front pay, punitive damages, pay increases, bonuses or awards, fringe benefits, disability benefits, severance benefits, reinstatement, retroactive

seniority, pension benefits, contributions to retirement plans, or any other form of economic loss;

(e) All claims for personal injury, including physical injury, mental anguish, emotional distress, pain and suffering, embarrassment, humiliation, damage to name or reputation, interest, liquidated damages and punitive damages;

(f) Any claims arising out of the terms and conditions of Ms. Farley's employment with the Board and the separation of such employment;

(g) Any rights to reemployment with the Board;

(h) Any grievance pursuant to any Board policy or regulation and any collective bargaining agreement; and

(j) All claims for costs, interest and attorneys' fees.

5. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"). Ms. Farley represents that she has not filed and does not intend to file a Workmen's Compensation claim related to her employment with the Millville Board of Education. This release does not limit Ms. Farley's right to seek indemnification, in accordance with N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1, with respect to a claim filed against her for any act or omission arising out of and in the course of the performance of her duties as an employee of the

Millville Board of Education. The parties are not aware of the existence of any such claims.

6. This Agreement sets forth the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the Parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

7. Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, or any liability to any other party.

8. This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the Parties hereto, as well as their respective successors and assigns.

9. This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

10. This Agreement may be signed in counterparts and that facsimiles of signatures as well as electronic signatures through the use of email or "pdf" files will have the same force and effect as original signatures.

11. The undersigned officer of the Board is fully authorized to execute this Agreement on the Board's behalf.

12. The Parties have executed this Agreement without duress or coercion, and have done so with the opportunity to consult counsel. No other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

13. The terms of this Agreement are the product of good faith negotiations between the Parties and their respective counsel, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

14. The Parties, including their agents and members of District Administration, agree to maintain in confidence and not to disclose the terms of this Agreement, including but not limited to any facts surrounding Ms. Farley's employment and separation from employment, unless otherwise required by state or federal law, such as the New Jersey Open Public Records Act. It shall not be considered a breach of the obligation of confidentiality for Ms. Farley to make disclosure of the settlement terms to her immediate family (who shall first be expressly advised of the same requirement of confidentiality), or to make disclosure of the settlement terms and the underlying events in order to obtain private and confidential legal, tax or financial advice or to her union representatives, or to respond to any inquiry from any governmental entity or agency.

15. Ms. Farley is provided with 21 days to review this Agreement and may revoke her signature of this Agreement within seven (7) calendar days of signing it by delivering written notice of revocation to Lauren E. Tedesco, Esq., Capehart Scatchard, 8000 Midlantic Drive, Suite 300 South, Mt. Laurel, NJ 08054. If Ms. Farley has not revoked her signature of this Agreement by written notice received within the seven (7) day period, it becomes effective immediately thereafter.

16. This Agreement is subject to formal approval by the Board.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.

Denise L Farley 8-17-17
Denise Farley Date

Bryce Kell 8/28/17
Bryce Kell Date
Business Administrator/Board Secretary
Millville Board of Education

David Gentile 8/28/17
David Gentile Date
Superintendent
Millville Board of Education

Lisa Santiago 8/30/17
Lisa Santiago Date
Board President

Resignations – cont'd

28 It is recommended the Board of Education approve the resignation of Rochelle Fordyce from the position of Paraprofessional (pc#10089) at Lakeside effective August 22, 2017.

29 It is recommended the Board of Education approve the resignation of Luz Ortiz from the position of Paraprofessional (pc#567) at Lakeside effective August 21, 2017.

30 It is recommended the Board of Education approve the resignation of Raymond Rossi from the position of Security (pc#1107) at Lakeside effective August 18, 2017

31 It is recommended the Board of Education approve the resignation of Denise Farley from the position of Cafeteria (pc#221) effective September 11, 2017.

18-31 MILLVILLE

*32 It is recommended the Board of Education approve the resignation of Mike LaTorre from the Co-Curricular position of Fall Weight Training effective August 22, 2017.

Leave of Absence

*33 It is recommended the Board of Education approve the paid medical leave of absence for employee #2746 from July 24 to August 24, 2017 utilizing the Family Medical Leave Act.

*34 It is recommended the Board of Education approve the intermittent, paid medical leave of absence for employee #2874 from August 25 to October 20, 2017 utilizing the Family Medical Leave Act.

*35 It is recommended the Board of Education approve the intermittent, paid medical leave of absence for employee #5608 from September 5 to September 12, 2017 utilizing the Family Medical Leave Act.

*36 It is recommended the Board of Education approve the paid medical leave of absence for employee #2483 from August 21 to September 10, 2017 utilizing the Family Medical Leave Act.

32-36 ALL

Angiulo, Nicholas

From: Lauren E. Tedesco <LTedesco@capehart.com>
Sent: Monday, December 4, 2017 1:39 PM
To: Angiulo, Nicholas; kkirvan@selikoffcohen.com
Cc: Messina, JoAnn
Subject: RE: In the Matter of Denise Farley - Settlement

Mr. Angiulo,

This issue came up with Civil Service Commission employee Ollie G. Levant in the processing of this matter. On October 6, 2017, Mr. Levant amended the employee's record to place the employee on a leave with pay from February 27, 2017 until September 11, 2017 as the agreement itself contemplates backpay. Therefore, in terms of consistency, this time period should be recorded as a leave of absence with pay.

Thank you, and please let me know if there is anything else you need.

Best,

Lauren

Lauren E. Tedesco | *Associate* | *School Law Department*

CAPEHART || SCATCHARD
ATTORNEYS AT LAW
New Jersey - Pennsylvania - New York

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Confidentiality Note: This transmission is intended only for the addressee, and may contain privileged and/or confidential information from the law firm of Capehart & Scatchard, P.A. If you are not the intended recipient, please do not use, disseminate, or copy this material. If you have received this transmission in error, please notify us immediately by telephone, return this transmission, and delete or destroy any copies.

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, December 04, 2017 12:17 PM
To: kkirvan@selikoffcohen.com; Lauren E. Tedesco <LTedesco@capehart.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: In the Matter of Denise Farley - Settlement
Importance: High

Ms. Kirvan and Ms. Tedesco:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Denise Farley from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Ms. Farley agrees to a general resignation from her position effective September 11, 2017 (per the superintendent's report), in exchange for, *inter alia*, back pay from January 30, 2017 through June 30, 2017. However, the settlement does not reflect how to record the time period from July 1, 2017 to her resignation date. Before the matter can be acknowledged by the Commission, we require all periods of time to be accounted for in an employee's personnel record. In this regard, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

3-27-18

STATE OF NEW JERSEY

In the Matter of Wayne Floyd
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2017-2464
OAL DKT. NO. CSV 2034-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 2034-17
AGENCY DKT. NO. 2017-2464

IN THE MATTER OF WAYNE FLOYD, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Aimee Blenner, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: December 14, 2017 Decided: December 18, 2017

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 10, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

December 18, 2017
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 12/21/17

Date Mailed to Parties: 12/21/17

/cb

OAL DKT. NO. CSV 02034-2017
AGENCY DKT. NO. 2017-2464
SETTLEMENT AGREEMENT

IN THE MATTER OF
WAYNE FLOYD
AND
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOPSITAL

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated January 23, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee – removal effective June 20, 2016
2. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective June 20, 2016.
3. Admin. Order 4:08 C-3.1 Physical or mental abuse of a patient, client, resident, or employee – removal effective June 20, 2016.
4. Admin. Order 4:08 C-5.1 Inappropriate physical contact or mistreatment of a patient, client, resident, or employee – removal effective June 20, 2016.
5. Admin. Order 4:08 C-8.2 Falsification; intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding – removal effective June 20, 2016.
6. Admin. Order 4:08 E-1.3 Violation of a rule, regulation, policy, procedure, order or administrative decision – removal effective June 20, 2016.

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Wayne Floyd withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge:

Resolved via general resignation pursuant to N.J.A.C. 4A:2-6.3(b). Floyd agrees not to seek reemployment with the Department of Health, including but not limited to psychiatric hospitals run by the Department of Health.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Wayne Floyd's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or

prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12/14/17
DATE

Wayne Floyd

12/14/17
DATE

ON BEHALF OF Appellant
William A. Nash, Esq

12/14/17
DATE

Aimee Blenner
ON BEHALF OF Respondent

12-14-17
Date

APH

CERTIFICATION

I, Wayne Floyd, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/14/17
DATE

Wayne L. Floyd Jr.
Wayne Floyd

STATE OF NEW JERSEY

In the Matter of Vincent Garcia
Ancora Psychiaric Hospital,
Department of Human Services

CSC DKT. NO. 2018-127
OAL DKT. NO. CSV 10777-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

IN THE MATTER OF VINCENT GARCIA
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL

OAL DKT. NO. CSV 10777-17
AGENCY DKT. NO. 2018-127

William A. Nash, Esquire, attorney for appellant (Nash Law Firm, LLC)

Aaron Creuz, Deputy Attorney General, for respondent Department of Human Services, (Gurbir S. Grewal, Attorney General, attorney)

Record Closed: February 9, 2018 Decided: February 9, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

Respondent, Department of Human Services, Ancora Psychiatric Hospital, removed appellant, Vincent Garcia, from his position as Human Services Assistant, effective July 7, 2016. Appellant filed an appeal. The matter was transmitted to the Office of Administrative Law on July 31, 2017, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13.

The parties appeared on February 9, 2018, for the scheduled hearing and agreed to a settlement of all issues in dispute and prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

February 9, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 2/12/18

Date Mailed to Parties: 2/12/18

mph

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement (4 pages)

OAL DKT. NO. CSV 10777-2017 S
CSC DKT. NO. 2018-127
SETTLEMENT AGREEMENT

VINCENT GARCIA
v.
DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL

J-1
cwd.
02/09/2018

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated June 20, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(3) Inability to perform duties – removal effective July 7, 2016
2. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective July 7, 2016.
3. Admin. Order 4:08 B-10.1 Inability to discharge one's duty due to mental or physical incapacity – removal effective July 7, 2016.

B. The parties have agreed to the following:

1. The grievant withdraws his appeals and request for a hearing with OAL Docket No: CSV 10777-17 S.
2. The employee shall be reinstated to the position **Human Services Assistant**. Reinstatement of the Employee is contingent upon his first successfully clearing any and all Department of Human Service's (re)hiring prerequisites, including, but not limited to, all background checks, fingerprinting, driver's license checks, etc.
3. The Final Notices of Disciplinary Action dated June 20, 2017 will be modified as follows:
    a. Removal modified to reinstatement with no back pay.

4. The grievant will not receive any back pay or attorney's fees from the appointing authority.
5. Any other days from the time of last suspension day until return to work shall be recorded as Approved Leave of Absence Without Pay. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer. Grievant is not entitled to any accrued leave time while on Leave of Absence Without Pay.

C. Department of Human Services shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

E. Except for the assessment of Vincent Garcia's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against

Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

G. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

H. The parties waive the right to file exceptions and cross exceptions.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/9/2018
DATE

Vincent Garcia

2/9/18
DATE

ON BEHALF OF Appellant William Nash, Esq

2-8-2018
DATE

ON BEHALF OF Respondent

2/9/18

CERTIFICATION

I, Vincent Garcia, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/9/2018

DATE

Vincent Garcia

B-24

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Matthew Gomm

CSC Docket No. 2016-3502
OAL Docket No. CSV 02360-17

ISSUED: APRIL 20, 2018 (SLK)

The appeal of Matthew Gomm, a Police Officer with the Borough of Carteret (Carteret), of his 45 working day suspension, on charges, was heard by Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on December 22, 2017. No exceptions were filed by the parties.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 27, 2018, accepted and adopted the Findings of Fact as detailed in the initial decision. However, the Commission did not adopt the ALJ's recommendation to modify the 45 working day suspension to a 30 working day suspension. Rather, the Commission modified the suspension to a 20 working day suspension. Additionally, the Commission ordered that the appellant undergo retraining regarding the appointing authority's rules and regulations concerning the operation of a motor vehicle, emergency calls and the use of lights and siren.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, misuse of public property and other sufficient cause. Specifically, the appointing authority alleged that the appellant operated an assigned police cruiser in such a negligent and/or careless manner as to cause the same to strike another operating motor vehicle, causing his police vehicle to then leave the roadway and strike other property, including a light pole, lamp and residential shrubbery. Upon the

appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in his initial decision that Deputy Chief of Police Dennis McFadden testified that an Officer asked to check if a suspect had any open warrants and Dispatch responded to the Officer that the suspect had an active warrant. Although the appellant did not notify Dispatch of his actions, the appellant proceeded to aid the Officer traveling, with sirens and lights activated, at 60 miles per hour. He also crossed an intersection at 40 miles per hour, which ultimately led him to drive over the sidewalk adjacent to the oncoming lane of traffic where he struck a decorative pole in front of a residence. He then drove back onto the street where he was struck by the vehicle he was trying to avoid which caused him to drive up on the sidewalk again where his vehicle stopped. McFadden stated that he disagreed with statements that were in the appellant's accident report. Specifically, the appellant stated that the suspect had several warrants while Dispatch only mentioned one. The appellant stated that he knew the suspect tended be with relatives with criminal records and ran from the police. However, Dispatch did not provide this information. The appellant stated he responded to the incident because it was in his assigned zone, but he did not relay this to Dispatch. The appellant stated that he thought the other vehicles had heard his siren and had seen his lights as vehicles moved to the side of the road and, based on his training, experience, the conditions, and his observations, he felt that he could pass vehicles in what he felt was an "emergent" situation. Based on McFadden's viewing of the appellant's report and the video from the vehicle, he testified that it was his opinion that the other driver did not have enough time to observe the appellant and get out of his way. McFadden issued the Investigator's report, which found that the appellant's "excessive speed" caused the accident and stated that the appellant's actions violated department rules and regulations for operating motor vehicles and the use of lights and sirens for emergency calls. McFadden believed that the appellant's actions caused the incident as he did not consider this to be an emergency since the warrant was for a nonviolent suspect, there were three or four other Officers at the site, and the appellant did not advise Dispatch that he was going to the site.

The appellant testified that he heard the Officer's call to Dispatch and knew the suspect from prior experience, including arresting him three times. The appellant stated that he responded to the call with lights and sirens and was familiar with the area and streets where he would be traveling. He indicated that he reduced his speed at intersections and acted with caution and had responded to similar situations with lights and sirens. The appellant disagreed with McFadden's assessment that it was not an emergent matter because he knew the suspect had multiple warrants, was usually with others who also had warrants and was a "runner." He explained that he did not call Dispatch because he was responding to an occurrence in his zone. The appellant presented that when he realized what was

happening, he tried to drive evasively to avoid an accident, but ended up driving on the sidewalk as the accident occurred.

The ALJ found both witnesses to be credible as McFadden's and the appellant's views were based on information that was known to them. However, the ALJ indicated that McFadden's experience and circumspect view carried more weight. Specifically, the ALJ found that the appellant traveled at an excessive rate of speed considering the circumstance and that it was his actions that caused the accident. Therefore, the ALJ concluded that Carteret met its burden of proof on all charges. The ALJ presented that the appellant did not have any prior major disciplinary actions in his record and had previously received two minor disciplines that involved the operation of his police vehicle, which resulted in a loss of one holiday day each. Based on the two sustained disciplinary charges, both involving vehicles, and considering the facts of the case, the ALJ found that major disciplinary action was warranted. However, the ALJ modified Carteret's 45 working day suspension to a 30 day working suspension, as he found the reduced penalty met Carteret's goals for imposing a suspension, while still adhering to the concept of progressive discipline.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. Clearly, the appellant's actions had the potential to be much more serious and tragic and warranted a finding of conduct unbecoming a public employee, misuse of public property and violation of Carteret's Police Department's rules and regulations. However, as discussed further below, the Commission does not adopt the ALJ's recommendation to modify the 45 working day suspension to a 30 working day suspension.

In determining the proper penalty, the Commission's review is *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In the instant matter, the Commission notes that the appellant was a relatively long-term employee with only two minor disciplines, which each resulted

in a loss of one holiday day. Therefore, in light of these circumstances, the Commission shall modify the appellant's 45 working day suspension to a 20 working day suspension. However, the Commission emphasizes, that it does not condone the appellant's misconduct since as stated above, the appellant's action could have led to more tragic results. Therefore, even though the penalty is reduced, the appellant's infractions were serious enough to warrant major discipline. Further, given the infractions, the Commission orders that the appellant undergo retraining regarding the appointing authority's rules and regulations concerning the operation of a motor vehicle, emergency calls and the use of lights and siren.

Since the penalty has been modified, the appellant is entitled to 25 days of mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission agreed with the ALJ's determination sustaining the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. In light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

ORDER

The Civil Service Commission finds that the appointing authority's action of imposing a 45 working day suspension was not justified under the circumstances and modifies that action to a 20 working day suspension. Additionally, the Commission orders that the appellant undergo retraining regarding the appointing authority's rules and regulations concerning the operation of a motor vehicle, emergency calls and the use of lights and siren. The Commission further orders that the appellant be granted 25 days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be

submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 02360-17
AGENCY DKT. NO. 2016-3502

IMO MATTHEW A. GOMM, BOROUGH OF CARTERET POLICE DEPARTMENT.

Leonard C. Schiro, Esq., for Matthew A. Gomm, appellant (Mets, Schiro & McGovern, LLC, attorneys)

Robert Bergen, Esq., Law Director, for Borough of Carteret, Police Department, respondent

Record Closed: November 3, 2017 Decided: December 22, 2017

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

Appellant Matthew A. Gomm (Gomm) appeals from a forty-five day suspension from his position as a Police Officer, imposed by his employer the Borough of Carteret (Carteret). The suspension resulted from charges of conduct unbecoming a public employee, misuse of public property, other sufficient cause and Borough of Carteret Police Department Rules and Regulations. Gomm denies these charges, maintaining that he did nothing wrong and submitted that he acted appropriately due to what he felt to be the emergent nature of a call by another officer.

PROCEDURAL HISTORY

On August 5, 2015, Carteret issued a Preliminary Notice of Disciplinary Action (PNDA) setting for the charges and specifications made against Gomm (R-1). This was served on Gomm on August 7, 2015. Following a disciplinary hearing held on October 7, 2015, Carteret, on March 9, 2016[1], issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA which notice was served on Gomm on March 4, 2016[2].

On March 24, 2016 Gomm requested a hearing, and on February 13, 2017 the Civil Service Commission transmitted the contested case to the Office of Administrative Law (OAL) where it was filed on February 16, 2017. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on October 4, 2017. The record was held open for simultaneous written summations which were filed on October 27, 2017, and the record closed on November 3, 2017.

FACTUAL DISCUSSION

The following facts are not disputed. On July 20, 2015, shortly before 13:50 hours, Officer Justin Terebetski (Terebetski) issued a call for a warrant check on H.C.[3]. Terebetski had just observed H.C. getting into a taxi in the area of Holmes Street and Washington Avenue. Dispatch indicated that there was an active warrant on H.C.

Gomm was on duty and was driving a marked police vehicle. He was located on Marion Street and went to aid Terebetski. While on route, Gomm activated his lights and sirens. He proceeded through a number of intersections at a speed in excess of the posted speed limit. While driving on Washington Avenue, Gomm observed vehicles on Washington Avenue in front of him. As Gomm attempted to pass them, using the

[1] The date typed into the form
[2] The handwritten date on the form.
[3] Abbreviations will be used in lieu of the names of suspects mention during testimony.

oncoming lane, one of the vehicles turned left and moved across the double yellow line dividing the lanes. Gomm attempted to stop and in that attempt, drove over the sidewalk adjacent to the oncoming lane of traffic. He struck a decorative pole in front of a residence on Washington Avenue. Gomm then drove back onto Washington Avenue and was struck by the vehicle he was trying to avoid, causing Gomm to drive up on the sidewalk again where his vehicle stopped.

Information on the accident was detailed in a police report prepared by Sgt. Frank Ciarkowski (Ciarkowski) (R-3) and in an arrest report regarding the other driver (P-1). Information on the accident was also provided through the video recording taken in the police vehicle (R-2).

TESTIMONY

For Respondent

Dennis McFadden, Deputy Chief of Police detailed his training, experience and background in approximately thirty-four years in law enforcement. On the date of the incident he was the Deputy Chief of Police for Carteret Borough in charge of the patrol division.

McFadden provided background information regarding the date of the incident and stated that the initial call was for a warrant check for credit card fraud against H.C. Officer Terebetski had observed H.C. getting into a taxi proceeding on Washington Street. Terebetski asked for a check to see if H.C. had any open warrants. Dispatch responded to Terebetski that H.C. had an active warrant.

Gomm proceeded to aid Terebetski, although Gomm had not notified dispatch of his action. McFadden stated that Gomm traveled 60 mph on Cypress Street and crossed an intersection at Cypress at 40 mph. The estimate of speed was taken from the video recording within the vehicle. Terebetski reported that he had stopped the taxi at Roosevelt and Grant Avenue, approximately a quarter mile from Gomm's location.

As Gomm was proceeding to assist Terebetski, Officer Paul Stentella stated that he (Stentella) would be with him (Terebetski).

While Gomm was travelling on Washington Avenue, with sirens and lights activated, the accident occurred. McFadden testified that he reviewed the accident report and the video from the police vehicle and requested that Gomm provide a statement regarding the incident, which Gomm did provide (R-6).

Gomm's report contained information on his actions, but also contained several statements that McFadden did not agree with. Specifically, Gomm stated that H.C. had several warrants outstanding; however, dispatch only mentioned one. Gomm stated that Terebetski did not state if H.C. was alone or with accomplices, as Gomm has never seen H.C. alone – he was usually with relatives with criminal records. However, this information was not detailed by dispatch. Gomm stated he knew H.C. tended to run from the police; however, this information was not detailed by dispatch. Gomm stated he felt it was his duty to respond as the area where the incident was occurring was in Gomm's assigned zone of the day; however, this information was not relayed to dispatch.

According to McFadden, Gomm's report stated that at the time he (Gomm) decided to respond, he activated his overhead lights and sirens. As he approached each intersection he scanned the area for pedestrians and vehicles. As he turned on to Washington Avenue he heard Stentella stating that he (Stentella) was out with them – which Gomm took to mean that there were possibly several individuals. As he approached the intersection of Washington Avenue at Randolph Avenue he observed three vehicles ahead of him. Gomm thought the vehicles had heard his siren and seen his lights as they moved to the right side of the roadway. He stated that based on his training and experience, the conditions and the observation of the vehicles he could pass the vehicles and continue to what he felt was an "emergent" situation.

Gomm's report detailed the accident, his subsequent notification to his headquarters to dispatch EMS and advised that he was trapped in his vehicle. He was

ultimately able to extricate himself and met responding vehicles. He stated that at that point he advised the responders that he had back, neck and shoulder pain but that EMS should attend to others on the scene first.

His statement further detailed statements of on-site witnesses and states that he conducted himself in a professional manner and that the cause of the accident was due to the other driver. He further stated that the other driver did not have a valid driver's license.

After reviewing the accident report, Gomm's statement, and the video from the vehicle, it was McFadden's opinion was that the other driver did not have enough time to observe Gomm and get out of Gomm's way. McFadden issued a report to Police Chief John Pieczyski detailing the investigation and found that Gomm's "excessive speed" caused the accident (P-4).

McFadden stated that he considered this to be a warrant arrest for a nonviolent crime, that there were already 3 or 4 officers at the site, Gomm did not advise dispatch that he was going to the site and as such, Gomm's actions caused the accident.

McFadden also stated that Carteret's Rules and Regulations 11:63 Operation of Motor Vehicles and 11:64 Emergency Calls and Use of Red Light and Siren were violated. These rules detail the appropriate use of vehicles and the use of lights and sirens.

For Appellant

Patrolman Matthew Gomm testified on his own behalf. Gomm stated that he has been a Patrolman since 2008. He detailed driver training he received at Rutgers University and at the Police Academy.

He stated he heard the call from Terebetski and knew H.C. from prior experience. Gomm stated he had arrested H.C. on 3 occasions. He responded to the

call with lights and sirens and was familiar with the area and the streets he would be traveling. He reduced his speed at intersections and acted with caution. He stated that he had responded to similar situations with lights and sirens.

He disagreed with McFadden's testimony as Gomm thought this was an emergent matter. Gomm stated that he knew H.C. had multiple warrants, was usually with others (who had warrants also) and was a "runner". He did not call in to dispatch that he was responding because the occurrence was in his zone. He said when he realized what was happening, as the accident unfolded, he tried to drive evasively to avoid an accident, but drove up on the sidewalk and the accident occurred.

FINDINGS OF FACT

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself" in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-522. See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Although both witnesses were credible, McFadden has had thirty-four years of experience in law enforcement and his testimony shows that he perceived the situation as would a supervisor. His view of the situation dealt with it as it was, from the

information that was known. Gomm's perspective took into consideration information that he said was known to him. This information, however, was not necessarily known to others in charge. Gomm did not relay this information to his dispatch or supervisors and thereby created a situation which led to the subject accident. On balance, McFadden's experience and circumspect view carried more weight.

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

On July 20, 2015 Officer Terebetski observed H.C. getting into a taxi proceeding on Washington Street. Terebetski asked for a check to see if H.C. had any open warrants. Dispatch responded to Terebetski that H.C. had an active warrant.

Officer Gomm was at another location and decided to proceed to aid Terebetski. Gomm did not notify dispatch of his action. Gomm traveled at approximately 60 mph on Cypress Street and crossed an intersection at Cypress at approximately 40 mph. As Gomm was proceeding to assist Terebetski, Gomm heard Officer Paul Stentella stated that he (Stentella) would be with him (Terebetski).

Gomm had his siren and lights activated during the majority of the time while he was proceeding to aid Terebetski. While Gomm was proceeding on Washington Avenue, the accident as detailed herein occurred.

Deputy Chief McFadden reviewed the accident report, reviewed the video from the police vehicle and reviewed Gomm's statement. McFadden's review led to his position that the accident occurred due to Gomm's speed and the inability of the other driver to get out of Gomm's way.

Terebetski's initial call related to a warrant stop. Gomm traveled at an excessive rate of speed considering the circumstances. Gomm's actions were the proximate cause of the accident occurring at approximately 13:50 on July 20, 2015.

LEGAL ANALYSIS AND CONCLUSION

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In this matter, Carteret has sustained charges of: Conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); Misuse of public property, including motor vehicles in violation of N.J.A.C. 4A:2-2.3(a)(8); Other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11); Borough of Carteret Police Department Rules and Regulations Sec. 11-63; Operation of Motor Vehicles; and Borough of Carteret Police Department Rules and Regulations Sec. 11-64; Emergency Calls and Use of Red Light and Siren.

Gomm was charged with "conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the

public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). The New Jersey Supreme Court, in In re Phillips, 117 N.J. 567, 576-77 (1980), recognized that the obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official:

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public, particularly in a small community (quoting Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)).

Gomm testified that he wanted to assist Terebetski as he had knowledge of H.C., H.C.'s accomplices, and outstanding warrants on H.C. McFadden stated that, as this was a warrant arrest, and did not constitute an emergency, Gomm's excessive speed unnecessarily caused of the accident. Further, McFadden stated that the speed at which Gomm was traveling would only be justified in a situation where life and property are at risk - and that lights and sirens should be used with utmost caution.

Gomm's response to Terebetski's call had the potential to be much more serious and tragic as he traversed both local and County roads and intersections at a high rate of speed. Gomm's desire to assist Terebetski caused him to disregard appropriate safety rules and proper protocols, considering this was not an emergent situation. Accordingly, I **CONCLUDE** that Carteret proved by a preponderance of the credible evidence that Gomm violated N.J.A.C. 4A:2-2.3(a)(6).

Regarding the charge of Misuse of Public Property, N.J.A.C. 4A:2-2.3(a)(8). The misuse is tied to operation of his police vehicle in a manner not within appropriate safety protocols. Flowing through the charge of Conduct Unbecoming, the petitioner

utilized his vehicle in a manner which jeopardized the public, public property, government property and himself. Accordingly, I **CONCLUDE** that Carteret proved by a preponderance of the credible evidence that Gomm violated N.J.A.C. 4A:2-2.3(a)(8).

Gomm has also been charged with violating N.J.A.C. 4A:2-2.3(a) (12), "Other sufficient cause." Specifically, Gomm is charged with the following violations of the Borough of Carteret Police Department Rules and Regulations: Sec. 11-63; Operation of Motor Vehicles; and Borough of Carteret Police Department Rules and Regulations Sec. 11-64; Emergency Calls and Use of Red Light and Siren. Consideration of such violation(s) will be addressed in concert with the current analysis. Gomm was under the presumption that he was assisting to apprehend a known felon, but created a dangerous situation in his ill-fated attempt to assist Terebetski. However, he was taking into consideration information not relayed by dispatch and did not report his actions or progress to dispatch. He made presumptions regarding the observations and actions of other officers which could have been clarified and resolved if he had contacted dispatch. His actions using his police vehicle, his lights and his sirens in an unsafe and inappropriate manner, considering the circumstances, were unjustified and unsafe. Accordingly, I **CONCLUDE** that Carteret has met its burden in demonstrating a violation of Borough of Carteret Police Department Rules and Regulations Sec. 11-63; Operation of Motor Vehicles; and Borough of Carteret Police Department Rules and Regulations Sec. 11-64; Emergency Calls and Use of Red Light and Siren. Accordingly, I **CONCLUDE** that, after consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a) (12) (Other Sufficient Cause) as limited to the specific rules and regulations enumerated in the FNDA, that Carteret has met its burden of proof in demonstration of the charge of Other Sufficient Cause.

PENALTY

A civil service employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident

complained of and/or the employee's past record, major discipline may include removal. West New York v. Bock, 38 N.J. 500, 522–24 (1962). Once a determination is made that an employee has violated a statute, rule, regulation, etc., concerning his/her employment, the concept of progressive discipline must be considered. Bock, supra, 38 N.J. 500.

In the present case, Gomm has not received any major disciplinary actions during his career with Carteret. He received two minor disciplines resulting in a loss of 1 holiday day each. Both disciplinary actions involved operation of his police vehicle. As to the penalty of a forty-five day suspension, the issue is whether it is too harsh under the circumstances. I must consider whether the spirit of progressive discipline is upheld by Gomm's forty-five day suspension. Progressive discipline is intended to give the employee notice and an opportunity to correct the improper behavior. Based upon Gomm's two sustained disciplinary charges, both involving vehicles, and in light of the facts of the incident, a major disciplinary action is warranted. After having considered all the evidence in this matter and the possible impact upon the public caused by unsafe and reckless operation of a motor vehicle in response to a warrant call, and after having given due consideration to progressive discipline, I **CONCLUDE** that a thirty-day suspension meets the goals that Carteret set forth in arguing for imposing a forty-five day suspension, while still adhering to the concept of progressive discipline.

DECISION AND ORDER

I hereby **ORDER** that the charges in the Final Notice of Disciplinary Action against Matthew A. Gomm be **AFFIRMED**. However, I **ORDER** the penalty modified from forty-five days to thirty days.

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

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

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

12/22/2017
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 12/22/17

Date Mailed to Parties: 12/22/17

/lam

LIST OF EXHIBITS

For appellant:

P-1 Carteret Police Adult Arrest Report, dated July 7, 2015

For respondent:

R-1 Preliminary Notice of Disciplinary Action, dated August 5, 2015
R-2 DVD
R-3 New Jersey Police Crash Investigation Report, dated July 20, 2015
R-4 Administrative Submission, dated July 28, 2015
R-5 Final Notice of Disciplinary Action, dated March 9, 2016
R-6 Letter, dated July 26, 2015
R-7 List of Duties
R-8 Notice of Minor Disciplinary Action, dated May 24, 2012
R-9 Final Notice off minor Disciplinary Action, dated July 2, 2014

LIST OF WITNESSES

For appellant:

Dennis McFadden

For respondent:

Matthew A. Gomm

3-27-18

A-6

STATE OF NEW JERSEY

In the Matter of Billie Hayes
Division of Medical Assistance and
Health Services,
Department of Human Services

CSC DKT. NO. 2017-221
OAL DKT. NO. CSV 11466-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Billie Hayes, Quality Control Reviewer, Division of Medical Assistance and Health Services, Department of Human Services, removal and resignation not in good standing effective April 18, 2016, on charges, was heard by Administrative Law Judge Sarah G. Crowley, who rendered her initial decision on September 15, 2017.[1] Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission therefore grants the appointing authority's motion for summary decision and dismisses the appeal of Billie Hayes.

[1] This matter was consolidated with three other disciplinary appeals filed by the appellant. However, this decision only pertains to this matter and the other three remain pending at the Office of Administrative Law.

Re: Billie Hayes

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECEISION
OAL DKT. NOS. CSV 11466-16; 11468-16; 11471-16; 11474-16
AGENCY DKT. NOS. 2017-221, 2017-219, 2015-1554, 2017-222
(CONSOLIDATED)

IN THE MATTER OF BILLIE HAYES, DEPARTMENT OF HUMAN SERVICES, MEDICAL ASSISTANCE AND HEALTH SERVICES.

William A. Nash., Esq. for appellant, Billie Hayes (Nash Law Firm, L.L.C., attorneys)

Rimma Razhba, Deputy Attorney General, for respondent, Department of Human Services (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: August 7, 2017 Decided: September 15, 2017

BEFORE **SARAH G. CROWLEY,** ALJ:

PROCEDURAL HISTORY

Billie Hayes (appellant), was employed as a Quality Control Reviewer for the respondent, Department of Human Services, until his removal effective April 18, 2016.

Appellant was charged with absence from work without permission; abandonment of job as a result of absence from work; and chronic absenteeism. The Preliminary Notice of Discipline (PNDA) was served on April 18, 2016, and a Final Notice of Discipline (FNDA) served on June 10, 2016. The appellant filed an appeal, and that matter was transmitted to the Office of Administrative Law as a contested matter on July 28, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On March 24, 2017, respondent filed a motion for summary decision on the within charges.[1] Opposition to the motion was filled by the appellant on July 13, 2017. A response to the opposition was filed by the respondent on August 7, 2017.

FACTUAL DISCUSSION

The essential facts in this case are not disputed and are as follows:

1. The appellant was out on approved worker's compensation leave from November 6, 2014, through April 10, 2016, as a result of a workplace injury that he sustained on or about November 5, 2014.

2. The appellant was given several extensions on his leave, and was cleared to return to work on April 10, 2016, by his treating physician, Dr. Vasko Gulevski.

3. Dr. Gulevski submitted a return to work form dated April 6, 2016, in which he certifies that Billie Hayes was seen or treated in his office on that date and may return to work on April 10, 2016.

4. Treatment Notices from Dr. Gulevski dated March 17, 2016, were also provided to the employer.

[1] There are several other disciplinary matters that are pending against the appellant, which have been consolidated with this matter. The within motion only relates to OAL Docket No. 11466-16.

5. Neither the notes or the return to work certification from Dr. Gulevski request an accommodation for the appellant under the ADA. The appellant never requested an accommodation.

6. On April 7, 2016, in response to the return to work notice, the respondent sent a letter to the appellant which advised that "you may have a need for a work accommodation, therefore, I am enclosing the American with Disability Act (ADA) accommodation forms for you review and completion."

7. The appellant did not respond to the correspondence or ask for an accommodation either in writing, or verbally.

8. On April 11, 2016, the date the appellant was to return to work, he sent an email at 8:30 a.m. which stated "I would like to use 7 hours of AL time today 4-11-16. Thanks."

9. The appellant was advised by the respondent on April 12, 2016, that he was not permitted to call out or request time off by email, and must have direct contact with a person at work. The letter further advised appellant that he had no remaining time available, and was therefore, "out on authorized leave as of Monday, April 11, 2016."

10. The appellant did not respond to this letter and had no further contact with the respondent, by phone or email. The appellant did not return to work on April 12, 2016, April 13, 2016, April 14, 2016, or April 15, 2015. The appellant did not request time off or an accommodation.

11. On Monday, April 18, 2016, a Preliminary Notice of Disciplinary Action (PNDA) was issued, charging the appellant with a violation of N.J.A.C. 4A:6-1.10, regarding approval for leave of absence.

12. A second PNDA was issued on charging appellant with being absent from work without permission or proper notice, and job abandonment in violation of N.J.A.C. 4A:2-6.2(c).

The foregoing facts are not disputed and I **FIND** them as **FACT:**

STATEMENT OF ISSUE

The issue presented in this Motion for Summary Decision is whether the respondent is entitled to a decision as a matter of law on the discipline related to unauthorized leave, job abandonment and excessive absenteeism. The respondent has opposed the motion on the grounds that a request for an accommodation was made, and thus, the respondent was required to respond to such a request before terminating the appellant. The appellant has provided no evidence that a request for an accommodation was ever made.

LEGAL ARGUMENT AND CONCLUSION

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection, therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'.

[Brill, supra, 142 N.J. at 540 (citations omitted).]

Pursuant to N.J.A.C. 1:12-59(b), "an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding." The non-moving party must present more than his own self-serving facts to establish the existence of a material issue of fact. Fargas v. Gorham, 276 N.J. Super. 135, 139 (Law. Div. 1994).

The material facts in this case are undisputed. The appellant had been on approved leave for seventeen months as a result of a work-related injury. On April 6, 2016, appellant's treating physician cleared him to return to work on April 10, 2016. The certification contains no request for an accommodation, nor do the treatment notes which were submitted with the certification for return to work. The respondent sent a form letter to the appellant regarding his return to work, which included a statement that he "may" qualify for an accommodation, and if so, he should request it. The April 7, 2016, letter provided documentation to assist in the event a request for an accommodation was made. However, neither appellant or his doctor ever requested an accommodation, either verbally or in writing.

The appellant has argued that Dr. Gulevski stated that appellant would need an accommodation and requested such an accommodation on his behalf. However, no documentation to support this argument has been submitted. The documentation which was provided by the appellant made no such request. Neither the certification or the treatment notes from Dr. Gulevski request an accommodation. The appellant has not presented any material facts in dispute to warrant a hearing. The appellant's reliance on Administrative Order 4:07 is misplaced. These rules, are only applicable when a request for an accommodation is made. There is no evidence that any such request was ever made. The undisputed facts demonstrate that no request was ever made and appellant failed to return to work on April 11, 2016, and every day thereafter.

I therefore **CONCLUDE** that appellant's failure to return to work on April 11, 2016, constituted an absence without permission. I also **CONCLUDE** that the appellant's refusal to return to work for five consecutive days without leave or

permission constitutes job abandonment as well as excessive absenteeism. Accordingly, the charges are hereby **SUSTAINED**.

It is therefore hereby **ORDERED** that the respondent's motion for summary decision be and hereby is **GRANTED,** and the appeal is hereby **DISMISSED.**

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

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

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

September 15, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: September 15, 2017 (emailed)

Date Mailed to Parties: September 15, 2017 (emailed)

/mel

APPENDIX

BRIEFS RELIED ON

For Appellant:

Appellant's opposition to Motion for Summary Decision, dated July 13, 2017

For Respondent:

Respondent's motion for Summary Decision, dated March 22, 2017.

EXHIBITS

For Appellant:

A-1 Affidavit of appellant

For Respondent:

R-1 Administrative Order 4:08

R-2 RWJUHH Occupational Health Patient Visit Summary and Instructions dated November 10, 2014

R-3 Dr. Vasko Gulevski Medical Report dated March 17, 2016

R-4 Return to Work Note dated April 6, 2016

R-5 Letter from Christine Boriolo, ADA Coordinator to Billie Hayes dated April 7, 2016

R-6 E-mail from Billie Hayes to Sharon Metro dated April 11, 2016

R-7 E-Mail from Sharon Metro to Billie Hayes dated March 10, 2016

R-8 Memorandum from John Karl, Jr., Employee Relations Coordinator to Billie Hayes dated April 12, 2016

R-9 Preliminary Notice of Disciplinary Action dated April 18, 2016 (Case Id. 16-016)

R-10 Preliminary Notice of Disciplinary Action dated April 18, 2016 (Case Id. 16-020)

R-11 Preliminary Notice of Disciplinary Action dated April 19, 2016 (Case Id. 16-021)

R-12 E-Mail from John Karl to Billie Hayes dated June 9, 2016

R-13 Hearing Officer Report dated June 17, 2016 (Case Id. 16-016)

R-14 Hearing Officer Report dated June 17, 2016 (Case Id. 16-020)

R-15 Hearing Officer Report dated June 17, 2016 (Case Id. 16-021)

R-16 Final Notice of Disciplinary Action dated June 22, 2016 (Case Id. 16-016)

R-17 Final Notice of Disciplinary Action dated June 22, 2016 (Case Id. 16-020)

R-18 Final Notice of Disciplinary Action dated June 22, 2016 (Case Id. 16-021)

3-27-18

STATE OF NEW JERSEY

In the Matter of William Heine
County of Bergen,
Department of Parks

CSC DKT. NO. 2017-1986
OAL DKT. NO. CSV 03144-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03144-17
Agency DKT. NO. 2017-1986

IN THE MATTER OF WILLIAM HEIN, COUNTY OF BERGEN, DEPARTMENT OF PARKS.

Gail Oxfeld Cohen, Esq., for appellant (Oxfeld Cohen, P.C., attorneys)

Eric M. Bernstein, Esq., for respondent (Eric M. Bernstein and Associates, LLC,)

Record Closed: February 9, 2018 Decided: February 13, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On March 6, 2017, the Civil Service Commission transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

2/13/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

dr

Attachment

PLEASE CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THIS DOCUMENT, YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS THAT YOU MAY HAVE.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter referred to as the "AGREEMENT"), is made this ___ day of _____, 2018 by and among the County of Bergen, a governmental entity created under the laws and Constitution of the State of New Jersey, whose principal offices are located at One Bergen County Plaza, Hackensack, New Jersey 07601 (hereinafter referred to as the "COUNTY") and William Heine, a former employee of the COUNTY, with a mailing address of 24 Butternut Drive, Vernon, NJ 07462 (hereinafter referred to as "HEINE").

1. The COUNTY, as defined and used throughout this Agreement, shall at all times mean the COUNTY OF BERGEN, its divisions, subdivisions, departments, agencies, affiliates, designees, predecessors, successors and assigns of any and all of them, their past, present and future directors, officers, officials (elected and/or appointed), representatives, employees, agents, attorneys and/or representatives, heirs, executors and administrators, whether in their individual or official capacities, in the past, present and future.

2. HEINE, as defined and used throughout this Agreement, shall mean WILLIAM HEINE, his family (by marriage and/or blood relation), relatives, heirs, representatives, designees, privies, executors, administrators, representatives, assigns, successors-in-interest and predecessors-in-interest.

3. The parties agree that this AGREEMENT is contingent upon and subject to execution by HEINE and approval and execution by the COUNTY.

4. In consideration of the mutual promises of this AGREEMENT and for other good and valuable consideration, the sufficiency of which the parties hereby acknowledge, the parties agree to resolve all controversies and disputes between them under the terms of this AGREEMENT.

a. HEINE was formerly employed by the COUNTY in the title of Mechanic.

b. On or about October 6, 2016, the COUNTY served HEINE with a Preliminary Notice of Disciplinary Action (hereinafter referred to as "PNDA I") and a Loudermill notice.

c. On or about November 11, 2016, while PNDA I was pending, the COUNTY served HEINE with a second (2nd) Preliminary Notice of Disciplinary Action (hereinafter referred to as "PNDA II").

d. On or about December 9, 2016, the COUNTY served HEINE with a Final Notice of Disciplinary Action (hereinafter referred to as "FNDA") in which the COUNTY sustained the charges listed in PNDA II and terminated HEINE's employment, effective December 30, 2016.

e. HEINE timely appealed his termination as to PNDA II, in a matter entitled "Heine, William v. County of Bergen," OAL Docket No. CSV 03144-2017-N, Agency Ref. No. CSC Dkt# 2017-1986 (hereinafter referred to as the "OAL Action").

f. On or about November 9, 2017, the parties appeared for a settlement conference in the OAL Action before the Hon. Barry E. Moscowitz, A.L.J. and, in order to avoid the time and expense of proceeding with the OAL Action, reached a settlement which was placed on the record and agreed to by both parties.

5. The COUNTY and HEINE, through their respective attorneys and/or representatives, hereby agree to enter into the within AGREEMENT upon the following terms and conditions, which are now to be made effective:

a. The COUNTY shall pay HEINE the amount of Twenty-Two Thousand Five Hundred Dollars and Zero Cents ($22,500.00), less all applicable payroll deductions, by check no later than the next payroll date occurring after the full execution of this AGREEMENT by all parties; provided, however, that no payment shall be required or made until after the expiration of the seven (7) day revocation period set forth in Paragraph 19 below. Such amount shall be treated for all purposes as wage income for the period January 1, 2017 to June 30, 2017 and will be reflected on an IRS form W-2.

b. The COUNTY shall cause HEINE's employment/personnel/pension records to reflect that his separation from employment with the COUNTY was due to "Resignation in Good Standing" and not "Termination," effective December 31, 2016.

c. HEINE shall withdraw the OAL Action with prejudice.

6. HEINE agrees not to contest, in any judicial, quasi-judicial and/or administrative forum, any of the terms and conditions of this AGREEMENT.

7. HEINE and the COUNTY acknowledge that the parties enter into this AGREEMENT solely to avoid expensive and burdensome disciplinary and/or administrative proceedings. This AGREEMENT is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between HEINE and the COUNTY as set forth herein or to enforce the terms of this AGREEMENT. No party hereto admits to any wrongdoing and/or any liability as to any and/or all of their actions regarding each other.

8. HEINE releases, acquits, gives up and forever discharges any and all claims and rights that he may have against the COUNTY and any and all of its officials (elected and/or appointed), officers, employees, representatives, assigns, successors and designees, up to the time

of complete execution of this AGREEMENT by all parties. This releases any and all claims, including those that HEINE, his family, designees, representatives and assigns are not aware and those not mentioned in this Agreement. This AGREEMENT applies to claims resulting from anything that has happened from HEINE's first (1st) date of application for employment with the COUNTY through the date of complete execution of this AGREEMENT by all parties. HEINE specifically releases the following claims:

a. Any collective bargaining agreement with the COUNTY covering HEINE and/or any other resolution, ordinance, policy, practice or procedure addressing, specifically or generally, HEINE'S employment with the COUNTY;

b. The National Labor Relations Act;

c. Title VII of the Civil Rights Act of 1964;

d. Sections 1981 through 1988 of Title 42 of the United States Code (Civil Rights Act of 1871);

e. Civil Rights Act of 1991;

f. The Americans with Disabilities Act ("ADA");

g. The Rehabilitation Act of 1973;

h. The Age Discrimination in Employment Act ("ADEA");

i. The Fair Labor Standards Act ("FLSA");

j. The Occupational Safety and Health Act ("OSHA") and the New Jersey Public Employee Occupational Safety and Health Act ("NJPEOSHA");

k. The Equal Pay Act;

l. The Employee Retirement Income Security Act ("ERISA");

m. The New Jersey Law Against Discrimination ("LAD");

n. The New Jersey Conscientious Employee Protection Act ("CEPA");

o. The Family and Medical Leave Act (Federal) and the Family Leave Act (New Jersey);

p. The Federal and New Jersey State Wage and Hour Acts;

q. The Federal and New Jersey State Equal Pay Law;

r. The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA");

s. The New Jersey Civil Rights Act;

t. The New Jersey Employer-Employee Relations Act;

u. Any other Federal, State and/or local civil rights law or any other local, State or Federal laws, regulations, statutes or ordinances involving labor/employment or other applicable matters;

v. Any claims under public policy, contract (express, written, implied or oral), tort and/or common law;

w. Any claims for terminal, vacation, sick and/or personal leave with or without pay or payment pursuant to any practice, policy, handbook or manual of the COUNTY;

x. Any allegation for costs, fees or other expenses, including but not limited to attorneys and/or representatives' fees; and/or,

y. ANY AND ALL CAUSES OF ACTION, CLAIMS OR DAMAGES, WHETHER KNOWN OR UNKNOWN AS OF THE DATE OF EXECUTION OF THIS AGREEMENT, ARISING FROM OR RELATING IN ANY WAY TO ANY AND/OR ALL PORTIONS OF HEINE'S EMPLOYMENT WITH THE COUNTY, FROM THE FIRST (1ST) DATE OF HIS EMPLOYMENT APPLICATION WITH THE COUNTY THROUGH AND INCLUDING THE DATE OF COMPLETE EXECUTION OF THIS AGREEMENT BY ALL PARTIES.

This covers any and all amendments and supplements to any and/or all such laws, statutes, rules and/or regulations. Workers' Compensation claims, if any, shall be preserved by operation of N.J.S.A. 34:15-39, if applicable.

9. All of the terms and conditions herein are specific to this AGREEMENT and shall not serve as a precedent for any other future agreements with any other applicant/employee/ official/officer of the COUNTY nor used as an indication of future actions of the COUNTY.

10. HEINE agrees that the within waiver and release in favor of the COUNTY shall also include his waiver and release from joining or being included in any class or collective action litigation in which any claim is asserted against the COUNTY by HEINE, involving any event that has occurred on or before HEINE's execution of this Agreement, unless HEINE is found to be an indispensable party and ordered by a court to become a party to any such action. A copy of any such Order will be provided to the COUNTY for its records and response.

11. The waiver by HEINE or the COUNTY of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

12. This AGREEMENT contains the full agreement of HEINE and the COUNTY and may not be modified, altered, changed or terminated, except upon the express prior written consent of HEINE and the COUNTY, which consent must be in writing and signed by HEINE and the COUNTY and/or their duly authorized agents.

13. If any term, provision or condition of this AGREEMENT is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this AGREEMENT.

14. This AGREEMENT shall be construed and interpreted in accordance with the laws of the State of New Jersey.

15. This AGREEMENT shall become effective immediately as to HEINE following execution by HEINE and shall become effective upon the COUNTY after approval and execution by all applicable COUNTY officials.

16. HEINE and the COUNTY shall bear all costs and expenses arising from the actions of their own counsel and/or representatives in connection with this AGREEMENT.

17. This AGREEMENT shall be binding upon and inure to the benefit of the parties and the officials (elected and/or appointed), officers (elected and/or appointed), directors, attorneys and/or representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

18. All notices, demands and requests that are required and/or desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

FOR THE COUNTY OF BERGEN:

Eric M. Bernstein, Esquire
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
34 Mountain Boulevard, Building A
P.O. Box 4922
Warren, New Jersey 07059-4922

WITH A COPY TO:

Julien X. Neals, Esq., County Counsel/ Acting County Administrator
County of Bergen
One Bergen County Plaza, 5th Floor
Hackensack, New Jersey 07601

FOR WILLIAM HEINE:

WILLIAM HEINE
24 Butternut Drive

Vernon, New Jersey 07462

WITH A COPY TO:

Gail Oxfeld Kanef, Esq.
OXFELD COHEN, P.C.
60 Park Place
Newark, New Jersey 07102

19. HEINE understands and agrees that the COUNTY could have given him twenty-one (21) calendar days from the date of his receipt of this AGREEMENT to consider and review this AGREEMENT with his attorney and/or representative. By his signature below, HEINE agrees to waive the twenty-one (21) calendar day provision. Following his execution of this AGREEMENT, HEINE has a period of seven (7) calendar days to revoke this AGREEMENT. Revocation of the AGREEMENT must be undertaken by advising the COUNTY'S attorney in writing by 5:00 P.M. on the seventh (7^{th}) calendar day following HEINE'S execution of this AGREEMENT. Failure to advise shall be considered a waiver. If the AGREEMENT is revoked, this AGREEMENT becomes null and void and the COUNTY will proceed with the OAL Action.

20. In entering into this AGREEMENT, HEINE has relied upon the legal advice of his attorney and/or representative, who is the attorney and/or representative of his own choosing, as to the terms of this AGREEMENT, which terms have been fully explained by his attorney and/or representative and fully understood and voluntarily accepted by HEINE. By executing this AGREEMENT, HEINE warrants and affirms that, at the time of said execution, he was not suffering from any mental or psychological disorder, nor was he under the influence of alcohol or any drug and/or medication, prescribed by a physician or otherwise, which would prevent him from understanding the terms of this AGREEMENT. Furthermore, HEINE, by executing this AGREEMENT, warrants and affirms that he was not under any mental duress and was not coerced by any individual or other party to enter into this AGREEMENT. HEINE expressly acknowledges,

represents and warrants that: (a) he has carefully read this AGREEMENT; (b) he fully understands the terms, conditions, and significance of this AGREEMENT; (c) he has had ample time to consider and negotiate this AGREEMENT; (d) he has had a full opportunity to review this AGREEMENT; (e) he is able to make an informed decision and is not physically, medically or mentally incapacitated so that he is able to make an informed decision to accept the AGREEMENT; and, (f) he has executed this AGREEMENT voluntarily and knowingly, and with the advice of his own counsel and/or representative, if applicable.

IN WITNESS WHEREOF, WILLIAM HEINE and THE COUNTY OF BERGEN have hereunto set their hands this 24 day of January 2018.

Witness:

WILLIAM HEINE

WILLIAM HEINE

Dated: 1/24/18

Dated: 1/24/18

Attest:

COUNTY OF BERGEN

Julien X. Neals, Esq.,
County Counsel/ Acting County Administrator

Dated: 2/7/18

Dated: 2.7.18

[REST OF PAGE LEFT INTENTIONALLY BLANK]

STATE OF ~~NEW JERSEY~~ NEW YORK :

: SS.:

COUNTY OF ~~BERGEN~~ ORANGE :

I, Robin K. Reynolds, a Notary Public, do hereby certify that WILLIAM HEINE, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 24 day of January, 2018.

Robin K. Reynolds
Notary Public

ROBIN K. REYNOLDS
Notary Public, State of New York
No. 01RE6036215
Qualified in Orange County
Commission Expires January 18, 2022

3-27-18

A-7

STATE OF NEW JERSEY

In the Matter of Franklin Hernandez
City of Perth Amboy

CSC DKT. NO. 2018-1058
OAL DKT. NO. CSR 15611-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Franklin Hernandez, Police Officer, City of Perth Amboy, removal effective January 29, 2016, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on January 18, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Franklin Hernandez.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF FRANKLIN HERNANDEZ, CITY OF PERTH AMBOY.

OAL DKT. NO. CSR 15611-17

Charles J. Uliano, Esq., for appellant Franklin Hernandez (Chamlin, Rosen, Uliano and Witherington, attorneys)

Michael S. Williams, Esq., for respondent City of Perth Amboy (Cruser, Mitchell, Novitz, Sanchez, Gaston and Zimet, LLP, attorneys)

Record Closed: January 8, 2018 Decided: January 18, 2018

BEFORE **JEFF S. MASIN**, ALJ t/a:

On August 7, 2017, the City of Perth Amboy issued a Preliminary Notice of Disciplinary Action (PNDA) against Police Officer Franklin Hernandez, seeking to remove him from employment because he had violated N.J.A.C. 4A:2-2.3(a) (3), inability to perform duties; (5) Conviction of a crime; (6) Conduct unbecoming a public employee; and (12) Other sufficient cause. After a departmental hearing, Hernandez was removed by the appointing authority, effective January 29, 2016, as detailed in a Final Notice of Disciplinary Action (FNDA) issued on October 6, 2017. On October 17, 2017, Hernandez filed a simultaneous appeal with the Civil Service Commission and the Office of Administrative Law, and the contested case was assigned to this judge. A prehearing conference was held with counsel on November 8, 2017. The parties agreed

that the resolution of the contested case necessitated a legal analysis concerning the nature of a violation of the Uniform Code of Military Justice (UCMJ) to which Officer Hernandez pled guilty in 2014. As such, they agreed to file legal argument prior to a hearing scheduled for January 23, 2018. The City then moved for summary decision. N.J.A.C. 1:1-12-5. Hernandez, while not specifically moving for summary decision, contends that a proper understanding of the provision at issue demonstrated that Officer Hernandez's removal was improper and that he should be restored to duty.

The PNDA's Specification of Officer Hernandez's alleged offenses against the Administrative Code identifies that he pled guilty to a "crime consummated by a battery" while a member of the military and that this offense had been against a fellow soldier with whom Hernandez had a "romantic relationship." Additionally, the Middlesex County Prosecutor's Office had advised the City that it considered Hernandez's conviction to constitute a domestic violence offense and that, as such, he was prohibited by statute from possessing firearms, including his service weapon, and was ordered to turn in his personal firearm. The Specification concluded that as a result of this prohibition, Hernandez was incapable of performing his duties as a police officer and that his conduct was unbecoming a public employee. Finally, it charged that he had failed to inform the Police Department of the status of pending charges of serious crime while on military leave under the Uniform Code of Military Justice, in violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and (7), neglect of duty.

Hernandez's Conviction

According to a Stipulation of Fact offered in evidence by Perth Amboy, entered in the military court in the matter of United States of America v. Hernandez, Franklin, Sergeant (SGT), United States Army Headquarters Support Company, on June 29, 2016, and specifically consented to by Sergeant Hernandez, at that time, Hernandez was assigned to Shaw Air Force Base, South Carolina. His primary Military Occupational Specialty was "Military Police." He had enlisted in the New Jersey Army National Guard in January 2008, after having been honorably discharged following seven years of service as a United States Marine. While on active duty in 2014 and

assigned to Camp As Sayliyah, Qatar (CAS), he became involved in what the Stipulation of Facts identifies as a "romantic relationship" with a specialist, here identified by her initials as SPC T. The relationship began on or about September 11, 2014. Specialist T.'s roommate provided a sworn statement that she was aware of the "romantic relationship, noting that Hernandez and SPC T. "act(ed) like a real couple, publicly holding hands even though it was against the rules." This refers to the fact that as a non-commissioned officer, Sergeant Hernandez was prohibited from any fraternization with a junior enlisted soldier. The Stipulation noted that on November 14, 2014, First Sergeant Stuart counseled Hernandez for what Stuart described as a "blatant act of fraternization" between these two. Stuart learned of this relationship on or about that date after he and Sergeant Hernandez's company commander observed the two holding hands. Stuart ordered Hernandez to terminate the relationship "immediately" and to undergo corrective training. Hernandez acknowledged the orders. However, according to the Stipulation, despite the order, Hernandez and SPC T. "continued to engage in a romantic relationship until on or after 16 December 2014."

The Stipulation then describes events that occurred on December 24, 2014. Sergeant. Hernandez and SPC T. had by that date ended their romantic relationship. Each arrived separately at the Top-Off Club on base. They greeted each other, but then engaged in

> a verbal dispute regarding whether SPC T. was seeing other persons. Sergeant Hernandez turned around and grasped with his hand the area on SPC T.'s body where her neck and shoulder met. Sergeant Hernandez did not have SPC. T.'s permission to touch her in that manner. In a sworn statement to Military Police, SPC T. stated that SGT Hernandez forcefully grabbed her by the back of her neck and tried to take her out of the Top-Off club. She stated that before he grabbed her, she had agreed to talk to SGT Hernandez outside of the club so as not to create a scene. She stated that she asked SGT Hernandez to let her tell her friends where she was going and to let her get her purse . . . SGT told her "no," to get her purse only, and to leave with him now. It was at this moment that she stated SGT Hernandez grabbed her neck and tried to take her out of the club. . . T. . . . told Hernandez he was hurting her and to let go of her. . . . He did not let go of her, and it was not until she asked him

> three times to remove his hand and two other Soldiers came to intervene that he finally removed his hand from her neck. . . . Sergeant Hernandez did not have permission to touch SPC. T. in the manner described. . . Hernandez did not believe that she was about to inflict bodily harm upon him. Therefore, he was not acting in self-defense when he touched her. Sergeant Hernandez's touching of SPC T. constituted bodily harm because he offensively touched SPC T. without her consent and without legal justification.

The Specification notes that by definition, Hernandez had committed an assault and battery. In an Offer to Plead Guilty, Hernandez agreed to plead guilty to Specification 5 of Charge III.[1] a violation of Article 128 of the UCMJ, which is also codified at 10 U.S.C. 928.

> Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

After being advised of Sergeant Hernandez's conviction, Perth Amboy notified the Middlesex County Prosecutor's Office of the conviction.

N.J.S.A. 2C:39-7 b. (2) provides

> A person having been convicted in this State or elsewhere of a disorderly persons offense involving domestic violence, whether or not armed with or having in his possession a weapon enumerated in subsection r. of N.J.S. 2C:39-1, who purchases, owns, possesses or controls a firearm is guilty of a crime of the third degree.

On November 30, 2016, the Prosecutor's Office advised the City that it should have Hernandez surrender his firearms because he was a "person not to have weapons." On August 7, 2017, the City filed the PNDA that is the subject of this appeal.

[1] The Offer to Plead Guilty notes that the text of the Specification to which Hernandez pleaded was amended from "grabbing her neck with his hands" to "grasping her neck and shoulder with his hand." He also pled guilty to a charge regarding having alcohol in his quarters and to failing to obey a lawful general order, to wit: engaging in a prohibited relationship with a junior enlisted soldier. Neither of these violations of the UCMJ is relevant to the motion for summary decision.

It should be noted here that the offense to which Sergeant Hernandez pled, 10 U.S.C. 928, does not include any language regarding "domestic violence." Indeed, the parties agree that the UCMJ does not include any crimes that are entitled "domestic violence." Yet, for the prohibitions of N.J.S.A. 2C:39-7 b. (2) to apply there must be evidence that the person who is to be subjected to this criminal sanction for the possession of a firearm has a pre-existing conviction for a disorderly persons offense that "involv[ed] domestic violence."

N.J.S.A. 2C:25-19 a. defines "domestic violence" as

> the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor:
>
> . . . .
>
> (2) Assault N.J.S. 2C:12-1

Thus, the elements of this definition include the occurrence of an act falling within the list of offenses, including assault, and that the act be perpetrated against a "person protected under this act."

The crux of the current dispute is whether Hernandez's plea to the violation of 10 U.S.C. 228 constituted a plea to a "disorderly person's offense involving domestic violence." Perth Amboy agrees with the Prosecutor's Office that it does, and that this fact bars Hernandez from possessing a weapon. As such, he is unable to fulfill the requirements of his job as a police officer and his removal is warranted under that provision of the Administrative Code. Officer Hernandez does not dispute that he pled guilty to an assault. However, he disputes the notion that his plea invokes the prohibition, as he contends that he did not plead guilty to an "offense involving domestic violence." Further, even if the offense might serve in some situations as the predicate for the invocation of the prohibition, the nature of his relationship with the victim of the assault simply does not come within the confines of those relationships defined as "domestic" and thus capable of including "domestic violence." Thus, summary decision must be denied to the City, and he should be restored to his position.

In support of his claim, Officer Hernandez points to the fact that the Army did not "require a guilty plea to an allegation of 'domestic violence.'" As such, there is no predicate offense upon which to base the prohibition, as that only applies where there exists a conviction for "an offense involving domestic violence." Perth Amboy responds that the predicate offense need not include the element of "domestic violence." Further, the facts of the situation acknowledged by Hernandez in the Stipulation of Facts as the grounding for his guilty plea to the assault charge make it clear that what he engaged in was indeed "domestic violence."

Summary Decision

The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986) (Anderson).

In Judson, , at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be

something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106 S.Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

The Predicate Offense

For the prohibition to apply, Hernandez's plea to the assault charge must serve as the predicate offense. He is correct that the words of the federal provision to which he pled do not include any reference to the assault as occurring in the context of a domestic relationship of any sort. It is necessary only that the "assault" simply be perpetrated on "another person." However, Perth Amboy points to the United States Supreme Court decision in United States v. Hayes, 555 U.S. 415 (2009). There, the Court reviewed a conviction under the federal Gun Control Act of 1968, 18 U.S.C. 921 et seq., which was amended to include a prohibition on possession of a firearm by one "convicted of a misdemeanor crime of domestic violence." Hayes had been convicted in

West Virginia of battery in 1994. The statute under which he was convicted did not require as an element of the offense the existence of a domestic relationship involving the perpetrator and the victim. When he was prosecuted for being in possession of a firearm despite having this conviction, the District Court held that this absence did not bar prosecution for a violation of the Gun Control Act. The Court of Appeals reversed, and the Supreme Court then took up the issue. The Court, Ginsburg, J., explained the issue as: "must the statute describing the predicate offense include, as a discrete element, the existence of a domestic relationship between offender and victim?"

The majority held that

> In line with the large majority of the Courts of Appeals, we conclude that § 921(a)(33)(A) does not require a predicate-offense statute of that specificity. Instead, in a § 922(g)(9) prosecution, it suffices for the Government to charge and prove a prior conviction that was, in fact, for 'an offense . . . committed by' the defendant against a spouse or other domestic victim.

Thus, the Supreme Court, considering a federal statute penalizing firearm possession that is very similar to N.J.S.A. 2C:39-7 b.(2), concluded that it was not essential to the prosecution that the prior statute under which Hayes had been prosecuted specify that the assault involved persons whose "relationship" come within the definition "domestic" such that the assault was an act of "domestic violence." It was the facts regarding the nature of the relationship that governed whether the prosecution could proceed, not the language of the West Virginia statute. Hernandez tries to evade the result of this decision by noting that this case, unlike Hayes, is not a criminal prosecution for possession of a firearm and that the alleged domestic relationship has not been proven beyond a reasonable doubt. But these arguments fail. Here, the predicate federal offense did not refer to domestic relationships or domestic violence, but Hayes makes clear that that is not a bar to the use of the conviction for assault in determining whether the State's own firearms prohibition applies to Hernandez. As for the need to prove the relationship beyond a reasonable doubt, in this civil matter, the issue is whether the preponderance of the evidence supports the ban on Hernandez's possession of a firearm. The facts of the relationship to be examined to determine if the required "domestic violence" was involved in the assault are to be drawn from a Stipulation of

Facts agreed to by Hernandez as the basis for his court martial. Whether these then prove the existence of the necessary "domestic" relationship must be determined by reference to relevant definitions. The parties point to differing frames of reference for this task.

Officer Hernandez's frame of reference for understanding this question is drawn from federal statutes. Presumably, this is because his plea was to a federal offense, one defined by the United States Code and the UCMJ.

18 U.S.C. 921(a)(33) provides

> (A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—
>
> > (i) is a misdemeanor under Federal, State, or Tribal [tribal] law; and
> > (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

He also cites as another definition relevant to this discussion that is found in 18 U.S.C. 921(a)(32), which defines an "intimate partner" as

> with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

According to Hernandez, none of these relationships involve the limited relationship that Hernandez had with SPC T. prior to the date of the offense to which he pled guilty, an

offense committed, as the Stipulation of Facts notes, after the "romantic relationship" had already terminated. There was no marriage, they were not a divorced couple and the "relationship" did not even reach the level of "cohabitation." Konzelman v. Konzelman, 307 N.J. Super. 150, 157 (App. Div. 1998). Thus, contrary to the position taken by the Prosecutor's Office and the City, he was not convicted of an offense involving "domestic violence" and the prohibition of N.J.S.A. 2C:39-7 b.(2) does not apply. He is not precluded from possessing his duty weapon and can therefore function as a police officer.

In response, Perth Amboy looks to New Jersey law to understand what constitutes a domestic relationship that can result in a victim of violence coming within the definition of a "victim of domestic violence." N.J.S.A. 2C:25-19(d) provides

> d. "Victim of domestic violence" means a person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member. "Victim of domestic violence" also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant. "Victim of domestic violence" also includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship.

This definition is more expansive than either the definition at 18 U.S.C. 921(a)(33) of "misdemeanor crime of domestic violence," or that of "intimate partner" at 18 U.S.C. 921(a)(32). On their face, those two definitions do not purport to include within their coverage a person who "has had a dating relationship" with the person who has committed an act that, were the "victim" a spouse, one with whom the perpetrator had a child, or one with whom the perpetrator had cohabitated, would constitute such an act of domestic violence. What definition then guides the understanding of the coverage of the New Jersey prohibition when the conviction that is the alleged source for the bar was a federal, and not a state conviction?

Within the limits of the Second Amendment, the issue of who may or may not possess a weapon is a matter over which the states do have some ability to legislate. District of Columbia v. Heller, 554 U.S. 570 (2008). And it is certainly within the authority of the state to define those relationships for which it finds it necessary to provide some additional measure of protection for the participants. The occurrence of incidents of domestic violence and the tragic consequences that can occur need not be documented here. To the extent that New Jersey has an interest in preventing individuals from possessing firearms where such persons have committed violent offenses against individuals with whom they have had a relationship that the State has determined requires such enhanced protection, it is within the State's authority to define for itself those who should benefit from such protection. Thus, while the United States Code and the UMCJ have defined for federal and military, purposes those who are deemed to be "victims of domestic violence" more narrowly than has New Jersey, the State has seen fit to include within its definition of "victims of domestic violence" "any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship." And in this context at least, it is the State's definition that is the proper one to apply in determining whether its citizens should be prevented from possession of firearms.

In United States v. LaVictor, 848 F.3d 428, 458 (6th Cir.), cert. denied, 137 S.Ct. 2231, 198 L.Ed. 2nd 671 (2017), the Sixth Circuit considered a case involving, among other issues, whether the defendant was a "habitual offender" who had committed a "domestic assault." 18 U.S.C. 117. This provision defined such an assault as

> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or . . .
>
> > (b) Domestic assault defined. In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or

> guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

The court considered the scope of coverage, where, as in the case before it, the perpetrator and the victim where not married and had never been married.

> Although we have not defined what constitutes an "intimate partner," a similar domestic assault statute states that a "spouse or intimate partner" includes "a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship." 18 U.S.C. § 2266(7)(A)(i)(II); see United States v. St. John, 716 F.3d 491, 493 (8th Cir. 2013) (applying the definition to §117). Reading the plain language of the statute, we see no reason to limit the definition, as LaVictor encourages, to cohabitating partners. Rather, we look to the general nature of their relationship to determine, as the Eighth Circuit has done, whether C.B. and LaVictor constitute intimate partners.

New Jersey has obviously also understood that the nature of domestic relationships can go beyond the more traditional marriage and even cohabitation. As the two Circuit Courts understood, and as has become ever more apparent, domestic relationships may involve other sorts of arrangements and interactions. In the Federal enactments, 18 U.S.C. 117 and 18 U.S.C. 2266(7)(A)(i)(II)(a definitional section, part of 18 U.S.C. 2261, a statute that address "interstate domestic violence), these include relationships in which victim and perpetrator were, or still are, "intimate partner(s)." New Jersey has chosen to include as a covered relationship "a dating relationship." But how are we to understand what constitutes such a "dating relationship?" While it uses this term, N.J.S.A. 2C:25-19 does not define it. While it might be doubted that one date is enough to form such a "relationship", how often must the dating occur, over what period of time, and what degree of "connection" must the "dating" involve before it becomes what the statute speaks of?

It would appear that a reasonable way to determine if such a "dating relationship" exists is to look to the definitions and factors identified in the federal statutes and cases discussed above. Thus, an "intimate partner" includes a "social relationship of a

romantic or intimate nature between the perpetrator and the victim. Cohabitation, and sexual connection, are not necessary elements of such a relationship. The length of time, the type of relationship, the indicia of romantic connection, the frequency of interaction, the holding out to the public of a romantic, socially intimate, more than merely "friendly" association, these all are factors that can be utilized to assess if the required "dating relationship" exists. LaVictor, at 458; St. John, at 493.

In this case, the evidence as to the nature of the relationship between then Sergeant Hernandez and SPC T. is drawn from the Stipulation of Facts which the Government and Hernandez, voluntarily and expressly entered into on June 29, 2016. As Hernandez by his "express consent" agreed to these facts, they are accepted herein as the **FINDINGS OF FACTS** concerning the connections between these two soldiers at Camp As Sayliyah, Qatar.

1. As of that date, both Hernandez and T. were members of the New Jersey Army National Guard.
2.They began a romantic relationship on or about September 11, 2014.
3. Specialist Pimental and SPC Restrepo each confirmed that they were aware that the two were dating.
4. Specialist Pimental described the two as "acting like a real couple, publicly holding hands even though it was against the rules, showing public affection, and going everywhere together."
5. SPC T. told Pimental that she was "happy she was in a relationship with Sergeant Hernandez.
6. First Sergeant (1SG) Stuart and Hernandez's company commander both observed the two holding hands on November 14, 2014, as they entered the MWR building, and saw that Hernandez dropped SPC T.'s hand when Hernandez saw Stuart.
7. Stuart counseled Hernandez about the "blatant act of fraternization" on November 14. He ordered that the romantic relationship be terminated "immediately."
8. Hernandez acknowledged this order.

9. Despite receiving and acknowledging this order to terminate the relationship, Hernandez continued "to engage in a romantic relationship until on or about 16 December 2014."

10. The Stipulation notes that while the two soldiers were in different companies, "they were in the same battalion, and soldiers within the battalion would frequently interact with each other regardless of their company of assignment." The base had a small geographic footprint.

11. Multiple soldiers at CAS knew Sergeant Hernandez and SPC T. were in a relationship, had seen them holding hands and being likewise affectionate to each other, and had seen or heard them arguing.

12. Although the romantic relationship had ended by December 24, 2014, the dispute that occurred at the Top-Off Club that evening was in regard to the issue of whether SPC T. was seeing other persons.

While the nature of the relationship between Hernandez and SPC T. was certainly not of the length or to the degree of combining living arrangements that were present in the relationships examined in LaVictor and St. John, it must be remembered that the New Jersey statute sweeps broadly to include relationships that involve dating, but do not necessarily go so far as to include sexual activity, cohabitation and other such entanglements. It must be understood that the Legislature felt it necessary in view of the events of the day to enlarge the types of interpersonal connections that fall within the definition of "domestic," such that violence perpetrated by one or conceivably both parties to the relationship to the other party would come within the scope of "domestic violence." Given this, by his own admission, Officer Hernandez had a romantic relationship with SPC T. that lasted from on or about September 11, 2014 through December 16, 2014, a period of three months. During that time they were physically affectionate in public settings, held hands, and at least SPC T. openly expressed her happiness at being in a relationship that Hernandez acknowledged was "romantic." It is unknown to what degree the two may have been "intimate" as that term may imply sexual relations. However, it is acknowledged that they were a couple, and this was well known. The nature of the romantic connection was apparently such that despite being counseled by his superior officer and indeed ordered by him to end the romantic

relationship, Hernandez, who agreed that he received the order, ignored it and the romantic relationship continued even after that order was issued on November 14, until mid-December. And while the exact details of the discussion/argument that occurred on the evening of December 24, 2014, outside the Top-Off Club are not detailed in the Stipulation, it does relate that the "verbal dispute" was about "whether SPC T. was seeing other persons." This topic surely is understood to be related to the fact that the two were, until shortly before the incident, a romantically attached couple. The nature of this incident implies jealousy on Hernandez's part, certainly a frequent enough element in domestic violence.

Based upon the above findings, I **FIND** that the Officer Hernandez "had a dating relationship" with SPC T. Given this, I **CONCLUDE** that the "assault consummated with a battery" that he committed upon her on December 24, 2014, and for which he was guilty of a violation of 10 U.S.C. 928, UCMJ Article 128, was "a disorderly persons offense involving domestic violence" as meant in N.J.S.A. 2C:39-7 b. (2). As a "person" so convicted, Officer Hernandez is barred from possessing a firearm. Given this, he is unable to perform the essential duties of a police officer.

Conduct Unbecoming

In addition to charging that Hernandez was unable to perform the duties of a police officer due to his inability to possess a weapon, Perth Amboy also charged that his conduct was unbecoming a public employee. The unbecoming conduct was the commission of the "assault consummated by a battery" upon SPC T. As a police officer, Hernandez is held to a higher standard of conduct than even the typical public employee. Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Conduct that is unbecoming for a public employee is that conduct that offends publicly accepted standards of decency, Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). It is the sort of conduct that can undermine public respect for public employees, and in the case of law enforcement personnel, the public's respect for law and for those that society employs to enforce its most important standards of conduct. Here, Officer Hernandez, while serving in the

military as a military police officer, assaulted a woman without any legal justification. Such conduct is reprehensible in any citizen, but given that the perpetrator of this assault was a sworn civilian police officer and was also serving in a similar law enforcement capacity within the military, his misconduct is all the more troubling. That it occurred outside of his police duties for Perth Amboy is of no consequence. Based upon the facts of the case, and with these standards in mind, I **CONCLUDE** that Hernandez's conduct was unbecoming a public employee.

Conviction of Crime

Perth Amboy also charges that Hernandez was "convicted of a crime" and is thus in violation of N.J.A.C. 4A:2-2.3(a)(5), conviction of a crime. Under the UCMJ, a conviction in 2014 for assault consummated by battery, a violation of 10 U.S.C. 928, was subject to a maximum sentence that could include a bad conduct discharge, forfeiture of all pay and allowances and confinement for no more than six months. Manual for Courts-Martial United States (2012 Edition) Part IV Punitive Articles 54. Art. 128 e.(2). Under New Jersey law, this offense would not generally be considered a crime, but instead a disorderly person's offense. N.J.S.A. 2C:1-4. classifies offenses against the criminal laws of New Jersey.

> **a.** An offense defined by this code or by any other statute of this State, for which a sentence of imprisonment in excess of 6 months is authorized, constitutes a crime within the meaning of the Constitution of this State. Crimes are designated in this code as being of the first, second, third or fourth degree.
> **b.** An offense is a disorderly persons offense if it is so designated in this code or in a statute other than this code. . .Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State. . . Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime.
> **c.** . . . Insofar as any provision outside the code declares an offense to be a misdemeanor when such offense specifically provides a maximum penalty of 6 months' imprisonment or less, whether or not in combination with a fine, such provision shall constitute a disorderly persons offense.

Several cases have held that for the purposes of the prohibition enacted by the Lautenberg Amendment a simple misdemeanor assault conviction qualifies as a "misdemeanor crime of domestic violence." United States v. Smith, 171 F.3d 617, 620-21 (8th Cir. 1999). Thus, by definition the offense Hernandez was convicted of under federal law is considered a "misdemeanor crime." In State v. Wahl, 365 N.J.Super. 356, 374 (App. Div. 2004), the case dealt with the authority of a New Jersey court to order the return of weapons seized under the Prevention of Domestic Violence Act, N.J. Stat. Ann. §§ 2C:25-17 to -35. The Appellate Division concluded that the term "misdemeanor crime of domestic violence" as defined in 18 U.S.C. 921(a)(33)(A) and 27 C.F.R. 478.11 "must be construed . . . to include offenses that New Jersey law classifies as disorderly person's offenses." Thus, for the purposes of understanding the reach of gun possession prohibitions, a conviction in New Jersey for a "simple" assault, or an "assault with battery," while traditionally defined as a disorderly person offense, is, when perpetrated upon a person defined in New Jersey law as a "victim of domestic violence," also a "misdemeanor crime."

This connection of "misdemeanor" with "crime" might raise some doubt as to whether the conviction for assault consummated by a battery should be regarded as a "crime", at least in respect to N.J.A.C. 4A:2-2.3(a)(5). However, as N.J.S.A. 2C:1-4 states, a "crime" within this State means an offense for which confinement may exceed six months, and the maximum confinement authorized for the federal offense here involved is not so great as to meet this definition of a "crime." A simple assault committed in New Jersey, punishable by no more than six months incarceration, is not a "crime." Given this, I **CONCLUDE** that while Hernandez is barred from possessing a firearm and cannot serve as a police officer, and while his conduct was unbecoming that expected of a public employee, he was not convicted of "crime" and that charge must fail.

Conclusion and Order

Based upon the facts of this case and the applicable statute, I **FIND** that there are no disputes of material fact that require a hearing and **CONCLUDE** that the

contested case can be resolved by summary decision pursuant to N.J.A.C. 1:1-12(5). Based upon the evidence and the applicable law, I **CONCLUDE** that Perth Amboy is entitled to summary decision in its favor.

I **FIND** that Officer Hernandez pled guilty to assault consummated by a battery, in violation of 10 U.S.C. 928, Section 928 of the UCMJ. I **FIND** that the assault was committed upon a person with whom the appellant had a "dating relationship." I **CONCLUDE** that under the terms of N.J.S.A. 2C:39-7 b. (2) it would be illegal for Hernandez to possess a firearm. As such, I **CONCLUDE** that he cannot fulfill the duties of a sworn police officer. Additionally, I **CONCLUDE** that his conduct was unbecoming a public employee. However I **CONCLUDE** that he was not convicted of a "crime." Therefore, I **CONCLUDE** that the City of Perth Amboy has proven by a preponderance of the credible evidence that Hernandez violated N.J.A.C.4A:2-2.3(a)(3), inability to perform duties, and (a)(6) conduct unbecoming a public employee. I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(5), conviction of a crime, is **DISMISSED**. As for the charge of N.J.A.C. 4A:2-2.3(a)(6) and (7), involving Hernandez's alleged failure to inform the Police Department of status of the military charges, no evidence as to this alleged failure has been presented as a part of the proofs associated with the motion for summary decision, which does not seek summary decision as to that charge. Given the dispositive outcome of the motion in favor of Perth Amboy, and the resulting termination of Hernandez, no findings are made as to that charge.

It is **HEREBY ORDERED** that Franklin Hernandez be removed from his position as a police officer for the City of Perth Amboy.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

January 18, 2018
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 1-18-18

Date Mailed to Parties: 1-18-18

mph

APPENDIX

LIST OF EXHIBITS:

For appellant:

None

For respondent:

R-1 Certification of Michael S. Williams, Esq., dated December 14, 2017, with attached Exhibits A, B, C. and D., as described therein

STATE OF NEW JERSEY

In the Matter of Devin Higgs
City of East Orange Police Department

CSC DKT. NO. 2017-2408
OAL DKT. NO. CSV 02001-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02001-17

AGENCY DKT. NO. 2017-2408

IN THE MATTER OF DEVIN HIGGS,

CITY OF EAST ORANGE POLICE DEPARTMENT,

Joshua Forsman., Esq. for appellant (Caruso Smith Picini, P.C., attorneys)

Heather J. Fay, Esq., for respondent (Roth D'Aquanni, LLC))

Record Closed: February 1, 2018 Decided: February 5, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on February 8, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing conferences was conducted on March 22, 2017 wherein the parties agreed on hearing dates of July17 & 18, 2017. The hearing dates were adjourned to November 20 & 21, 2017 due to the parties negotiating settlement. A status conference was conducted on November 17, 2017 wherein the parties advised that he matter is resolved and the settlement will be submitted to the OAL upon execution. The November 17 & 18, 2017 hearing dates were adjourned. On February 1, 2018 the parties submitted the fully executed settlement agreement which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

February 5, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: February 7, 2018

LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: 2-9-18
lr
attachment

ROTH D'AQUANNI, LLC
150 Morris Avenue - Suite 303
Springfield, New Jersey 07081
(973) 258-1288

IN THE MATTER OF DEVIN HIGGS, Appellant, -vs.- CITY OF EAST ORANGE POLICE DEPARTMENT, Respondent.	OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY OAL DOCKET NO.: CSV 02001-17 SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into between the City of East Orange (the "City") and DEVIN HIGGS ("Employee"), collectively, "the Parties".

WHEREAS, Employee has been employed by the City as a police officer since 2000; and

WHEREAS, Employee filed an appeal of the disciplinary action with the Office of Administrative Law (Docket No. CSR 02001-2017);

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. Employee's pending OAL appeal, docket number CSV 02001-17 shall be considered settled, without the need for a hearing.

2. The following charges in the Final Notice of Disciplinary Action dated January 12, 2017 to Employee charging him with violating East Orange Rules and Regulations 2:4.29, 3:1.9 and 3:1.10 shall be sustained. The remaining charge shall be withdrawn.

3. The penalty for the Final Notice of Disciplinary Action dated January 12, 2017 shall be amended to a three (3) day suspension without pay, via an amended Final Notice of Disciplinary Action to be issued by the City, provided that Employee fulfills the conditions as set forth hereinbelow. The Employee agrees to waive any and all claims for back pay that he may be entitled to.

4. The following charges in the Preliminary Notice of Minor Disciplinary Action dated June 17, 2016 and Hearing Officer Decision dated August 22, 2016, to Employee charging him with violations of East Orange Rules and Regulations 3:1.9 and 3:1.10 shall be sustained. The remaining charge shall be withdrawn.

5. The POP will withdraw the grievance set forth in P.4, currently pending with PERC with prejudice.

6. The penalty for the Preliminary Notice of Minor Disciplinary Action June 17, 2016 and Hearing Officer Decision dated August 22, 2016, shall be amended to a four (4) day suspension without pay. The Employee agrees to waive any and all claims for back pay that he may be entitled to.

7. The charges in the Preliminary Notice of Disciplinary Action dated January 6, 2017 to Employee charging him with violating East Orange Rule and Regulations 3:1.9 and 3:5.1 shall be sustained.

8. The penalty for the Preliminary Notice of Disciplinary Action dated January 6, 2017 shall be amended to a five (5) day suspension without pay, via a Final Notice of Disciplinary Action to be issued by the City, provided that Employee fulfills the conditions as set forth in this agreement. The Employee agrees to waive any and all claims for back pay that he may be entitled to.

9. Employee will be credited with suspension days already served (15) and will not serve any additional suspension days for the charges contained herein. The Employee agrees to waive any and all claims for back pay related to same.

10. Employee voluntarily enters into this Stipulation and Settlement.

11. Employee voluntarily and in consideration of the above, hereby waives and releases the City, its employees, officials, agents and assigns from all claims, stemming from the instant charges or the basis of these charges, that he may have or have had as of the date of this Agreement, against the City, its employees, officials, agents and assigns, including but not limited to all discrimination claims, liabilities, costs, and attorney fees under federal, state and local statutory and or common law, including Title VII of the Civil Rights Act ("Title VII," 42 U.S.C. 2000(e) et seq.), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act (the "ADEA," 29 U.S.C. 621 et seq.), the Equal Pay Act ("EPA"), the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) and the New Jersey Civil Rights

Act.

a. This Waiver and Release specifically does not in any way waive or limit Employee's right to file a charge with or testify, assist or participate in an investigation, hearing or proceeding conducted by the U.S. Equal Employment Opportunity Commission ("EEOC") under the ADEA, Title VII, the ADA or the EPA.

b. Employee hereby agrees to waive his right to any monetary or equitable recovery should he or any federal, state or local administrative agency pursue any claims on his behalf arising out of or related to his employment with the City and/or separation from such employment and promises not to seek or accept any award, settlement or other monetary or equitable relief from any source or proceeding brought by any person or governmental entity or agency on his behalf or on behalf of any class of which he is a member with respect to any of the claims he has herein waived.

12. Employee agrees that the City has advised him to consult an attorney and/or Union Representative before accepting and executing this agreement and that he has been afforded the opportunity to consider the terms of this Agreement with advice of counsel.

13. Each party shall bear the costs of their own legal fees.

14. Employee shall not institute any appeal or any other action with respect to this matter.

15. This settlement agreement is not intended to establish precedent in any future disciplinary matters.

EMPLOYEE

DATED: 1/11/2018

DEVIN HIGGS

DATED: 1/11/18

JOSHUA FORSMAN, ESQ.
Attorney for the Employee

CITY OF EAST ORANGE

DATED: 1/23/18

HEATHER J. FAY, ESQ.
Attorney for the City

DATED:

WILLIAM SENANDE, ESQ.
City Administrator

SOLOMON STEPLIGHT

DATED: 29 Jan 18

SHEILAH COLEY
Public Safety Director

DATED: 1/26/18

PHYLLIS BINDI
Chief of Police

Angiulo, Nicholas

From: Heather Fay <hfay@rdlegal.com>
Sent: Monday, February 12, 2018 3:29 PM
To: Angiulo, Nicholas; jforsman@carusosmith.com
Cc: Messina, JoAnn
Subject: RE: Devin Higgs v. East Orange Police Department - Settlement

Mr. Angiulo:

Sorry to add to the confusion but I spoke to quickly.

Officer Higgs served 10 days from 1/23/17 through 2/1/17. The 10 day suspension was modified to a three day suspension which was served on 1/23, 1/24 and 1/25/17. The 5 day suspension from the PNDA 1.10.17 (not before you) was to be considered served on 1/26, 1/27, 1/28, 1/29 and 1/30. The remaining two days 1/31 and 2/1 are to be recorded as administrative leave without pay.

Sorry again for the confusion.

Heather J. Fay, Esq.

ROTH D'AQUANNI, LLC
150 Morris Avenue, Suite 303
Springfield, N.J. 07081
973-258-1288 (P)
973-258-1171 (F)
hfay@rdlegal.com

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From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, February 12, 2018 2:44 PM
To: Heather Fay <hfay@rdlegal.com>; jforsman@carusosmith.com
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: Devin Higgs v. East Orange Police Department - Settlement

Ms. Fay:

Thank you for the clarification. With your clarification, this matter should be okay to be presented to the Commission for acknowledgment.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Heather Fay [mailto:hfay@rdlegal.com]
Sent: Monday, February 12, 2018 2:37 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; jforsman@carusosmith.com
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: Devin Higgs v. East Orange Police Department - Settlement

Mr. Angiulo:

As per the settlement, the FNDA dated 1/12/17 was modified from a 10 day suspension to a 3 day suspension. Officer Higgs previously served the 10 day suspension from January 23, 2017 through February 1, 2017. An Amended FNDA is going to be filed stating that the penalty has been modified to 3 day suspension which was served from January 23 through January 25, 2017. The remaining 7 days (period of January 25, 2017 through February 1, 2017) will be recorded as an administrative leave without pay.

Sorry for the confusion. If you have any additional questions, please let me know.

Heather J. Fay, Esq.

ROTH D'AQUANNI, LLC
150 Morris Avenue, Suite 303
Springfield, N.J. 07081
973-258-1288 (P)
973-258-1171 (F)
hfay@rdlegal.com

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From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, February 12, 2018 12:24 PM
To: jforsman@carusosmith.com; Heather Fay <hfay@rdlegal.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: Devin Higgs v. East Orange Police Department - Settlement
Importance: High

I apologize for the resend, I had Mr. Forsman's e-mail incorrect.

From: Angiulo, Nicholas
Sent: Monday, February 12, 2018 12:19 PM
To: 'jforsman@carusosimth.com' <jforsman@carusosimth.com>; 'hfay@rdlegal.com' <hfay@rdlegal.com>

Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: Devin Higgs v. East Orange Police Department - Settlement
Importance: High

Mr. Forsman and Ms. Fay:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Devin Higgs from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Higgs and the City, agree, *inter alia*, to modify his 10 day suspension to a three day suspension as well as settling other disciplinary matters not before the Civil Service Commission. However, the settlement does not reflect how to record the remaining seven days he served his suspension. Before the matter can be acknowledged by the Commission, we require all periods of time to be accounted for in an employee's personnel record. In this regard, is that time period to be recorded as an approved leave of absence without pay, or are the other suspension days referred to in the other matters to be used to cover that time period, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

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STATE OF NEW JERSEY

In the Matter of Reginald Hudson
City of East Orange Police Department

CSC DKT. NO. 2018-349
OAL DKT. NO. CSV 12871-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 12871-17

AGENCY DKT. NO. 2018-349

IN THE MATTER OF REGINALD HUDSON, CITY OF EAST ORANGE POLICE DEPARTMENT,

---

Joshua Forsman., Esq. for appellant (Caruso Smith Picini, attorneys)

Marissa L. Quigley, Esq., for respondent (Roth D'Aquanni, LLC))

Record Closed: January 23, 2018 Decided: January 25, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on September 5, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on September 27, 2017 wherein the parties agreed on a hearing date. The December hearing date was adjourned due to the parties negotiating settlement. A status conference was conducted on January 3, 2018 wherein the parties advised that he matter is resolved and the settlement will be submitted to the OAL upon execution. On January 23, 2018 the parties submitted the fully executed settlement agreement which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 25, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: 1-30-18

Date Mailed to Parties: JAN 30 2018

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ROTH D'AQUANNI, LLC
150 Morris Avenue, Suite 303
Springfield, NJ 07081
973-258-1288

RECEIVED
2018 JAN 23 P 1:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

IN THE MATTER OF

REGINALD HUDSON

EAST ORANGE POLICE DEPT.

ESSEX COUNTY, NEW JERSEY

STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, Reginald Hudson ("Employee") and the City of East Orange ("City"), hereto that the above-captioned matter be and is hereby settled upon the following terms and conditions:

1. Effective February 1, 2018, Employee will be considered to have retired from his employment with the City as a Sergeant. The City acknowledges receipt of proof of Employee's retirement application filing, dated January 5, 2018.

2. The City shall withdraw the disciplinary action, dated March 24, 2017 due to Employee's retirement.

3. Employee agrees and voluntarily elects to dismiss, with prejudice, all claims set forth in his appeal against the City docketed as CSV 12871-2017N.

4. Effective October 30, 2017 through and including January 31, 2018 Employee will be on an administrative leave with pay, utilizing sixty-two (62) days or 496 hours, of his accumulated vacation, compensatory time, commendation and contract vacation days (CVD). During this administrative leave, Employee will not accrue any contractual time-related benefits, i.e. sick, vacation, holiday, or personal time.

5. Employee agrees and understands that his employment with the City will terminate effective the close of business on January 31, 2018, irrespective of whether or not his retirement application is approved by PFRS at that time, consistent with Title 34.

6. Employee will be paid any remaining accumulated time owed as of his retirement on January 31, 2018, pursuant to the collective negotiations agreement in effect between the City and the Fraternal Order of Police, Lodge 188 and the City's policies.

7. Employee voluntarily enters into this Stipulation and Settlement.

8. Employee voluntarily and in consideration of the above, hereby waives and releases the City, its employees, officials, agents and assigns from all claims, stemming from the instant charges or the basis of these charges, that he may have or have had as of the date of this Agreement, against the City, its employees, officials, agents and assigns, including but not limited to all discrimination claims, liabilities, costs, and attorney fees under federal, state and local statutory and or common law, including Title VII of the Civil Rights Act ("Title VII," 42 U.S.C. 2000(e) et seq.), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act (the "ADEA," 29 U.S.C. 621 et seq.), the Equal Pay Act ("EPA"), the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) and the New Jersey Civil Rights Act.

a. This Waiver and Release specifically does not in any way waive or limit Employee's right to file a charge with or testify, assist or participate in an investigation, hearing or proceeding conducted by the U.S. Equal Employment Opportunity Commission ("EEOC") under the ADEA, Title VII, the ADA or the EPA.

b. Employee hereby agrees to waive his right to any monetary or equitable recovery should he or any federal, state or local administrative agency pursue any claims on his behalf arising out of or related to the instant disciplinary charges and/or the basis of these charges and promises not to seek or accept any award, settlement or other monetary or equitable relief from any source or proceeding brought by any person or governmental entity or agency on his behalf or on behalf of any class of which he is a member with respect to any of the claims he has herein waived.

9. Employee agrees that the City has advised him to consult an attorney and/or Union Representative before accepting and executing this agreement and that he has been afforded the opportunity to consider the terms of this Agreement with advice of counsel and has at least 21 days to consider and review this Stipulation of Settlement, unless Employee waives this 21 day period.

10. Employee understands that he may revoke this Agreement for a period of seven (7) calendar days following the day he signs this Agreement. Any revocation within this period must be submitted, in writing, to the Chief of Police, 15 S. Munn Ave, East Orange, NJ 07018, and state "I hereby revoke my acceptance of our negotiated settlement agreement and general release." Said revocation must be postmarked within seven (7) calendar days after Employee signs this Agreement and General Release. This seven (7) day period cannot be changed or waived by Employee or the City.

11. Employee shall not institute any appeal or any other action with respect to this matter.

12. Each party shall bear the costs of their own legal fees.

13. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

14. This Agreement supersedes all prior agreements and understandings between the parties; it contains the full understanding of the parties with respect to this subject matter, and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement. This Agreement does not set precedent for the Employer or establish any policy.

IN WITNESS WHEREOF, the parties of set their hands and seal the day and year as written below.

EMPLOYEE

DATED: 1-5-18

REGINALD HUDSON

DATED: 1/5/18

JOSHUA FORSMAN, ESQ.
Attorney for Employee

EAST ORANGE POLICE DEPT.

DATED: 1/22/18

HEATHER J. FAY, ESQ.
Special Counsel for Dept.

DATED: 22 Jan 18

SHEILAH COLEY
Public Safety Director

DATED: 1/22/18

PHYLLIS BINDI
Chief of Police

WAIVER

By signing below, the undersigned Employee hereby irrevocably elects to waive the 21-day period referred to in Paragraph 6, Page 2, of this Agreement.

Reginald Hudson

Date 1-5-18

STATE OF NEW JERSEY

In the Matter of Laurens Hunt
Hudson County,
Department of Family Services

CSC DKT. NO. 2017-3148
OAL DKT. NO. CSV 06115-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 06115-17

AGENCY DKT. NO. 2017-3148

IN THE MATTER OF LAURENS HUNT, HUDSON COUNTY DEPARTMENT OF FAMILY SERVICES.

William Strazza, Esq., for appellant, Laurens Hunt

Sean D. Dias, Esq., for respondent Hudson County, Department of Family Services (Scarinci & Hollenbeck, Attorneys)

Record Closed: January 29, 2017 Decided: January 29, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 2, 2017, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a hearing on January 17, 2018, but the date was adjourned because the parties engaged in settlement discussions and agreed to settle the matter. The signed Settlement Agreement indicating the terms of settlement was signed by the parties on January 29, 2017 and is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 29, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

1/29/18

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:
sej

FEB 1 2018

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 29th day of January 2018 between the County of Hudson, (hereinafter referred to as the "County") and Laurens Hunt (hereinafter referred to as "Hunt" or the "Employee"), in full resolution of all issues related to Employee's employment with the County.

WHEREAS, the County instituted disciplinary action against Hunt in the Preliminary Notice of Disciplinary Action dated November 28, 2016 and in the Final Notice of Disciplinary Action dated March 29, 2017, wherein the penalty of removal from the position of HSS1 was effective March 27, 2017 (hereinafter referred to as the "Disciplinary Action"); and

WHEREAS, Hunt filed an appeal of the Disciplinary Action with the Office of Administrative Law (hereinafter referred to as the "OAL"), specifically docket number CSV 06115-2017 N; and

WHEREAS, Hunt and the County desire to resolve all outstanding issues with respect to the Disciplinary Action and the appeal pending in the OAL.

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the County and Hunt agree as follows:

1. **TERMS.**

a. The County agrees to withdraw the Preliminary Notice of Disciplinary Action issued against Hunt, dated November 28, 2016 and the Final Notice of Disciplinary Action issued against Hunt, dated March 29, 2017. The County also agrees

to make a payment to Hunt of back pay in the amount of thirty-seven thousand three hundred fifty-four dollars ($37,354) and an additional settlement sum of three thousand dollars ($3,000) for a total settlement sum amount of forty thousand three hundred fifty-four dollars ($40,354). The payment is subject to all required deductions and withholdings. In exchange for the withdrawal by the County of the Disciplinary Action and the aforesaid payment, Hunt agrees that he has resigned from his position with the County effective January 29, 2018, in good standing. Hunt agrees that his execution of this Agreement shall serve as his written notice of resignation from employment with the County in good standing. Hunt further agrees to withdraw, with prejudice, the appeal pending in the OAL, specifically docket no. CSV 06115-2017 N. The County will amend Hunt's personnel records to reflect that he resigned from the County effective January 29, 2018, in good standing. Also in consideration for the County's withdrawal of the Disciplinary Action and payment of the settlement sum herein above, Hunt further agrees to withdraw, with prejudice, the charge of discrimination that he filed with the Equal Employment Opportunity Commission, specifically, Charge No. 524-2017-00949.

b. Hunt acknowledges that his employment with the County is permanently and irrevocably severed, effective January 29, 2018. Hunt further agrees that he will not apply for or accept employment with the County and/or any of its independent but related agencies and that any such employment which may nevertheless occur in the future for whatever reason shall be deemed null and void ab initio. Hunt hereby waives any reinstatement or reemployment with the County and/or any of its independent but related agencies in any capacity at any time in the future. Hunt will neither appeal nor challenge in any court of law, administrative agency, governmental body or any other

forum any refusal by the County and/or any of its independent but related agencies to hire him.

c. Hunt will also receive payment for accumulated unused vacation leave days and a .75 personal day in the amount of three thousand one hundred sixty-nine dollars ($3,169). The payment is subject to all required deductions and withholdings.

d. Hunt acknowledges that he has been paid and/or has received all compensation, wages and benefits to which he accrued during his employment with the County, and he agrees that no other compensation, wages or benefits or any other monetary claims are due to him other than those payments and benefits set forth above in this Agreement. Hunt also waives any claims for attorney's fees.

2. **COMPLETE RELEASE.**

In further consideration of the settlement hereinabove, Hunt, his heirs, assigns and agents (hereinafter collectively referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that Releasor has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character of description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of the Disciplinary Action and his separation from employment. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense,

compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any claim, cause of action, demand or complaint arising out of or under Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which, among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA) which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.

vi. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning the public health, safety or welfare.

The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2.a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. **NON ADMISSION**

This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the County, by whom any such obligation or liability is expressly denied.

4. **NO DISPARAGING STATEMENTS**

Hunt agrees that he will not make any statement that has, have or can be expected to have the effect of disparaging the County.

5. **CONSULTATION WITH ATTORNEY.**

Hunt has consulted with his attorney with respect to this Agreement and reviewed with his attorney all the terms and conditions of this Agreement prior to executing this Agreement.

6. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between Hunt and the County, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the County to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

9. **HUNT ATTESTS.**

Hunt represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Hunt represents and warrants that he enters into this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity including, but not limited to, the County and the Releasees.

10. **REASONABLE PERIOD OF TIME.**

Hunt agrees that he has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but Hunt may waive this 21 day period by signing the space provided at the end of this Agreement.

11. **REVOCATION.**

Hunt may revoke this Agreement within seven (7) days after the date this Agreement is signed by Hunt. This revocation must take the form of written notice by Hunt that Hunt intends to revoke this Agreement. This revocation must be provided directly to the County, c/o Robert Martinovich, at County Plaza in Jersey City. This seven (7) day revocation period may not be waived by Hunt.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Laurens Hunt, executed the foregoing Agreement this 19th day of January, 2018.

Laurens R. Hunt
LAURENS HUNT

Sworn and Subscribed to before me
this 19th day of January, 2018.

William Harper
Notary Public State of New Jersey

COUNTY OF HUDSON

BY: _____

DATED: _____

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 days period referred to in the 10th recital on page 8 of this Agreement.

Laurens R. Hunt
LAURENS HUNT

DATED: 1-29-18

10. **REASONABLE PERIOD OF TIME.**

Hunt agrees that he has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but Hunt may waive this 21 day period by signing the space provided at the end of this Agreement.

11. **REVOCATION.**

Hunt may revoke this Agreement within seven (7) days after the date this Agreement is signed by Hunt. This revocation must take the form of written notice by Hunt that Hunt intends to revoke this Agreement. This revocation must be provided directly to the County, c/o Robert Martinovich, at County Plaza in Jersey City. This seven (7) day revocation period may not be waived by Hunt.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Laurens Hunt, executed the foregoing Agreement this 29th day of January, 2018.

Laurens R. Hunt
LAURENS HUNT

Sworn and Subscribed to before me
this 29th day of January, 2018.

William Stroeza
Notary Public/State of New Jersey

COUNTY OF HUDSON

DATED: 1/29/18

BY: Robert Martinovich
Dep Dir Dept of Family Services

3-27-18

A-1

STATE OF NEW JERSEY

In the Matter of Joseph Isa
Judiciary, Passaic Vicinage

CSC DKT. NO. 2017-909
OAL DKT. NO. CSV 15250-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15250-16

Agency DKT. No 2017-909

IN THE MATTER OF JOSEPH ISA,
JUDICIARY – PASSAIC VICINAGE.

Lynsey A. Stehling, Esq., for appellant (Law Offices of Daniel J. Zirrith, LLC, attorneys)

Thomas Russo, Esq., for respondent

Record Closed: March 9, 2018 Decided: March 12, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 6, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Settlement Agreement and Release were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 12, 2018

DATE

LESLIE Z. CELENTANO, ALJ

3-14-18

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Received at Agency:

MAR 14 2018

Date Mailed to Parties:

dr

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is made and entered into by and between Joseph R. Isa (hereinafter referred to as the "Employee"); the Probation Association of New Jersey, Case-Related Professional Unit (hereinafter referred to as "PANJ/CRPU"); and the State of New Jersey Judiciary, Passaic Vicinage (hereinafter referred to as the "Vicinage"), with its principal offices located in Paterson, New Jersey.

W I T N E S S E T H:

WHEREAS, the Employee was employed by the Vicinage in the capacity of a Senior Probation Officer assigned to the Vicinage's Probation Division; and

WHEREAS, during his employment with the Vicinage, the Employee was a member of the collective negotiations unit represented by PANJ/CRPU; and

WHEREAS, the Vicinage issued a Final Notice of Disciplinary Action (hereinafter referred to as "FNDA"), which terminated the Employee's employment, effective August 25, 2015, based upon charges of incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause consisting of a violation of the Code of Conduct for Judiciary Employees (Canon 3); and

WHEREAS, a copy of the FNDA is appended to this Agreement as Exhibit A, and it is incorporated into this Agreement by reference; and

WHEREAS, the Employee has appealed the termination to the Civil Service Commission (hereinafter referred to as "CSC"), which has transmitted the appeal to the Office of Administrative Law (hereinafter referred to as "OAL") where it has been assigned to the Hon. Leslie Z. Celentano, Administrative Law Judge, for hearing as a contested case; and

WHEREAS, the above-referenced hearing commenced on December 4, 2017, and it is scheduled to resume on March 29, 2018; and

WHEREAS, the parties to this Agreement desire to fully and finally settle all matters in dispute between them regarding the Employee's employment and termination; and

WHEREAS, in consideration for the settlement of all claims that have, or could have, been raised by the Employee and/or PANJ/CRPU relating to the Employee's employment and removal, and for other good and valuable consideration, including the mutual promises and terms and conditions contained in this Agreement;

IT IS AGREED AS FOLLOWS:

1. The Vicinage will deem the Employee to have resigned from the above-referenced position, effective August 25, 2015. The Vicinage agrees that the Employee's records will reflect a general resignation, in accordance with N.J.A.C. 4A:2-6.3, and it will issue an Amended FNDA reflecting the general resignation. The Employee understands and agrees that he is not entitled to, and shall not receive, any back pay or other form of compensation from the Vicinage.

2. The Employee agrees neither to seek nor accept employment, in any capacity, with the State of New Jersey Judiciary, any Vicinage, the Administrative Office of the Courts, Central Office or any of the municipal courts in this State, nor will the Employee seek an appointment as a Special Civil Part Officer, nor seek to work as a contract employee or as a volunteer, now and in the future, in any of the above-referenced entities.

3. The Employee agrees to withdraw the pending appeal, wherein he challenges his removal. The appeal, which is captioned Joseph Isa v. Judiciary-Passaic

Vicinage, Agency Ref. No. 2017-909; OAL Dkt. No. CSV 15250-2016N, is hereby withdrawn with prejudice.

4. The Employee agrees not to appeal the subject matter underlying the discipline charges referenced in the FNDA in any other forum, including, but not limited to, a grievance or arbitration.

5. The parties acknowledge that a copy of this Agreement will be forwarded by the Vicinage's Human Resources Division to the Division of Pensions and Benefits, pursuant to N.J.S.A. 43:1-3 et seq. In addition, it is understood that any information regarding the underlying charges will be provided to the Division of Pensions and Benefits, upon request.

6. In the event the Vicinage is contacted in the future by a prospective employer regarding the Employee, it will provide a neutral job reference consisting of the following information: (a) the Employee's dates of service in the Vicinage; (b) his job title(s); and (c) his salary history. The Vicinage will not comment on the Employee's job performance.

7. In consideration of the promises made herein by the Vicinage, the Employee agrees to release and forever discharge all potential and existing claims arising out of his employment with the Vicinage, including, but not limited to, any alleged violation of the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, Section 1981 et seq. of Title 1974, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Occupational Safety and Health Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the Family and Medical Leave

Act, the New Jersey Family Leave Act, the New Jersey Employer-Employee Relations Act, each of the foregoing as amended, and any and all other federal, State or local wage and hour laws, civil or human rights laws, or any other alleged violation of any local, State or federal law, regulation, or ordinance, and/or public policy, collective negotiations agreement, contract or tort or common law claim and/or any claim for attorneys' fees having any bearing whatsoever on this matter that the Employee now has or may have as of the date of this Agreement. The Employee acknowledges and agrees that this release extends to anyone who succeeds to his rights and responsibilities, including but not limited to, heirs, assignees or successors in interest, and that this release is given for the benefit of the State of New Jersey Judiciary, the Vicinage and such entities' employees, agents and representatives.

8. In consideration of the promises made herein by the Vicinage, the Union agrees to release and forever discharge all potential and existing claims arising out of, or in any way related to, the Employee's employment with the Vicinage, including, but not limited to, any alleged violation of the New Jersey Employer/Employee Relations Act, or any other alleged violation of any local, State or federal law, regulation or ordinance, and/or public policy, collective negotiations agreement, contract or tort or other common law claim and/or any claim for attorney's fees having any bearing on this matter, which it now has, or may have, as of the date of this Agreement.

9. The Employee acknowledges that he has carefully read and fully understands all of the provisions of this Agreement and was afforded the opportunity to review and discuss each provision with an attorney and/or PANJ/CRPU representative. To the extent that the Employee utilized the services of an attorney and/or PANJ/CRPU representative, he acknowledges that he is satisfied with the advice and services provided by that individual(s).

10. The Employee acknowledges that he is voluntarily executing this Agreement.

11. The parties acknowledge and agree that each party shall be responsible for their own attorney's fees and costs, if any.

12. The construction, interpretation and performance of this Agreement shall be governed by the laws of the State of New Jersey.

13. This settlement shall not be considered binding or as precedent in any other matter, except as set forth herein.

14. This Agreement contains the entire agreement between the parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter addressed in this Agreement. The parties represent and acknowledge that, in executing this Agreement, no one has relied upon any representation or statement not set forth herein with regard to the subject matter of this Agreement.

15. The parties acknowledge and agree that neither party is to be regarded as the prevailing party in the aforementioned appeal. The parties further acknowledge and agree that nothing contained herein shall be construed by a court or agency of competent jurisdiction or in any other legal matter or proceeding to be an

admission of liability or wrongdoing by either party, except as otherwise specifically provided herein.

16. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed an original, but all of which together shall constitute one and the same instrument. Any signatory hereto may indicate acceptance of this Agreement with a facsimile signature, provided that an original signature is provided to all other parties thereafter.

17. If any term or condition of this Agreement shall be declared invalid or unenforceable, to any extent or in any application, by a court or agency of competent jurisdiction, then such term or condition shall automatically, and without any further action, be reformed so as to retain the fullest extent of any restriction therein permitted by law and the remainder of this Agreement, and such term or condition, except to such extent or in such application, shall not be affected thereby, and each and every term and condition of this Agreement shall be valid and enforced to the fullest extent and in the broadest application permitted by law.

18. The parties understand and agree that this Agreement is subject to, and shall take effect upon, its approval by the OAL and the CSC. Both parties agree to waive the right to file exceptions and cross-exceptions in the above-referenced appeal.

Joseph R. Isa,
Employee

Dated: February 23, 2018

Ellen Cribbin, First Vice President
PANJ/CRPU

Dated: February 23 2018

Lynsey A. Stehling, Esq.
Attorney for Employee

Dated: February 23 2018

Robert D. Tracy, 3/2/18
Vicinage Trial Court Administrator

Dated: February ___, 2018

Thomas Russo, Esq., Staff Attorney
Attorney for Vicinage

Dated: ~~February~~ March 8, 2018

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

TO BE COMPLETED BY EMPLOYER

Employing Agency Name	Address/ Phone Number	Date
Superior Court of New Jersey-Passaic Vicinage	77 Hamilton Street Paterson, New Jersey 07505/ (973) 247-8000	08/31/16

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Meryl Nadler, Esq.	25 West Market St., Trenton, NJ (609) 633-6540 meryl.nadler@njcourts.gov

Employee Name	Permanent Civil Service Title	Employee Identification Number
Joseph Isa	Senior Probation Officer	512982

Address/ Phone Number	Pension Number
30 Donna Court Nutley, NJ 07110	1278048

On 06/09/16 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ You requested a hearing which was held on 07/21&26/2016 ☐ You did not request a hearing

☐ You requested a hearing and did not appear at the designated time and place

Sustained Charges:

N.J.A.C. 4A:2-2.3(a)

(1) Incompetency, inefficiency or failure to perform duties;
(6) Conduct unbecoming a public employee;
(7) Neglect of duty; and
(12) Other sufficient cause – violation of Code of Conduct for Judiciary Employees, Canon 3.

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

On August 24, 2015, you failed to timely schedule and conduct field visits with probation clients. In addition, while driving your personal vehicle during the course of that work day, you were pulled over by a Guttenberg Police Officer. When the police officer approached your vehicle, you identified yourself as a Probation Officer, showed him your identification and stated that you were "on the job." You admitted to the officer that you had been smoking marijuana, and then

☒ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☒ Removal, effective (date) August 25, 2015

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ (amount) which is equal to _____ (number) (number of working days)

Appointing authority or authorized agent's signature and title.

Signature Greg D. Bailey Title Acting Trial Court Administrator

This form must be personally served on the employee or sent by certified or registered mail.

☒ Certified or Registered Mail ☒ Receipt Number _____

☐ Signature of Server _____ ☐ Date of personal service _____

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.

When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

EXH. A

asked the police officer if he could give you a "break" because you are best friends with another Guttenberg Police Officer and godfather to one of his children. At the time, you also had controlled dangerous substances in your possession, specifically cocaine and Xanax.

STATE OF NEW JERSEY

In the Matter of Donald Jackson
City of Newark,
Department of Public Safety

CSC DKT. NO. 2018-1247
OAL DKT. NO. CSV 17469-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17469-17

AGENCY DKT. NO. 2018-1247

IN THE MATTER OF DONALD JACKSON, CITY OF NEWARK DEPARTMENT OF PUBLIC SAFETY,

---

Anthony Fusco, Jr., Esq. for appellant (Fusco & Macaluso, LLC)

Joyce Clayborne, Esq., for respondent (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: January 11, 2018 Decided: January 11, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on November 27, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. An in person prehearing was scheduled for January 11, 2018. During the pendency of the prehearing, the parties resolved all issues in dispute. The parties prepared and submitted a Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 11, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

1-17-18

Date Received at Agency:

Date Mailed to Parties:
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

January 11, 2018

IMO Donald Jackson OAL-CSV-17464-17

v.

City of Newark Dept. of Public Safety

Appointing Authority agrees to accept a Resignation in good standing and same will be amended in Jackson's personnel record and Final Notice.

Appellant waives any back pay and all claims with regard to this matter.

Appellant will not reapply to City of Newark and Newark will not object to appellant's application in any other County.

Anthony D. Fusco, Esq.
For appellant

Joyce Claybourne, Esq.
Joyce Claybourne, Esq.
For respondent
CITY OF NEWARK
LAW DEPT.

STATE OF NEW JERSEY

In the Matter of Margarette Jean-Baptiste
New Jersey Memoral Home - Menlo Park,
Department of Military & Veterans Affairs

CSC DKT. NO. 2017-193
OAL DKT. NO. CSV 11504-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11504-16
AGENCY DKT. NO.2017-193

IN THE MATTER OF MARGARETTE JEAN-BAPTISTE,
NJ VETERANS MEMORIAL HOME - MENLO PARK,
DEPARTMENT OF MILITARY & VETERANS AFFAIRS.

Raymond Montgomery, Staff Representative, AFSCME, for Appellant, Margarette Jean-Baptiste, pursuant to N.J.A.C. 1:1-5.4(a)6

Susan Sautner-Sweeney, Esq, for Respondent, NJ Department of Military & Veterans Affairs

Record Closed: December 5, 2017 Decided: December 19, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

On August 1, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. An In-Person Conference was held for December 13, 2017 and the parties agreed to settle the matter. An executed copy of the Settlement Agreement indicating the terms of the settlement was signed on said date and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

December 19, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: December 21, 2017

Date Mailed to Parties: December 21, 2017
lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

attachment

STATE

OAL DKT. NO. CSV 11504-16
AGENCY DKT. NO. 20 – 2017-193
SETTLEMENT AGREEMENT

IN THE MATTER OF

Margarette Jean-Baptiste

AND

NJDMAVA-NJ Veterans Home @ Menlo Park

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 6/24/16 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)6	117 Day Suspension	1/14/16 - 6/26/16
2.			
3.			
4.			
5.			

B. The Appellant Margarette Jean-Baptiste withdraws his/her appeal and request for a hearing, and the Respondent Department of DMAVA agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	NJAC 4A:2-2.3(a)6	20 Day Suspension	
2.		remainder of time to be credited @ leave of	
3.		absence without pay for personal reasons (approved)	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 117 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Approved LOA without pay, personal reasons.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of M. Jean-Baptiste will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of M. Jean-Baptiste's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 11504-16

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12/13/17
DATE

Margaret Bofinger
Appellant

12/13/17
DATE

Respondent NJDMAVA

12/13/17
DATE

NJ Veterans Home @ Menlo Park
ON BEHALF OF

DATE

ON BEHALF OF

OAL DKT. NO. CSV 11504-16

CERTIFICATION

I, Margarette Jean-Baptiste, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/13/17
DATE

Margarette Baptiste
NAME

3-27-18

A-16

STATE OF NEW JERSEY

In the Matter of Allan Kenney
Juvenile Justice Commission

CSC DKT. NO. 2015-2797
OAL DKT. NO. CSR 05656-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Allan Kenney, Senior Correction Officer, Juvenile Justice Commission, removal effective April 20, 2015, on charges, was heard by Administrative Law Elia A. Pelios, who rendered his initial decision on January 26, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Allan Kenney.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 05656-15
AGENCY DKT. NO. n/a
2015-2797

IN THE MATTER OF ALLAN KENNEY,
JUVENILE JUSTICE COMMISSION.

Charles J. Sciarra, Esq., for appellant (Sciarra & Catrambone, LLC, attorneys)

Gregory R. Bueno, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney General of New Jersey, attorney)

Record Closed: September 23, 2015 Decided: January 26, 2018

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE

Appellant Senior Corrections Office Alan Kenney (Kenney) appeals the decision of respondent, the Juvenile Justice Commission (JJC) to remove him from employment. By Preliminary Notice of Disciplinary Action (PNDA) dated March 20, 2014 (J-1), respondent charged Kenney with violating N.J.A.C. 4A:2-2.3(a): 6. Conduct unbecoming a public employee; and 12. Other sufficient cause defined as violation of JJC human resources policies: H19.7 C.6 Inappropriate physical contact; C-9 Falsification; C-12 Conduct unbecoming a public employee and N.J.A.C. Title 13:95-3.2 Use of force policy.

PROCEDURAL HISTORY

Respondent issued a Final Notice of Disciplinary Action (FNDA) dated April 20, 2015, removing him from employment based upon those charges, effective April 20, 2015. Rhodes appealed the FNDA to the Office of Administrative Law (OAL) on April 21, 2015. The matter was heard on July 9, 2015. By way of letter dated August 20, 2015, appellant waived the 180-Day Rule between the time of the completion of the hearing and submission of simultaneous closing briefs. The record closed on September 23, 2015.

FACTUAL DISCUSSION AND FINDINGS

Respondent alleges that on or about January 12, 2014, while on duty at New Jersey Training School in Jamesburg, New Jersey, appellant, a senior correction Officer assigned to that area, initiated inappropriate physical force against a resident when he pushed the resident backward against a wall. It also alleged that Kenney used excessive force when he used hand- and knee-strikes while restraining the resident. The respondent has also alleged that on or about January 12, 2014, appellant provided false information concerning the incident during his initial report. Respondent argues that appellant's actions demonstrate an abuse of his authority and jeopardized the safety of the resident and his fellow officers. It is further argued that appellant's false statement demonstrated a lack of respect for his position as a law enforcement officer and a role model for troubled youth, and that such actions constitute conduct unbecoming a public employee.

Eric McLeod (McLeod), a senior investigator with the JJC, testified on behalf of respondent. He has been employed by JJC for seventeen years. He previously was a corrections officer from 1998 through 2000, and a probation officer from 1992 to 1994, in Bergen County. McLeod has been trained for his current position, which calls on him to investigate sexual assaults, and staff and administrator incidents. He investigated the incident of January 12, 2014.

The incident occurred at the New Jersey training school, and involved the appellant, Officer Collazo (Collazo), and a resident, D.S. The appellant received discipline in the form of removal, and as a result of the investigation, Collazo was given a sixty-day suspension.

McLeod handled both appellant's and Collazo's investigation. He reviewed photographs that had been taken of Kenney and D.S., conducted interviews of Kenney, Collazo, Sergeant Fisher (Fisher), and several residents. McLeod did not interview D.S., as D.S. refused, having declined after being read his Miranda rights. McLeod wrote reports which summarized his findings. This is his regular practice, and it is required by JJC. He acknowledged signing the January 12, 2014 Investigation Report (J-3), and also reviewed the January 12, 2014 Narrative Report of Senior Corrections Office (SCO) A. Kenney (J-11).

McLeod stated that D.S. was in the day room, and intentionally hit his head on the bathroom door, after which he was called into the hallway by officers. McLeod then reviewed Report TS-140112-02 Juvenile Statement Form of D.S., dated January 12, 2014 (J-8). He stated that Collazo called D.S. into the hallway, and Collazo and appellant talked to D.S. about why he was hitting his head. Kenney approached D.S., initiated contact, and the struggle ensued. He reviewed an Investigation Report dated January 31, 2014 (J-12), which is a memo of an interview with Kenney that the appellant signed. Kenney said that while talking to D.S. about hitting his head, he saw that D.S. was belligerent. D.S. then lunged at him, which resulted in the altercation. Kenney changed his statement, calling it more of a flinch than a lunge. D.S. broke free, Kenney applied hand strikes, and both went down to the ground. Kenney did not recall D.S. using force, but said that he may have pushed Kenney. Kenney admitted to striking D.S. in the head, and striking him with knees and with a closed hand. No one other than Collazo saw the incident. Officers did respond to an emergency code called over the radio. Investigation Report of Eric D. Cloud, dated February 3, 2014 (J-3), at page 15, indicated D.S. was taking a step toward Kenney, and raised his hand to waist-level.

At this time the video was set up to be reviewed. McLeod stated that he had previously seen the video. At the start of the video, McLeod identified D.S. sitting in the second row from the front, in the day room. He identified D.S. getting-up and exiting the room, and the video shows what seems more of not banging his head so much as tapping his head against the door, (in a manner that is barely discernable). D.S. then returned from the bathroom, and the first video concluded. McLeod concluded that D.S. did make physical contact with his head to the bathroom door. The video from the hallway (J-5) was then reviewed. McLeod had seen it before, and used this video in his investigation. He identified Officer Collazo at the end of the hall. He identified the appellant standing at the podium.

D.S. entered into the video by the podium, which was obscured somewhat by the time stamp. Appellant was at the podium, and D.S. was standing in front of him. McLeod explained that the appellant asked D.S. why he banged his head, and on the video Collazo can be seen moving closer to D.S. while appellant remained at the podium.

McLeod continued, noting that Collazo's back was to the wall, away from D.S. Kenney then stepped-out from behind the podium. He told McLeod during his interview that at this point D.S. was being belligerent, (which cannot be discerned from the video). Appellant was now leaning on the podium, and D.S. moved away from the wall toward the officers. Kenney leaned off the podium, stood-up and took another step. At this time D.S. is in front of the podium and Kenney is in front of D.S. Kenney then moved toward D.S. Collazo told McLeod that D.S. did not lunge (which is consistent with the video). Both individuals bounced back and forth and then went to the ground. Another officer identified as Sergeant Fisher then arrived. Fisher had been called by appellant, who at this time was on the ground subduing D.S. Appellant got up, D.S. remained on the floor, but was not restrained. Upon arriving, Fisher put his foot on D.S., and kept it there for a while—D.S. was not trying to move. Five to six officers arrived on the scene, and D.S. was taken up off the ground, and placed against the wall. D.S. was taken out of the camera view. Medical Officer North then walked down the hall and was speaking with officers at the podium as the video concluded.

McLeod further testified that Kenney had told Collazo that D.S. had lunged, which Collazo believed is inconsistent with what was on the video. McCleod noted that this was the same video he observed in conducting his investigation. He reiterated that D.S. was moving backward as appellant lunged.

McLeod explained that D.S. was charged with assault on a staff member, and a disciplinary infraction report was filed as a result of this altercation. D.S. was found guilty, and given a five-day room restriction. McLeod reviewed D.S.' Notice of Violation (J-15), as reported by appellant, which stated that D.S. assaulted him by pushing him to the floor, and striking him in the face. McLeod also reviewed Room Restriction/Separation Form, D.S., J201B Assault on Staff, dated January 12, 2014 (J-16), which is the prehearing restriction. He did not believe that the allegations contained in J-15 or J-16 are supported by the video. McLeod identified Disposition Recommendations By Office of Investigation, D.S.,

Inconclusive and Unfounded, Wimson J. Crespo, Sr., Chief, dated February 19, 2014 (J-17), which deemed allegations by Kenney unfounded and inconclusive, and Disposition Recommendations By Office of Investigations, SCO Allan Kenney, Substantiated, Wimson J. Crespo, Sr., Chief, dated February 19, 2014 (J-18), substantiating charges against appellant. McLeod had investigated prior discipline against Kenney.

On cross-examination, McLeod acknowledged that he did not list or mention the day room video in his report. He stated that the lack of its inclusion does not make his a false report, as it was merely an oversight. He noted that the video was cut-off before D.S. was taken into the hallway. The videos were reviewed again with McLeod. He did not know how many frames per second comprise the frame rate of the video. He stated there is nothing inappropriate about pulling D.S. out. He stated that an officer does not have an obligation to wait to be assaulted, and conceded that no one had the benefit of the video, when Collazo and Kenney made their reports.

The next witness to testify was Captain Edwin Gonzales (Gonzales), who is employed by the JJC. At the time of hearing Gonzales had been a captain for two years and seven months, and described his work duties as overseeing custody, security, and being in charge of training. He teaches use of force classes to JJC officers, as well as firearms certification and recertification. He noted that JJC has policies in which officers are trained regarding the use of force, and they are only tested as recruits. Gonzales is also trained on how to write incident reports. He reviewed Exhibit R-2, New Jersey Juvenile Justice Commission, Office of the Deputy Executive Director of Operations, Subject Use of Force, Effective Date November 4, 2011, which is the policy. The policy defines non-deadly force, states when force is appropriate, and gives examples from the policy. Gonzalez noted that the expectation is that reports will be true and accurate when submitted, and noted that the JJC keeps records of training. He reviewed the training roll call from September 28, 2007 (R-4), noting that Kenney was present. He noted that use of force was the subject of that session. This demonstrated that Kenney was present and was trained in the use of force. He also reviewed the Juvenile Justice Commission, Custody Discipline Table H-19.7 (R-3) regarding inappropriate physical contact, and noted that the recommended penalty range for a first offense would run from an official reprimand to removal. A second's offense would be removal. A charge of falsification

recommends for a first offense a range from official reprimand to removal, and a second offense would be official written reprimand to removal. Such a charge would apply to an incident report. Gonzales stated that officers are trained two times a year in areas including use of force and report writing. Retraining is needed. He stated that the use of force training is about one-hundred and twenty slides of a PowerPoint presentation. He stated that the retraining gives examples of improper use of force. When resistance ends force ends. On cross-examination, Gonzales noted that the use of force does occur daily. Gonzales stated that use of force is ideally a last resort, and that it is a violation of policy to use force in response to verbal insults.

Appellant Kenney testified in his own behalf. He stated that he started in September 2007, and went to Sea Girt for training and became a corrections officer. Appellant then became a senior corrections officer. He has had prior discipline, but nothing to do with the use of force. He has had to use physical force previously, and has been assaulted. He was injured and bitten in the face, punched in the face, kicked, pushed, and has had to go to the hospital. Kenney was out of work for six months after a previous incident when he was assaulted. He estimated using force approximately twenty times.

With regard to the January 12, 2014, incident, he noted that he was terminated the following April of that year. He performed the same job during that time from the incident to his removal. He noted that one other officer was on that particular wing of the facility at that time. There are thirty residents between two wings. Residents have committed crimes, but they are young.

The video was reviewed again. D.S. was new, and appellant was looking out for D.S., as new residents can be given difficulty. He is aware where the camera is located. Appellant asked why D.S. banged his head, and D.S. responded that he can do that, and he became belligerent. Appellant made it clear that D.S. was not in trouble. He called Officer Fisher twice, but had not yet called in a code. Everything appellant did to try to calm D.S. down only made him angrier. D.S. balled his fists and cursed at him. Appellant then called the Sergeant, and asked him for back up. D.S. got angrier, so appellant moved out from behind the podium to try and de-escalate the matter. Appellant assumed a defensive position when D.S.'s hand came up and determined that D.S. was an immediate threat. Kenney took the

appropriate action. When appellant physically engaged D.S, appellant stated that they were beyond verbal. D.S. was a threat, and Kenney engaged D.S. and pulled him down.

Appellant got out of his grasp, D.S. resisted, and Collazo and Kenney subdued D.S. Once D.S. stopped resisting, appellant stated he stopped using force. Appellant was pulling D.S.'s arms behind his back, when Fisher approached. Fisher told him to let him go.

Appellant wrote-up an assault on staff charge against D.S., and recalls that D.S. was convicted of assaulting him. With regard to the use of the word "lunge," he stated that he sought advice of colleagues, supervisors, and union reps. He described the situation for them, and all agreed that the word lunge was appropriate. Kenney was not trying to be intentionally misleading. He knew that a camera was on at all times, and he believes that his actions were reasonable. Appellant does not know if the JJC reviewed the video, or if they had the ability to.

Kenney reiterated that he was leaning on the podium, and was trying to look relaxed, and that when he told D.S. to back-up, D.S. did not back-up, and so he engaged him. He did not perceive D.S. backing away toward the wall. He observed D.S. pulling his hand toward his chest, and resisting putting his hands behind his back. Noting that D.S. told appellant to "suck my dick," appellant did not take it as an insult, rather he took it as verbal aggression and as a manifestation of his anger.

Appellant does not know on how many instances he has implemented use of force. He believes he has suffered several injuries which have taken a physical toll on him, but does not believe that they have taken a mental toll. He denied that these instances have made him jumpy, but stated they have made him more aware and less complacent.

Considering the foregoing[1], I **FIND** that on January 12, 2014, resident D.S. was in a day room at the New Jersey Training School in Jamesburg, New Jersey, when he put his head in physical contact with the door to the bathroom. Appellant, a senior correction Officer

[1] At hearing, ruling on an objection by appellant to photographs of D.S. and appellant after the incident (J-7) was reserved upon. In its closing brief, respondent withdrew its request that the document be included in the record, and it was given no weight or consideration.

assigned to that area, called D.S. into the hallway to ask him what he was doing. An animated discussion followed. While D.S. did raise his hand at one point, he did not appear to be behaving in a threatening, menacing or aggressive manner toward appellant, and appeared to be backing away from appellant, consistent with appellant's testimony as to his verbal instructions, when appellant came from behind the podium and pushed D.S. to the wall. In the ensuing scuffle, appellant appeared to use hand and knee strikes while attempting to restrain D.S., and another officer, Collazo, assisted in restraining D.S. before help arrived. In filing an initial report describing the incident, appellant stated that D.S. "lunged" at him, a statement which is not borne out by reviewing the video, as D.S. at no time lunged toward appellant or in any way appeared to move aggressively or threateningly toward him. Appellant also brought administrative charges against D.S. for assaulting an officer, which resulted in discipline against D.S. Appellant was properly trained in the use of force.

To the extent that respondent has charged appellant with "falsification," citing inclusion of the word "lunged" in the initial report as the basis for that charge, and to the extent that it has been found as fact that "lunged" did not properly reflect D.S.'s actions during the incident, it must be determined whether or not that inaccurate description was intentional. Additionally, appellant's intent in bringing the charges against D.S. must also be examined. To do that, the credibility of appellant's testimony must be examined.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. [Ibid. at 522.] See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common

experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Respondent alleges that appellant's describing D.S. in his initial report as having "lunged at him" was an intentional misstatement of a material fact, which constituted a provision of false information. Appellant states that he did not intend to mislead, and that he described the situation to colleagues, superiors and union reps, and that they all agreed that "lunged" was the correct word. He further stated that although he knew that cameras were running, he did not know if his employers had the ability to review the video of the incident. While nothing stated is inherently unbelievable, appellant's shopping his language to so many people could cut either way. It is conceivable that he was trying to justify his actions, it was also possible that he was looking for the correct phrasing in consulting colleagues and union reps and superiors so as to give an accurate depiction of the incident. However, given the common usage of the word lunge, coupled with an objective viewing of the video, that so many people who had not seen the event nor reviewed the video all agreed that "lunge" was the correct word tends toward a finding that the event had not been accurately described to them. If it had been, it is likely that at least one would have noted that lunge was not the correct word. Furthermore, even if appellant did believe that use of force was justified, a review of the video makes it hard to believe that he reasonably believed that the incident warranted charges against D.S. for assault of an officer, as nothing depicted fits that description. Accordingly, I **FIND** that appellant's story does not hang together, and that respondent has demonstrated that it is more likely than not that appellant's consulting colleagues and filing of charges was an intentional attempt to justify the action that he knew was excessive.

LEGAL ANALYSIS AND CONCLUSIONS

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J.

143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The respondent has charged appellant with violations of N.J.A.C. 4A:2-2.3(a)6, (Conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)12. (Other sufficient cause), specifically, violations of JJC human resources policies: H19.7 C.6 (Inappropriate physical contact); C-9 (Falsification); C-12 (Conduct unbecoming a public employee) and N.J.A.C. Title 13:95-3.2 (Use of force policy).

Regarding the charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6), to the extent that appellant is charged with violation of JJC human resources policy H19.7 C-12, which addresses unbecoming conduct, consideration of such violation will be addressed in concert with the current analysis. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that "adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atlantic City, 152 N.J. 532, 555 (1998) [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960).

In the present matter, the record reflects that appellant utilized physical force in his encounter with a juvenile resident, D.S. on January 12, 2014. He initiated physical contact that did not appear to be commensurate with what D.S.'s actions warranted. He described

the incident in his initial report in a manner which was not consistent with what was depicted in the video of the incident and that appeared designed to justify his actions, and he filed charges against D.S. for assaulting him, an allegation which is not apparent from the video. This clearly constitutes behavior which could adversely affect the morale of the facility and undermine public respect in the services provided. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee), and JJC human resources policy H19.7 C-12, should be and are hereby **SUSTAINED.**

Appellant is also charged with a violation of N.J.A.C. 4A:2-2.3(a)12. (Other sufficient cause). Specifically, appellant is charged with violations of JJC human resources policies H19.7 C.6 (Inappropriate physical contact); C-9 (Falsification); C-12 (Conduct unbecoming a public employee) and N.J.A.C. Title 13:95-3.2 (Use of force policy). Violation of policy H19.7 C-12 has already been addressed and **SUSTAINED** within the discussion of the violation of N.J.A.C. 4A:2-2.3(a)6. The JJC Human Resources policies violations appear to correspond to the Juvenile Justice Commission Custody Discipline Table H-19.7 (R-3), specifically Section C which addresses personal conduct violations.

The record reflects that appellant inappropriately initiated physical contact against resident D.S. by taking him down when D.S. was not acting in a manner so as to threaten D.S. or others or that would otherwise justify such. Accordingly, I **CONCLUDE** that a violation of JJC human resources policies H19.7 C.6, which prohibits "inappropriate physical contact or mistreatment of a patient, client, resident, employee or adult inmate" (R-3), should be and is hereby **SUSTAINED**.

Section C9 of that document addresses "Falsification" which is defined as an "intentional misstatement of material fact in connection with work, employment application attendance, or in any record, report, investigation or other proceeding." In the present matter, the record reflects that appellant authored a report describing the incident at issue in a manner which is not consistent with what actually occurred, and did so in a manner which appeared designed to justify the actions taken. Specifically he described D.S. as having "lunged" at him, a description which connotes aggressive physical behavior by D.S. directed toward appellant that simply is not a fair description of any action by D.S. depicted in the

video of the incident, constituting a misstatement of a material fact necessary for one to determine the appropriateness of the action. This is compounded by appellant's filing charges of assaulting an officer against D.S. that simply are not supported by an objective review of the video. Even if appellant reasonably believed that use of force was justified, it belies credulity that he reasonably believed he had been assaulted. Accordingly, I **CONCLUDE** that that a violation of JJC human resources policies H19.7 C.9, which prohibits "Falsification" (R-3), should be and is hereby **SUSTAINED.**

N.J.A.C. 13:95-3.2 provides that:

> a. In any case that a custody staff member uses force while on-duty, the custody staff member shall only use that force that is objectively reasonable and necessary under the totality of the circumstances as known by the custody staff member at the time force is used.
>
> b. A custody staff member may use the amount of force reasonably necessary to accomplish the law enforcement objective. If the individual resists, the custody staff member may increase the degree of force as necessary to accomplish the law enforcement objective, but as soon as the individual submits, the custody staff member shall reduce the degree of force used.

In the present matter, the record reflects that circumstances did not necessitate the degree of force utilized by appellant. Specifically, as D.S. did not act aggressively or threateningly toward appellant, and appeared to be backing away from him, it is not clear that any force was objectively reasonable or necessary under the totality of the circumstances as known by appellant at the time. Accordingly, I **CONCLUDE** that the charge of violating N.J.A.C. 13:95-3.2 should be **SUSTAINED.**

Given the foregoing, I further **CONCLUDE** that the charge of violating N.J.A.C. 4A:2-2.3(a)12. (Other sufficient cause) must be **SUSTAINED.**

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing West New York v. Bock, 38 N.J. 500, 522 (1962)). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." West New York v. Bock, 38 N.J. 500, 523-524 (1962).

As the Supreme Court explained in In re Herrmann, 192 N.J. 19, 30 (2007), "[s]nice Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

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

[In re Hermann, 192 N.J. at 30-33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on-duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. 474 (2007)

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

Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

In the present matter, respondent has brought and sustained charges of violations of N.J.A.C. 4A:2-2.3(a)6, (Conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)12. (Other sufficient cause), specifically, violations of JJC human resources policies: H19.7 C.6 (Inappropriate physical contact); C-9 (Falsification); C-12 (Conduct unbecoming a public employee) and NJAC Title 13:95-3.2 (Use of force policy). The record also reflects that on April 15, 2013, just shy of nine months before the incident at issue, appellant entered into a settlement agreement in which he pled guilty to charges of incompetence, inefficiency or failure to perform public duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause, specifically, violations of JJC Disciplinary Policies covering Neglect of duty, Physical or mental abuse of a resident; and Falsification (R-1). The agreement called for, and appellant served, a ninety-day suspension. Sixty days were unpaid and thirty days were recorded as a record-only suspension. A final notice of disciplinary action was issued memorializing and ratifying the agreement.

Taken together with the settlement agreement, which constitutes the appellant's substantive disciplinary history, the charges sustained in the present matter constitute a second offense for Conduct Unbecoming and a second offense for falsification. The remaining charges appear to be a first offense. Juvenile Justice Commission Custody Discipline Table H-19.7 (R-3) recommends appropriate penalty ranges for specific infractions. For a second infraction of Conduct Unbecoming, the table recommends a penalty range of ten days to removal. For a second offense of Falsification, it recommends a penalty range of Written Reprimand to Removal. For a first offense of Inappropriate Physical Contact, the table recommends a penalty range of Written Reprimand to Removal. The table is not binding on this tribunal, and the document itself notes that management reserves the right to deviate from the recommended penalties; however, the recommended penalty ranges appear to be reasonable and consistent with progressive discipline.

Considering the foregoing, the totality of appellant's history and the specifics of the present matter, I **CONCLUDE** that the behavior exhibited in the present matter is not aberrational, but rather a continuation of a pattern that seems to be increasing in seriousness and frequency rather than decreasing. Appellant does not seem to be learning from his mistakes, but rather appears to be compounding them. When an officer is involved in an incident like the present matter presents, it is to be expected that an officer will deal with the

incident, and its aftermath, in an honest, forthright, responsible manner. To expect otherwise is to invite disorder and confusion in responding to such instances, possibly leading to worse, more dangerous situations, and serves to undermine the confidence the public places in the correctional system. Appellant has failed to respond honestly and forthrightly, and has acted in an unbecoming manner, twice in fairly short order. It cannot be tolerated. Furthermore, although the violation of N.J.A.C. 13:95-3.2 (Use of Force) and of inappropriate contact are only first infractions, taken together with the previous guilty plea to physical or mental abuse of a resident it reflects two occasions, again in fairly short order, which reveal a pattern of not acting with the appropriate degree of care toward the juvenile individuals in his charge. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from his position was justified.

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against Kenney with violations of N.J.A.C. 4A:2-2.3(a): 6. Conduct unbecoming a public employee; and 12. Other sufficient cause defined as violation of JJC human resources policies: H19.7 C.6 Inappropriate physical contact; C-9 Falsification; C-12 Conduct unbecoming a public employee and NJAC Title 13:95-3.2 Use of force policy, and I **ORDER** that these charges be and are hereby **SUSTAINED.** Furthermore, I **ORDER** that the penalty of removal is hereby **AFFIRMED.**

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF**

APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 26, 2018
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: January 26, 2018

Date Mailed to Parties: January 26, 2018

nd

APPENDIX

WITNESSES

For appellant:

Allan Kenney

For respondent:

Eric McLeod

Captain Edwin Gonzales

EXHIBITS

Jointly:

J-1 Preliminary Notice of Disciplinary Action (31-A), Civil Service Commission, State of New Jersey, dated March 20, 2014

J-2 Final Notice of Disciplinary Action (31B), Civil Service Commission, State of New Jersey, dated April 20, 2015

J-3 Eric D. Cloud, Senior Investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Date/Time of Incident: January 12, 2014 at Approximately 1:15 p.m., Review Date February 19, 2014, dated February 3, 2014

J-4 Video Footage from the Day Room, January 12, 2014

J-5 Video Footage from the Hallway, January 12, 2014

J-6 Incident Number TS-140112-02N, Suspected Child Abuse Report, Confidential, DCF Institutional Abuse Unit, dated January 12, 2014

J-7 Withdrawn

J-8 D.S., Report TS-140112-02, Juvenile Justice Commission, Juvenile Statement Form, dated January 12, 2014

J-9 State of New Jersey, Department of Law and Public Safety, Complaint Notification, TO; SCO A. Kenney from SR Inv. E. Cloud, dated January 31. 2014

J-10 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Office of Investigation, Complaint Notification, dated January 30, 2014

J-11 Juvenile Justice Commission, Attachment Narrative Report, SCO, Kenney, A., dated January 12, 2014

J-12 Eric D. Cloud, Senior investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Allan Kenney, dated January 31, 2014

J-13 Juvenile Justice Commission, Attachment Narrative Report, COR Collazo, A. dated January 12, 2014

J-14 Eric D. Cloud, Senior investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Andres Collazo, dated February 7, 2014

J-15 Juvenile Justice Commission, Notice of Violation, D.S., undated

J-16 New Jersey Juvenile Justice Commission, Room Restriction/Separation Form (Prehearing Room Restriction), D.S., J201B Assault on Staff, dated January 12, 2014

J-17 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations by Office of Investigations, D.S., Inconclusive and Unfounded, Wimson J. Crespo, Sr., Chief, dated February 19, 2014

J-18 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations By Office of Investigations, SCO Allan Kenney, Substantiated, Wimson J. Crespo, Sr., Chief, dated February 19, 2014

J-19 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations By Office of Investigations, COR Andres Collazo, Substantiated, Wimson J. Crespo, Sr., Chief, dated February 19, 2014

J-20 Juvenile Justice Commission, Attachment Narrative Report, Lt. T. Braun, dated January 12, 2014

J-21 Eric D. Cloud, Senior investigator #9, State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Sergeant Terry Fisher, dated February 11, 2014

J-22 Juvenile Justice Commission, Attachment Narrative Report, Sergeant t. Fisher, dated January 12, 2014

J-23 Juvenile Justice Commission, Attachment Narrative Report, SCO J. Pintado, dated January 12, 2014

J-24 Juvenile Justice Commission, Attachment Narrative Report, B.S. Pearson, dated January 12, 2014

J-25 Juvenile Justice Commission, Attachment Narrative Report, SCO W. Narath, dated January 12, 2014

J-26 Juvenile Justice Commission, Attachment Narrative Report, ES Rosado, dated January 12, 2014

J-27 Juvenile Justice Commission, Attachment Narrative Report, OO/SCO Raul Yepez, dated January 12, 2014

J-28 Juvenile Justice Commission, Attachment Narrative Report, SCO M. Toranzo, dated January 12, 2014

J-29 Juvenile Justice Commission, Incident Report, Sergeant T. Fisher, dated January 12, 2014

J-30 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, A.J., dated January 22, 2014

J-31 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, T.H., dated January 22, 2014

J-32 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, H.H., dated January 22, 2017

J-33 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, C.O., dated January 22, 2014

J-34 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, I.R., dated January 22, 2017

J-35 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, X.S., dated January 22, 2014

J-36 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, G.H., dated January 22, 2014

J-37 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, Denial of Statement from D.S.; Approval to Interview D.S. by N.J.; Non-witness Statement of U.T., S.R., K.J., D.F., D.M., W.D., J.P., E.S., J.O., and S.B. by Senior Investigator #9 Eric D. Cloud, dated February 7, 2014

J-38 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, K.G., dated January 22, 2014

J-39 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, J.R., dated January 22, 2014

J-40 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Investigation Report, N.B., dated January 22, 2014

J-41 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Office of Investigation, Witness Acknowledgment Form, by Sergeant Fisher, dated February 11, 2014

J-42 State of New Jersey, Department of Law and Public Safety, Juvenile Justice Commission, Office of Investigation, Administrative Investigations Only, A. Collazo, dated January 30, 2014, and Allan Kenney, dated January 31, 2014

J-43 Department of Law and Public Safety, Juvenile Justice Commission, Disposition Recommendations by Office of Investigations, Subject Employee: Corrections Officer Recruit Andres Collazo, Victim: Resident D.S., dated February 19, 2014

J-44 Juvenile Justice Commission, Notice of Special Observation Status, D.S., date January 12, 2014

J-45 Secure Facilities 13:95-3.4 Supp. 5-21-12, page 95-10.1, and Secure Facilities 13:95-3.5 Supp. 2-6-06, page 95-11

For appellant:

None

For respondent:

R-1 Final Notice of Disciplinary Action (31B), Civil Service Commission, State of New Jersey, Suspension for Ninety-Working Days, Sixty Without Pay May 5,2 013 through July 25, 2013, dated April 23, 2015

R-2 New Jersey Juvenile Justice Commission, Office of the Deputy Executive Director of Operations, Subject: Use of Force, Effective Date November 4, 2011

R-3 Juvenile Justice Commission, Custody Discipline Table H-19.7

R-4 Department of Law and Public Safety, Juvenile Justice Commission Training Academy, BCJCO #21, dated September 27 2007

3-27-18

B-26

STATE OF NEW JERSEY

In the Matter of Frank Maisano,
Aberdeen Township

CSC Docket No. 2016-2614
OAL Docket No. CSV 03222-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 20, 2018 (HS)

The appeal of Frank Maisano, a Police Officer with Aberdeen Township, of his 10 working day suspension, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo (ALJ), who rendered her initial decision on October 31, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 27, 2018, did not adopt the ALJ's recommendation to uphold the 10 working day suspension. Rather, the Commission modified the penalty to a six working day suspension.

DISCUSSION

The appointing authority suspended the appellant for 10 working days on charges of incompetency, inefficiency or failure to perform duties, insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause. Specifically, it asserted that the appellant operated a motor vehicle unit with reckless disregard for the safety of others resulting in a collision. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision and based on the testimonial and documentary evidence presented, the ALJ found that the appellant had been employed with the

Aberdeen Township Police Department (ATPD) for 21 years, 18 years of which were served as a Police Officer. On November 26, 2014, at a few minutes after midnight, the appellant responded to a call for assistance from Raymond W. Campbell, Police Officer. The appellant was driving an unmarked police vehicle known as a "stealth car" that was not equipped with rooftop lights. The appellant believed Campbell was in trouble so he expedited his response to the emergency call. The appellant stated he had "tunnel vision" caused by recent events in the news against police officers and was motivated by a desire to reach Campbell. The appellant was originally proceeding to the call behind Charles Trucillo, Police Officer. He passed Trucillo on the left by crossing over double yellow lines to become the lead vehicle. The appellant's emergency lights were not activated, and it was unknown whether his sirens were activated. As the appellant approached the intersection at Railroad Plaza and Main Street, his light was red. The appellant applied his brakes but did not stop at the red light at the intersection. When the appellant entered the intersection against the traffic light, he did not immediately notice the other vehicle in the intersection that was travelling eastbound with the green light passing directly in front of him. When the appellant saw the other vehicle, he applied his brakes, but continued to proceed to the emergency call without stopping. The other vehicle continued to proceed eastbound without stopping. The intersection has a pronounced curvature or hump in the road. The appellant activated his emergency lights after he went through the intersection as he continued to proceed to the location of the emergency call. He traveled to the location at speeds that at different points reached 75 miles per hour, 79 miles per hour and 83 miles per hour while travelling on roads that were posted as 35 miles per hour. Upon arriving at the location of the call and after the suspect was in custody, the appellant noticed damage to the front bumper of his vehicle and notified Darryl Oliver, Police Sergeant, by radio that he had a minor accident. The appellant completed an Accident Report stating that he made contact with another vehicle while crossing an intersection. The damage to the vehicle cost ATPD $1,068.05 to repair.

The ALJ upheld all but the charges of insubordination and inability to perform duties. With respect to the penalty, the ALJ noted that the appellant had received a four-day suspension and was reprimanded on five occasions. Based upon this disciplinary history, the ALJ determined that major discipline was warranted. After considering both progressive discipline and the possible impact upon the public caused by the unsafe and reckless operation of a motor vehicle in response to an emergency, the ALJ determined that a 10 working day suspension was an appropriate penalty.

In his exceptions, the appellant contends that the ALJ erred in finding that the appellant's emergency lights were not activated. He argues that the correct wording for this factual finding should have been that the appellant's emergency lights were not *fully* activated since the ALJ indicated as much elsewhere in her initial decision. As such, the appellant maintains that the ALJ should also have

found that the appellant activated *the full complement* of his emergency lights after he went through the intersection. In addition, the appellant contends that it was inconsistent for the ALJ to find that it was not determinative whether there was a collision but also find an accident and use that fact as determinative in sustaining the charge of conduct unbecoming a public employee. Further, he contends that the ALJ gave no weight to the charges she dismissed in upholding the 10 working day suspension. The appellant argues that even if the ALJ was correct in believing that his conduct warranted major discipline, the proper penalty was a six working day suspension.

In its reply to exceptions, the appointing authority maintains that all of the pertinent legal analysis and conclusions in the initial decision rest on the ALJ's determination that the appellant's emergency lights were "not *fully* activated" or "not *fully* engaged" (appointing authority's emphasis). Further, ATPD rules allow no consideration for partial activation. In addition, the appointing authority argues that the facts clearly demonstrated that the appellant collided with something unintentionally – the "literal definition" of an accident. The appointing authority also contends that notwithstanding the dismissal of certain of the charges, a penalty of a 10 working day suspension was appropriate in that those dismissals did not bear on the "central justification" for disciplinary action: the appellant's reckless and dangerous actions.

While the Commission agrees with the ALJ's determination of the charges, it disagrees with the recommendation to uphold the penalty of a 10 working day suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In this matter, the appellant was a long term employee whose disciplinary history included only minor discipline, much of which was remote in time. Further, the ALJ dismissed some of the charges. The foregoing circumstances justify a reduction of the original penalty. Nevertheless, the appellant's infraction was serious and still warrants major discipline.

Accordingly, the Commission finds a six working day suspension to be the appropriate penalty.

Since the penalty has been modified, the appellant is entitled to four days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission agreed with the ALJ's determination sustaining most of the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Commission finds that the appointing authority's action in imposing a 10 working day suspension was not justified under the circumstances and modifies that action to a six working day suspension. The Commission further orders that the appellant be granted four days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03222-16
AGENCY DKT. NO. 2016-2614

IN THE MATTER OF
FRANK MAISANO, TOWNSHIP OF
ABERDEEN, DEPARTMENT OF
PUBLIC SAFETY.

Stuart J. Alterman, Esq., for appellant (Alterman & Associates, LLC, attorneys)

Ramon E. Rivers, Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: September 29, 2017 Decided: October 31, 2017

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Appellant, Frank Maisano (Maisano), a Police Officer with the Aberdeen Township Police Department (ATPD), appeals a 10-day suspension he received as major discipline for operating his police vehicle in response to a call for assistance with reckless disregard for the safety of others and the subsequent Internal Affairs investigation surrounding same. ATPD sustained the following charges: incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); insubordination, N.J.A.C. 4A:2-2.3(a)(2); inability to perform duties, N.J.A.C. 4A:2-2.3(a)(3); conduct

unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12).[1] ATPD also determined that Maisano violated Aberdeen Township Police Department General Rules and Regulations as follows: 3:1.8 Obedience to Laws and Regulations; 3:4.5 Operation of Motor Vehicle; 3:4.7 Reporting Accidents; 3:4.1 Damaged – Inoperative Property or Equipment; and 3:13 Operation of Police Vehicle. Maisano denied the allegations as baseless, maintained he did nothing wrong, and submitted that he acted appropriately due to the emergent nature of the call for assistance.

PROCEDURAL HISTORY

On March 18, 2015, ATPD issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against Maisano. (R-20.) Following departmental hearings held on August 6, 2015 and November 23, 2015, ATPD issued a Final Notice of Disciplinary Action (FNDA) on January 21, 2016 sustaining the charges in the Preliminary Notice and suspending Maisano from employment for ten working days. (R-21.) Appellant appealed on January 28, 2016. The matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on February 29, 2016 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearings were held on May 9 and May 19, 2017. The record remained open to allow the parties to submit post-hearing submissions and a chronology of past discipline. The record closed on September 29, 2017.

FACTUAL DISCUSSIONS AND FINDINGS

The following facts are not disputed. Just past midnight on November 26, 2014, Maisano, while on duty, responded to a call for assistance from Officer Raymond W. Campbell (Campbell). Maisano drove a black Dodge Charger, known as a "stealth car," because it does not have roof lights or markings usually associated with traditional

[1] The notices of disciplinary action reference N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Effective March 5, 2012, former (a)(11) was recodified as (a)(12).

police vehicles. Maisano reacted to the urgency in Campbell's voice heard over the radio and expedited his response to the call. While on route, Maisano made the decision to proceed through a red light at an intersection located at Main Street and Railroad Plaza in Matawan Borough. Maisano was travelling north and as he crossed the intersection, another vehicle, travelling east, passed directly in front of Maisano's car. This particular intersection has a hump or crown in the road. Maisano did not have his emergency lights activated when he crossed through the intersection. Upon arriving at the scene and after the suspect was in custody, Maisano examined his bumper and seeing damage, reported to his Sergeant that he had a minor accident.

TESTIMONY

Sergeant Darryl James Oliver (Oliver) has been a police officer with ATPD for eighteen years and a sergeant for the past eleven of those years. He was Maisano's supervisor and the officer in charge on the night in question. Oliver was at headquarters when Campbell's call came over the radio asking for assistance. He responded to the call. After arriving at the scene, Oliver encountered Maisano who told him he was involved in a minor motor vehicle accident while on route. Maisano showed Oliver the damage to his vehicle located on the front bumper grill area on the driver's side. Oliver testified that standard operating procedures required him to write a memo describing Maisano's account of the accident to his superior, Captain Allan Geyer. In the memo, Oliver reported that Maisano while responding to Campbell's call for help was involved in a motor vehicle accident causing minor damage to his vehicle. (R-1.) ATPD maintains a mobile video recorder (MVR) system that was installed and operated in selected police vehicles. Maisano's Charger had an MVR that recorded the incident. (R-23.) Oliver testified that he reviewed the video in the early morning hours of November 26, 2016. The video was played at the hearing. As we watched the video, Oliver identified Maisano's vehicle as it was proceeding behind Officer Trucillo's vehicle. Both vehicles were responding to the call. Maisano then proceeded to pass Trucillo's vehicle on the left by crossing over the double lines in the roadway. From the video, and the rates of speed recorded, Oliver observed that Maisano applied his brakes as he approached the intersection, but did not come to a full stop at the red light. As Maisano entered the intersection going north, a civilian vehicle travelling east passed directly in

front of him. Oliver testified that Maisano struck the vehicle based on what he observed on the video and because Maisano told him that he was involved in an accident. Neither vehicle stopped. As depicted in the video, it was not until after Maisano cleared the intersection that the emergency light bar in his vehicle was activated. In response to direct questions, Oliver testified that the vehicle's siren was shown as a capital letter "S" and he explained the blinking "S" on the video as the siren going on and off. By reading the miles per hour shown on the video, Oliver testified that Maisano's vehicle was traveling at rates of speed between 50 and 56 mph as he approached the intersection.

Oliver testified that he told Maisano not to respond to Campbell's call for assistance. He stated that he issued an order over the radio for 6308, Maisano's vehicle number, to stay west-side. According to Oliver, it was his practice to keep one officer available to respond in the event of another emergency. Oliver recalled that Maisano was assigned to section four on the west side of Aberdeen; Campbell's emergency call for assistance was on the east side of Aberdeen. Oliver testified that he told Maisano to "stay west side" because all other additional units, including Oliver, were responding to back up Campbell. The audiotape recording of Campbell's call for assistance was played during the hearing. (R-24.) Oliver was not able to identify on the recording his order to stay west-side. The radio transmission was transcribed in part and other parts were transcribed as "rest unintelligible." (R-6.) Oliver's order to "stay west side" was not transcribed. Oliver acknowledged that he did not get a response from Maisano regarding his order. The only recorded communication between Oliver and Maisano was the report of a "minor 15." Oliver recognized the voice on the audio recording as Maisano's and explained that a "15" is code for a motor vehicle accident. The transcript of the radio transmission shows that Maisano advised Oliver of the minor accident at 12:15:53 a.m. (R-6.)

As depicted on the video, Oliver and Maisano were examining Maisano's vehicle for damage at 12:25 a.m. at the location of the call. Because of the damage, Maisano and Oliver were required to fill out an Accident/Injury Report. Part one of the form was completed by Maisano and part two was completed by Oliver. (R-3.) Maisano wrote on the form that he was "responding to an officer in distress call, and upon crossing an intersection, made contact with another vehicle." Id. Oliver wrote that the accident was

not immediately reported, but that Maisano reported it "after handling a police call shortly after accident." Id. He also wrote that he felt that accidents such as this could be avoided by "driving safely" and following "Dept./AG Guidelines." Id.

Oliver prepared a second memorandum at the request of Captain Geyer for a recommendation of whether disciplinary action should be taken against Maisano. (R-2.) In Oliver's opinion, there were too many things that Maisano could have done differently to avoid or prevent the incident. Therefore, he recommended disciplinary action based on the following conduct: Maisano's decision to pass Trucillo's vehicle into an oncoming traffic lane at a high rate of speed; failure to stop before entering the intersection; failure to activate emergency lights; crossing an intersection against the traffic light and striking a vehicle proceeding with the green light; and failure to follow proper protocol after an accident.

Captain Alan Geyer (Geyer) has been a Captain for three years and employed by ATPD for thirty years. He is the operations commander which includes scheduling, equipment, training, and internal investigation work. He also works in a supervisory capacity to the Sergeants, Officers, and Patrol Division. During his thirty-year tenure, he worked as a traffic officer and accident investigator. He described that ATPD operates on a chain of command, consisting of the Chief, Deputy Chief, two Captains, and six Sergeants. The incident with Maisano occurred just after midnight on November 26, 2014 when Geyer was not on duty. Oliver was Maisano's supervisor. The first memo drafted by Oliver was a brief synopsis of the incident to inform Geyer of the accident involving Maisano's vehicle. (R-1.) After reviewing the memo, Geyer asked Oliver for a recommendation regarding disciplinary action. Geyer testified that this is a typical request to make of the Sergeant on duty and in charge. Geyer received and reviewed Oliver's recommendation regarding discipline. (R-2.) He also reviewed the MVR from Maisano's vehicle. (R-23.) After reviewing the video, Geyer drafted a memo and sent it to his superior, Deputy Chief Derechailo, with his recommendation regarding discipline. (R-5.) Geyer provided four reasons justifying disciplinary action: 1) lights and siren not activated until after the crash; 2) failure to have ICOP mic on; 3) failure to immediately advise supervisor of the accident; and 4) failure to stop at red light at the intersection where crash occurred.

The video was played for Geyer's analysis at the hearing. Geyer testified that he was very familiar, as part of his normal duties, with the ICOP i VAULT MMS viewer which is the software used to download the video from the officer's patrol vehicle. Maisano's vehicle is identified as 6308. Geyer explained that the software was designed to show when the lights, siren, or brakes are engaged. The video recording is triggered, or automatically activated, in any one of three instances: when the vehicle's emergency lights are activated; when the vehicle reaches a speed of seventy-five miles per hour; or in the event the vehicle is involved in a crash. (R-15.) Once activated, either manually or automatically, the last sixty seconds of video recording, prior to activation, will be captured. Id. There is no audio recording during this look back minute prior to activation. This recording allows the viewer to see what was happening in the minute before the MVR was engaged. Geyer testified to what he saw on the video as it was played at the hearing. He explained that the blinking "S" on the video is not related to the siren because ATPD disengaged that feature prior to this incident. ATPD did not want the siren to be a triggering event for the MVR because of the frequency and routine uses of sirens by patrol officers during their shifts. Geyer stated that based on his experience in viewing the tapes the blinking "S" on the video would indicate braking not siren. Geyer identified Maisano's vehicle on the video as it passed Trucillo's Durango on the left side into the oncoming traffic lane. As the video recorded Maisano's vehicle traveling through the intersection, Geyer pointed out that Maisano's emergency lights did not come on until he was through the intersection. The MVR in Trucillo's vehicle was not working, so no video of the event was captured from that car. (R-13.)

Geyer was also involved in the Internal Affairs (IA) investigation, giving assistance to the Deputy Chief. He personally inspected the vehicle and viewed the damage to the front of the bumper that he describes as a scrape with an opening. He did not take any photographs of the vehicle. The cost of repairs to vehicle 6308 was $1,068.05. (R-8 and R-22.) When asked on direct whether Maisano's conduct violated ATPD rules and regulations, Geyer stated that Maisano was required to stop at the red light before entering the intersection, and if Maisano believed that he was involved in an accident with another vehicle he was required to stop and immediately notify his supervisor. He also stated that Maisano's speed traveling through the Township was

excessive. From the MVR in Maisano's car, Geyer testified that Maisano's top speeds were recorded as 75, 79 and 83 miles per hour as he travelled to the call. On cross-examination, Geyer testified that the vehicle driven by Maisano was called a "stealth vehicle" that is not equipped with lights on the roof. Auxiliary lights do not activate the camera. Geyer testified that after Maisano crossed the intersection, the front windshield lights were activated, which triggered the recording. Geyer concluded that Maisano turned on the lights at that time based upon the activation of the video recording. There was no other triggering event. Geyer felt that any impact between Maisano's vehicle and the civilian vehicle in the intersection would have been too minor to trigger the camera. Geyer was familiar with the intersection of Main and High Street in Matawan Borough and acknowledged that there was a large depression in the road way. However, based on his experience, he did not think that the damage to the front bumper was caused by the roadway.

Deputy Chief Richard Derechailo (Derechailo) has been the Deputy Chief for the past eleven years and employed by ATPD for thirty-two years. It was his job to investigate complaints of officer wrongdoing as part of his overall responsibility for internal affairs investigations. On November 26, 2014, Derechailo reviewed the memo from Geyer (R-5) and initiated an internal affairs file. The next day, after reviewing the MVR from Maisano's vehicle with Geyer, he determined that further investigation, including an interview with Maisano was warranted. Consequently, he sent an Internal Affairs Complaint Notification to Maisano for an interview. (R-7.) Maisano was interviewed with his attorney present. A narrative of the interview was prepared by Derechailo. (R-10.) As set forth in the narrative, Maisano stated that although he slowed down prior to entering the intersection, he did not see the other vehicle. He was not sure at the time if he hit the other vehicle or if it was the unevenness in the road that he felt. He realized that he had hit the car when he saw the damage to his own vehicle after he arrived at the scene of Campbell's call. When questioned about his lights and siren, he stated that he was trying to locate the buttons while he was driving, but was unable to do so until he passed through the intersection. Maisano explained that he had tunnel vision when responding to the call and was concerned about Campbell's safety because of recent protests against police officers, such as the event in Ferguson, Missouri.

Derechailo physically reviewed the intersection at Railroad Plaza and Main Street where the accident allegedly occurred. He testified that the intersection is controlled by a traffic light and there is a crown in the road as you cross over Railroad Plaza onto High Street. This is a busy intersection due to its proximity to the train station and well known to Derechailo because he travels it each day to work. He also noted that the speed limit on the streets where Maisano traveled that night were posted at 35 mph but at different times the MVR showed Maisano's speed as 75 miles an hour, 79 miles an hour, and 83 miles an hour. Derechailo authored a report which was a compilation of his findings after reviewing the following: Geyer memo; MVR; the transcription of the dispatch communication recordings; the Matawan police report; and Maisano's interview narrative. (R-9.) His findings were as follows:

> Ptl. Maisano did not activate his emergency lights or siren until after he struck a car crossing the intersection of Main St. and Railroad Plaza;
> Ptl. Maisano did not use due caution when entering the intersection of Main St. and Railroad Plaza, causing him to crash with another vehicle;
> Ptl. Maisano did not remain at the scene of the accident but instead continued on to the assist call;
> Ptl. Maisano did not immediately report the accident but instead waited until he arrived at the assist call;
> Ptl. Maisano operated his patrol vehicle at excessive speeds en route to the assist call;
> MVA[2] resulted in excess of $1,000 damage to the patrol vehicle;
> In total, Ptl. Maisano's operation of the patrol vehicle created a substantial risk to himself and the public of serious injury.

Despite the recognition by Derechailo that Maisano was responding to a call for assistance from another officer, he believed that the findings of the investigation warranted disciplinary action in the form of a suspension. At the conclusion of the internal affairs investigation, Derechailo submitted a memo to Chief Powers wherein he stated that when an officer is responding to a call for assistance, regardless of its seriousness, he is not relieved of the responsibility to safely operate his vehicle. (R-12.)

[2] MVA refers to motor vehicle accident.

Derechailo testified that it was Maisano's overall operation of his vehicle in an unsafe manner that was the primary concern, not whether the accident occurred.

Chief of Police John T. Powers (Powers) has held the position of Chief for the past eleven years and has been employed by the ATPD for the past thirty-five years. He is responsible for the daily operations of the police department, budget matters, and maintaining good order and discipline within the department. He expressed his familiarity with the Rules and Regulations of the ATPD and identified Regulation 3:4 and its subparts as pertaining to officers' responsibility for the proper care of equipment and controlling the operation of motor vehicles. (R-14.) In summary, he stated that officers are required to set an example by safe operation of their vehicles and observe all motor vehicle laws. Powers discussed the procedures and guidelines for the use of the MVR set forth in General Order Number 2009-002. (R-15.) The Order requires that all emergency responses should be both audibly and visually recorded. Powell signed the Order on June 1, 2009; it was in force and effect on November 26, 2014. Powers signed the Preliminary Notice of Disciplinary Action on March 18, 2015 after receiving the final report on the internal investigation with its findings of violations of rules and regulations pertaining to the safe operation of motor vehicles. (R-20.) Powers also executed the Final Notice of Disciplinary Action on January 21, 2016. (R-21.) Powers testified that the actual costs for the damage to the subject vehicle were $1,068.05. (R-22.) In his capacity as Chief of Police, Powers testified that progressive discipline was warranted in this situation for violations of the township rules and regulations, the general order, and the state statute. On cross-examination, Powers testified that all internal affairs investigations are done in accordance with Internal Affairs Policy & Procedures implemented pursuant to N.J.S.A. 40A:14-181. (P-3.)

Officer Raymond W. Campbell (Campbell), patrolman at ATPD assigned to the Traffic Safety Division, has been employed by ATPD for eleven years. On the night in question, Campbell called for assistance because a suspect was resisting arrest. Campbell testified that he needed assistance from other officers to secure the suspect. He testified that while he was fighting with the suspect, Maisano and another officer arrived simultaneously to help him subdue and handcuff the suspect. Campbell testified that Maisano helped him place the suspect in custody.

Detective Charles Trucillo (Trucillo) is presently employed with the Monmouth County Prosecutor's Office as a Detective; however, in November 2014 he was employed by the ATPD as a patrolman. On November 25, 2014, Trucillo was working the peak shift from 4:30 p.m. until 2:30 a.m. with Maisano. Trucillo stated that he was assigned to patrol the east side of the township. When Campbell's radio call came in, Trucillo was at headquarters with Officer McDowell because they were processing a case. He recalled that Oliver and Maisano were also at headquarters. Trucillo responded to the call. He was assigned to drive a Dodge Durango SUV that had a full display of emergency lights including rooftop. Trucillo activated his emergency lights and sirens. He exited the parking lot before Maisano, who exited right behind him. He expressed his concern about being the lead vehicle because the Durango did not handle as well as Maisano's Charger and he was less familiar with the roads in Aberdeen. Therefore, he pulled over to the right and allowed Maisano to take the lead. Trucillo recalled that Maisano's rear lights were activated. As the two police vehicles approached the intersection at Railroad Plaza and Main Street, Trucillo was approximately a car length behind Maisano. Trucillo testified that Maisano slowed down prior to entering the intersection and he saw sparks from Maisano's car as it made impact with the road at the dip in the roadway. He also recalled a black vehicle swerve as it passed Maisano's vehicle in the intersection. Trucillo stated that he looked to make sure everything was okay, but the black car was already gone. The recording equipment in Trucillo's vehicle was not working. Trucillo was aware of the malfunction prior to the start of his shift.

Frank Maisano (Maisano) has been a police officer for eighteen years but employed by ATPD for twenty-one years. On the night in question, Maisano was driving a black stealth Dodge Charger. He testified that he was familiar with the vehicle because it had been assigned to him since it entered the fleet. He knew how to turn the lights on and off and how to activate the three different siren sounds. He was working the peak shift, 4:30 p.m. to 2:30 a.m., assigned to section 3 where headquarters is located. When Campbell's call came over the radio, Maisano was at headquarters to use the restroom. Initially, Maisano considered it a routine call; Campbell just alerting dispatch of his location and activity. Maisano used his radio to copy Campbell that he was on his way as he exited the building. At the time Campbell's call came through

dispatch, Maisano recalled that Sergeant Oliver and Officers Trucillo and McDowell were at headquarters. Trucillo and McDowell were dealing with an evidence issue from another call. Maisano recalled that the section assignments at the time of the call were as follows: McDowell one, Trucillo two, Maisano three, and Walsh four. Even though Trucillo and McDowell were assigned to the sections closest to the call, Maisano explained that he was next in line because McDowell and Trucillo were busy. Maisano heard a second transmission from Campbell requesting assistance and asking for more officers. This time Maisano heard urgency in Campbell's voice. Recognizing that Campbell was in trouble, he expedited his response. He stated that he ran to his vehicle and believed he engaged his light bar which moves from left to right and activated his sirens as he pulled out of the parking lot. Trucillo also responded and exited the parking lot in front of Maisano. Maisano heard more radio communications from Campbell so he radioed Trucillo to let him pass. Trucillo agreed and pulled to the right. Maisano made the decision to pass Trucillo by crossing the double yellow lines of the roadway because the light at the intersection ahead of him was red. He began to slow down as he got closer to the intersection to see if it was clear. As he entered the intersection against the red light, it appeared clear but he caught site of a vehicle coming from his left. He quickly applied his brakes and the vehicle went past him, never stopping. He claimed there was nothing from that near miss encounter that led him to believe that he had hit the other vehicle and damaged his own.

Maisano explained that the intersection had a very pronounced curvature that he described as a roller coaster because of the series of inclines. It was not until he was through the intersection that he realized his front lights were not engaged. He claimed that when he was driving behind Trucillo, he could not tell whether his lights were on because of the lights coming from Trucillo's vehicle. It was not until he became the lead vehicle that he realized his lights were not activated. As soon as he realized the lights were not on, he activated them and continued to the call. Maisano stated that when he arrived at the scene it was chaotic. He assisted Campbell in restraining the suspect. After the situation was diffused, Maisano noticed the damage to his vehicle and immediately notified his sergeant by radio. (R-6.) Maisano waited until Oliver arrived. They viewed the damage together. Maisano's counsel asked him to draw a picture of the damage to his bumper. (P-4.) Maisano drew a picture of the front bumper with a

small hole and a line scratch above the driver's side headlight. At some point, Maisano drove back to the intersection to see if he could learn anything about the accident or the other vehicle but there was nothing. He contacted Matawan Police Department and learned that no accidents had been reported. Prior to the end of his shift, Maisano completed a standard accident form. (R-3.) In response to the question asking for information about the accident Maisano wrote that he was responding to an officer in distress call and "upon crossing an intersection made contact with another vehicle." Id. He stated that the form was completed in haste when he was in an excited state due to the seriousness of the recent distress call. He only had a brief conversation with Oliver and had not viewed the video. In retrospect, Maisano believed that he made a premature assumption before considering all the factors. The next day, after viewing the video and examining the intersection from an investigatory perspective, he deduced that the damage was done from his impact with the curvature of the road, not from hitting another vehicle. Maisano maintained that his siren was on when he entered the intersection and the emergency flashing lights from Trucillo's vehicle were clearly visible, yet the other vehicle failed to yield and never stopped. Being familiar with this intersection, he knew he had to apply his brakes as he went over the crown. In the process of braking, he noticed the other car so he quickly applied his brakes and felt only a quick jerk but nothing indicating that he hit another vehicle. He was interviewed by Captain Geyer and Deputy Chief Derechailo about the incident in the presence of counsel.

John Reed (Reed), licensed private detective, testified as appellant's expert witness. He supplied his Curriculum Vitae (P-1) and a report (P-2.) Reed testified that he was providing an analysis of whether Maisano's vehicle had lights and sirens activated when approaching the intersection; whether a collision occurred in the intersection; and the rates of speed of Maisano's vehicle as it went through the intersection. Reed testified that when Maisano's vehicle entered the intersection, there were lights on, but not all the lights on the stealth vehicle were fully activated. He concluded that the siren was on from his observation that the "S" was activated on the MVR from Maisano's vehicle. He was not able to definitively conclude whether an accident occurred in the intersection or if it was a near miss. Reed stated that he watched the video footage from the MVR numerous times using special slow motion

special enhancement software, but still could not tell if the cars hit. Reed also used the enhanced software to view the MVR to determine Maisano's rate of speed as he traveled through the intersection. According to Reed, there was a delay in the speed as indicated on the video with the actual speed captured on video that he determined was a 1.18 seconds delay. Using his calculations and watching the MVR with the enhanced slow-motion software, he determined that Maisano was traveling at a speed from 26 to 20 mph through the intersection, but acknowledged that he did not come to a complete stop.

FINDINGS OF FACT

Private Detective Reed was offered as an expert by appellant. Under N.J.R.E. 702, expert testimony is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Reed based his findings upon his review of the MVR over one hundred times and his use of enhanced slow-motion software. His opinions do little to assist me in determining a fact in issue. Maisano admitted that he was unaware that his lights were not fully activated until after he went through the intersection. Accordingly, Reed's opinion that the lights were not fully activated is not disputed. Reed determined that the siren was engaged based on his review of the DMR with the aid of enhanced software; however, Reed was not aware that the siren function was disengaged from the MVR prior to this incident. In addition, the MVR's depiction of the vehicle while it was at the intersection was within the one minute look-back so there was no audio recording of the siren. Geyer testified that the blinking "S" was indicative of braking not siren. Therefore, Reed's opinion that the siren was activated has no support from the materials that he reviewed. Reed could not decisively determine whether Maisano hit the other vehicle in the intersection or whether it was a very close near miss. The issue to be determined is unsafe operation of a vehicle which puts the officer and the public at risk. Whether Maisano hit the other car or narrowly missed hitting the other car is not determinative. Finally, Reed's opinion about the speed of the vehicle as it went through the intersection does not contradict the fact that the vehicle did not come to a complete stop at the red light, the charged violation. Therefore, I **FIND** that scientific, technical or other specialized knowledge was not

needed for me to understand the evidence or determine a fact issue. Reed's testimony and report is given no weight.

In reviewing the record, and after having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

1. On November 26, 2014, at a few minutes after midnight, Maisano responded to a call for assistance from Campbell.

2. Maisano was driving an unmarked police vehicle known as a "stealth car" that was not equipped with rooftop lights.

3. Maisano believed Campbell was in trouble so he expedited his response to the emergency call. Maisano stated he had tunnel vision caused by recent events in the news against police officers and was motivated by a desire to reach Campbell.

4. Maisano was originally proceeding to the call behind Trucillo. He passed Trucillo on the left by crossing over double yellow lines to become the lead vehicle.

5. Maisano's emergency lights were not activated.

6. It is unknown whether Maisano's sirens were activated.

7. As Maisano approached the intersection at Railroad Plaza and Main Street, his light was red.

8. Maisano applied his brakes but did not stop at the red light at the intersection.

9. When Maisano entered the intersection against the traffic light, he did not immediately notice the other vehicle in the intersection that was travelling eastbound with the green light passing directly in front of him.

10. When Maisano saw the other vehicle, he applied his brakes, but continued to proceed to the emergency call without stopping. The other vehicle continued to proceed eastbound without stopping.

11. The intersection at Railroad Plaza and Main Street has a pronounced curvature or hump in the road.

12. Maisano activated his emergency lights after he went through the intersection as he continued to proceed to the location of the emergency call.

13. Maisano traveled to the location at speeds that at different points reached 75, miles an hour, 79 miles an hour, and 83 miles an hour while travelling on roads that were posted as 35 miles an hour.

14. Upon arriving at the location of the call and after the suspect was in custody, Maisano noticed damage to the front bumper of his vehicle and notified Sergeant Oliver by radio that he had a minor accident.

15. Maisano completed an Accident Report stating that he made contact with another vehicle while crossing an intersection.

16. The damage to the vehicle cost ATPD $1,068.05 to repair.

LEGAL DISCUSSION

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline,

depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20, and N.J.A.C. 4A:2-2.2.

The Appointing Authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

In the present case, Maisano was charged with incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); insubordination, N.J.A.C. 4A:2-2.3(a)(2); inability to perform duties, N.J.A.C. 4A:2-2.3(a)(3); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). Maisano was also charged with the following violations of Aberdeen Township Police Department General Rules and Regulations: 3:1.8 Obedience to Laws and Regulations; 3:4.5 Operation of Motor Vehicle; 3:4.7 Reporting Accidents; 3:4.1 Damaged – Inoperative Property or Equipment; and 3:13 Operation of Police Vehicle. Although the same specifications support each of the charges and they are not compartmentalized, I will discuss each charge in turn.

Regarding the charge of violating N.J.S.A. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties. There is no definition in the New Jersey Administrative Code for incompetency, inefficiency or failure to perform duties. However, case law has determined incompetence is a "lack of the ability or qualifications necessary to perform the duties required of an individual [and] a consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield Police Dep't, CSV 9921-98, Initial Decision (December 6, 1999), adopted, Merit Sys. Bd. (January 24, 2000), http://njlaw.rutgers.edu/collections/oal/final/ (citing Steinel v. City of Jersey City, 7

N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980)). N.J.S.A. 4A:2-2.3(a)(1) is written in the disjunctive; therefore, a finding that Maisano failed to perform his duties would be enough to sustain the charge. As specifically prescribed, it was Maisano's duty to observe and obey all laws and ordinances, all rules and regulations, and orders of the department. Rule 3:1.8. (R-14.) Rule 3:13.5 states that "[a]n officer shall stop his vehicle before entering an intersection regulated by a red traffic light or a stop sign and may proceed only when the safety of the public is insured." Id. Maisano testified that because the light was red, he applied his brakes as he entered the intersection, slowing, but not stopping the vehicle. The video recording also shows that Maisano did not come to a complete stop at the red light at the intersection. It is also well documented that there was another vehicle in the intersection with the right of way that Maisano did not initially see. In responding to an emergency, Maisano was required to not only have his red lights and siren activated, but to exercise extreme caution. Maisano testified that he had "tunnel vision" in his desire to reach Campbell. Regardless of the exigency of the call, rules of safety still apply. Rule 3:13.1 requires that "officers must exercise extreme caution to protect the safety of all persons and property upon the roadway." Maisano testified that he recognized the urgency of the call before he got to his vehicle; therefore, he was responsible for activating his emergency lights and siren before exiting the parking lot at headquarters. The facts show that the emergency lights were not immediately activated. It remains inconclusive whether the siren was activated because there was no sound for the first minute of the recording and the siren does not activate the MVR. Maisano's argument that he had "tunnel vision" and was motivated by his concern for Campbell's safety does not excuse his failure to exercise "extreme caution" by making sure his emergency lights were fully engaged and by stopping at the red light at the intersection to insure it was clear before proceeding. Therefore, I **CONCLUDE** that ATPD has proven by a preponderance of the credible evidence that Maisano violated Rules 3.1.8, 3:4.5, and 3:13 in his operation of his motor vehicle, and therefore, proved the charge of failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1).

Maisano was also charged with violating N.J.A.C. 4A:2-2.3(a)(2), insubordination. Insubordination can be defined as intentional disobedience or refusal to accept reasonable orders, assaulting or resisting authority, disrespect or use of insulting or

abusive language to a supervisor. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971). Oliver testified that he told Maisano not to respond to the call for assistance from Campbell because Maisano was assigned to patrol the section of Aberdeen furthest away from the location. Oliver's ability to recall where each officer was assigned was not as detailed as Maisano's testimony. In addition, Oliver stated that he gave the order over the radio, but there is nothing on the audio recording or the transcribed tape to substantiate that claim. Oliver acknowledged that Maisano never responded to his order; therefore, there is nothing in the record to suggest that Maisano heard it. Oliver did not include his order in either of his written summaries of the events drafted immediately after the incident. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958). I do not question Sergeant Oliver's credibility, but his testimony about ordering Maisano not to respond to the call is inconsistent with other testimony and overborne by the documentary evidence. Accordingly, I **CONCLUDE** that the ATPD has not met its burden in demonstrating support to sustain a charge of insubordination. The charge of violation of N.J.A.C. 4A:2-2.3(a)(2) is hereby **DISMISSED**.

Maisano was charged with "inability to perform duties," N.J.A.C. 4A:2-2.3(a)(3). The charge appearing on the PNDA and the FNDA (R-20 and R-21) is operation of a motor vehicle with reckless disregard for the safety of others. "Inability to perform duties" is a non-disciplinary type of charge under N.J.A.C. 4A:2-2.3(a)(3), where the employer seeks to prove that an employee should be demoted or removed due to his physical, intellectual, or psychological inability to perform his duties. Rivera v. Hudson County Department of Corrections, CSR 06456-16, Initial Decision (October 24, 2016); Newark v. Bellezza, 159 N.J. Super. 123, 128 (App. Div. 1978). I **CONCLUDE** that the charge of N.J.A.C. 4A:2-2.3(a)(3) does not apply to the facts of the present case.

Maisano was charged with "conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase which

encompasses conduct that adversely affects the morale or efficiency of a governmental unit or has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). The New Jersey Supreme Court, in In re Phillips, 117 N.J. 567, 576-77 (1980), recognized that the obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official:

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public, particularly in a small community (quoting Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)).

Maisano testified that he had "tunnel vision" in his desire to assist Campbell. Deputy Chief Derechailo recognized that Maisano's response to the call for assistance is a mitigating factor; however, Derechailo determined that it did not relieve Maisano from his duty to safely operate his motor vehicle with due regard for his own safety and the safety of others. (R-12.) Maisano testified that when he viewed the damage to his vehicle at the scene, he initially believed he hit the other vehicle in the intersection. He told his Sergeant that he had a minor accident and he completed an accident form stating that he made contact with another vehicle in the intersection. The admissions by Maisano that he had an accident on the way to the call show that he disregarded safety

rules and department regulations regarding accidents. Rather than stopping and immediately reporting the accident as required, he was undeterred in his determination to reach Campbell. Even prior to recklessly proceeding into the intersection, Maisano did not take the time to make sure that his emergency lights were fully engaged. He entered a busy intersection without emergency lights against the traffic light with a known curvature and was so preoccupied that he either hit another vehicle or barely missed it. As stated by Derechailo, the primary concern was not the accident itself, but the reckless driving. The incident at the intersection had the potential to be much more serious and tragic. Maisano's "tunnel vision" clouded his judgment and caused him to disregard safety rules and proper procedure for responding to an emergency call. Accordingly, I **CONCLUDE** that Maisano's conduct rose to the level of conduct unbecoming a public employee, and that ATPD has met its burden of proof on this issue.

Maisano was also charged with neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7). There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "negligent" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

Even in an emergency, Maisano was bound to proceed through the intersection with care. He failed to stop at the red light and obviously misjudged that the intersection was clear. His actions damaged his police vehicle and had the potential to have led to tragedy for the occupants of the other vehicle and for himself. Maisano was duty bound to obey the rules and regulations of ATPD. He failed to obey those regulations by failing to stop at the red light, by not activating his emergency lights, and by not operating his vehicle with "extreme caution to protect the safety of all persons and property upon the roadway." Therefore, I **CONCLUDE** that ATPD has met its burden of

proving by a preponderance of the credible evidence that Maisano's conduct constituted neglect of duty.

Maisano has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Specifically, Maisano is charged with the following violations of the ATPD General Rules and Regulations: Obedience to Laws and Regulations (3:1.8); Operation of Motor Vehicle (3:4.5); Reporting Accidents (3:4.7); Damaged – Inoperative Property or Equipment (3:4.1); and Operation of Police Vehicle (3:13). Maisano responded to an emergency without activating his emergency lights in violation of R. 3:13.1. He failed to stop at a red light at an intersection in violation of R. 3:13.5. He entered the intersection without due care for a vehicle that entered the intersection before him with the right of way in violation of R. 3:13.1 and R. 3:13.4. Maisano examined his vehicle after Campbell's emergency had been subsided. He deduced that he must have hit the other car in the intersection because of the damage to his vehicle. After examining his vehicle, he radioed his Sergeant. Proper procedure required Maisano to report the accident when it occurred. His decision to wait is a violation of R. 3:4.7. Maisano's violation of R. 3:4.1 is not as clear. The rule specifically refers to filling out forms for damage. Maisano completed the form as soon as it was practical. Therefore, I **CONCLUDE** that the violation R. 3:4.1 is **DISMISSED.** I **CONCLUDE** that ATPD has met its burden in demonstrating a violation of Aberdeen Township Police Department General Rules and Regulations 3:1.8, 3:4.5, 3:4.7, and 3:13. Accordingly, I **CONCLUDE** that, after consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) as limited to the specific rules and regulations enumerated in the FNDA with the exception of R. 3:4.1 that is dismissed, the charge of Other Sufficient Cause is hereby **SUSTAINED**.

PENALTY

A civil service employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and/or the employee's past record, major discipline may include removal. West New York v. Bock, 38 N.J. 500, 522–24 (1962). Once a determination is made that an

employee has violated a statute, rule, regulation, etc., concerning his/her employment, the concept of progressive discipline must be considered. Bock, supra, 38 N.J. 500.

In the present case, Maisano has not received any major disciplinary actions during the course of his career with ATPD. He received a minor discipline resulting in a four-day suspension. There was a preliminary notice submitted as part of the disciplinary history that I did not consider as there was no indication of whether it became final. Maisano's history shows that he was reprimanded on five occasions. As to the penalty of a ten-day suspension, the issue is whether it is too harsh under the circumstances. I must consider whether the spirit of progressive discipline is upheld by Maisano's ten-day suspension. Progressive discipline is intended to give the employee notice and an opportunity to correct the improper behavior. Based upon Maisano's multiple sustained disciplinary charges, a major disciplinary action is warranted. After having considered all the proofs offered in this matter and the possible impact upon the public caused by unsafe and reckless operation of a motor vehicle in response to an emergency, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that Maisano's violations are significant to warrant a penalty of a 10-day suspension. Therefore, I **CONCLUDE** that the imposition of a 10-day suspension was an appropriate penalty.

ORDER

I **CONCLUDE** that ATPD has sustained its burden of proof as to the charges of violating N.J.A.C. 4A:2-2.3(a)(1), Incompetency, Inefficiency or Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty; and N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, that includes ATPD Rules and Regulations 3:1.8, Obedience to Laws and Regulations; 3:4.5, Operation of Motor Vehicle; 3:4.7, Reporting Accidents; and 3:13, Operation of Police Vehicle.

Accordingly, I **ORDER** that the action of ATPD in suspending Maisano for ten days is **AFFIRMED.**

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

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

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

October 31, 2017
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: November 1, 2017

Date Mailed to Parties: November 1, 2017

cmo

APPENDIX

WITNESSES

For Appellant:

Officer Raymond W. Campbell
Officer Charles Trucillo
Officer Frank Maisano
John A. Reed

For Respondent:

Sergeant Darryl Oliver
Captain Alan Geyer
Deputy Chief Richard Derechailo
Chief John T. Powers

EXHIBITS

For Appellant:

P-1 John Reed Curriculum Vitae
P-2 John Reed Investigation Report
P-3 July 2014 revised Attorney General's Guidelines
P-4 Officer Maisano's sketch of damage to vehicle

For Respondent:

R-1 Oliver Memo to Geyer on the Accident
R-2 Oliver Memo to Geyer on Discipline
R-3 Accident/Injury Report
R-4 Not in evidence
R-5 Geyer Memo to Derechailo

R-6 Transcription of the Audio Recording

R-7 IA Complaint Notification

R-8 Estimate of damage

R-9 IA Report

R-10 Interview summary

R-11 Not in evidence

R-12 Derechailo Memo to Powers

R-13 Trucillo's Daily Worksheet Log

R-14 ATPD rules and regulations

R-15 General Order

R-16 Not in evidence

R-17 Not in evidence

R-18 Not in evidence

R-19 Not in evidence

R-20 PNDA

R-21 FNDA

R-22 Vehicle repair receipt

R-23 Video

R-24 Audio of radio transmissions

R-25 Letter dated September 29, 2017 with disciplinary history

3-27-18

A-1

STATE OF NEW JERSEY

In the Matter of Collette Mathis New Jersey Veterans Memorial Home-Menlo Park, Department of Military and Veterans Affairs CSC DKT. NO. 2018-548 OAL DKT. NO. CSV 14879-17	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 14879-17

AGENCY DKT. NO. 2018-548

IN THE MATTER OF COLLETTE MATHIS,
NJ VETERANS MEMORIAL HOME
MENLO PARK, DEPARTMENT OF
MILITARY AND VETERANS AFFAIRS.

William Nash, Esq., for appellant (Nash Law Firm, LLC, attorney)

Susan C. Sweeney, Administrator Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: March 19, 2018 Decided: March 19, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 6, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

3/19/18
DATE

LISA JAMES-BEAVERS,
Acting Director and Chief ALJ

Date Received at Agency: 3/19/18

Date Mailed to Parties: 3/19/18

/cad

OAL DKT. NO. CSV __14879-2017S_
AGENCY DKT. NO. 2018-548__
SETTLEMENT AGREEMENT

IN THE MATTER OF

___Collette Mathis_____
AND

__NJ Veterans DMAVA- Memorial Home-
Menlo Park

FILED
2018 MAR 19 A 8:41
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated ___7/5/2017_____ contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. **NJAC 4a:2-2.3 (a). 4, 12**	**30 day suspension**	**8/22/17-1/11/18**
2. **Departmental Directive: 230.05: A(4),**	**30 day suspension**	**8/22/17-1/11/18**
3. Departmental Directive: 230.05: A(9),	**30 day suspension**	**8/22/17-1/11/18**
4. **Departmental Directive: 230.05: E(1)**	**30 day suspension**	**8/22/17-1/11/18**

B. The Appellant ____**Collette Mathis**_____ withdraws his/her appeal and request for a hearing, and the Respondent Department of __DMAVA_____ agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. **NJAC 4a:2-2.3 (a). 4, 12, DD230.05: A4,A9,E1.**		

All charges will remain intact. The penalty will be modified to reflect a 15 day suspension. The Employee will receive eight (8) days back pay.

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _**twenty-three (23)**__ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: ___**Eight (8)**_____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: ____**N/A**_____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of ____**N/A**_____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____**N/A**_____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____**N/A**_____.

4. (Strike if not applicable) The Appellant agrees to a

N/A _____ resignation in good standing

_ **N/A** ____ general resignation

which shall be effective _ **N/A** _____ [date]. Any days from the effective date

of removal to the effective date of resignation shall be treated as follows:

_____**N/A**_____

_____.

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. _____**DMAVA**_____ (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of ___**Collette Mathis**_____ will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of _____ **Collette Mathis** _____'s (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of___ **DMAVA** _____, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of

the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3-13-18
DATE

Colette Mathis
Appellant

3/15/18
DATE

Respondent

DATE

ON BEHALF OF

DATE

ON BEHALF OF

CERTIFICATION

I, Collette Mathis, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3-13-18
DATE

Collette Mathis
NAME

3-27-18

STATE OF NEW JERSEY

In the Matter of Joseph McElwain
County of Bergen,
Department of Health

CSC DKT. NO. 2017-2100
OAL DKT. NO. CSV 00733-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 00733-17

AGENCY REF. NO. 2017-2100

IN THE MATTER OF JOSEPH MCELWAIN, COUNTY OF BERGEN, DEPARTMENT OF HEALTH.

Matthew Rocco, Esq., for Appellant Joseph McElwain (Rothman, Rocco, LaRuffa, attorneys)

Steen Siegler, Esq., for respondent Bergen County County Department of Health

Record Closed: January 3, 2018 Decided: January 11, 2018

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Civil Service Commission on January 18, 2017, for hearing as a contested case, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties reached an amicable resolution of the matter, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

January 11, 2018
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 1-17-18

Date Mailed to Parties: JAN 17 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

PLEASE CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THIS DOCUMENT, YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS THAT YOU MAY HAVE.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter referred to as the "AGREEMENT"), is made this 19 day of December, 2017 by and among the County of Bergen, a governmental entity created under the laws and Constitution of the State of New Jersey, whose principal offices are located at One Bergen County Plaza, Hackensack, New Jersey 07601 (hereinafter referred to as the "COUNTY") and Joseph M. McElwain, a former employee of the COUNTY, with a mailing address of 42 Hiawatha Court, Midland Park, NJ 07432 (hereinafter referred to as "McELWAIN").

1. The COUNTY, as defined and used throughout this Agreement, shall at all times mean the COUNTY OF BERGEN, its divisions, subdivisions, departments, agencies, affiliates, designees, predecessors, successors and assigns of any and all of them, their past, present and future directors, officers, officials (elected and/or appointed), representatives, employees, agents, attorneys and/or representatives, heirs, executors and administrators, whether in their individual or official capacities, in the past, present and future.

2. McELWAIN, as defined and used throughout this Agreement, shall mean JOSEPH M. McELWAIN, his family (by marriage and/or blood relation), relatives, heirs, representatives, designees, privies, executors, administrators, representatives, assigns, successors-in-interest and predecessors-in-interest.

3. The parties agree that this AGREEMENT is contingent upon and subject to execution by McELWAIN and approval and execution by the COUNTY.

4. In consideration of the mutual promises of this AGREEMENT and for other good and valuable consideration, the sufficiency of which the parties hereby acknowledge, the parties agree to resolve all controversies and disputes between them under the terms of this AGREEMENT.

a. McELWAIN was formerly employed by the COUNTY in the title of Senior Environmental Health Specialist.

b. On or about September 27, 2016, the COUNTY served McELWAIN with a Preliminary Notice of Disciplinary Action (hereinafter referred to as the "PNDA") in which the COUNTY charged McELWAIN with violations of N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency or failure to perform duties); (a)(3) (Inability to perform duties); (a)(6) (Conduct unbecoming a public employee); (a)(7) (Neglect of duty); and, (a)(12) (Other sufficient cause).

c. On or about October 17, 2016, the COUNTY conducted a departmental hearing pursuant to N.J.A.C. 4A:2-2.5(a) in which all parties participated with the assistance of their attorneys/representatives.

d. On or about December 15, 2016, the COUNTY served McELWAIN with a Final Notice of Disciplinary Action (hereinafter referred to as "FNDA") in which the COUNTY sustained the charges listed in the PNDA and terminated McELWAIN's employment, effective December 19, 2016.

e. McELWAIN timely appealed his termination in a matter entitled "McElwain, Joseph v. County of Bergen Department of Health," OAL Docket No. CSV 00733-2017-N, Agency Ref. No. CSC Dkt# 2017-2100 (the "OAL Action").

f. On or about June 7, 2017, the COUNTY served McELWAIN with an Amended Final Notice of Disciplinary Action (hereinafter referred as the "Amended FNDA") pursuant to

leave granted by the Order of the Hon. Leland S. McGee, A.L.J., dated May 22, 2017, which added additional facts to the FNDA and a charge of "Resignation Not in Good Standing" in violation of N.J.A.C. 4A:2-6.2.

g. On or about September 26, 2017, the parties appeared for trial on the OAL Action before the Hon. Jude-Anthony Tiscornia, A.L.J. and, in order to avoid the time and expense of proceeding with the OAL Action, reached a settlement which was placed on the record and agreed to by both parties.

5. The COUNTY and McELWAIN, through their respective attorneys and/or representatives, hereby agree to enter into the within AGREEMENT upon the following terms and conditions, which are now to be made effective:

a. The COUNTY shall pay McELWAIN the amount of Thirty Thousand Dollars and Zero Cents ($30,000.00), less all applicable payroll deductions, by check or direct deposit no later than the next payroll date occurring after the full execution of this AGREEMENT by all parties; provided, however, that no payment shall be required or made until after the expiration of the seven (7) day revocation period set forth in Paragraph 18 below. Such amount shall be treated for all purposes as wage income and will be reflected on an IRS form W-2.

b. The COUNTY shall cause McELWAIN's employment/personnel/pension records to reflect that his separation from employment with the COUNTY was due to "Resignation in Good Standing" and not "Termination," effective December 19, 2016. Furthermore, said employment/personnel/pension records, other than the provision that MCELWAIN's separation from employment with the COUNTY was due to 'Resignation in Good Standing' and not 'Termination,' shall remain confidential between the parties and shall not be discussed to any third party absent a subpoena, court order, or other lawful statutory request.

c. McELWAIN shall withdraw the OAL Action with prejudice.

6. McELWAIN agrees not to contest, in any judicial, quasi-judicial and/or administrative forum, any of the terms and conditions of this AGREEMENT.

7. McELWAIN releases, acquits, gives up and forever discharges any and all claims and rights that he may have against the COUNTY and any and all of its officials (elected and/or appointed), officers, employees, representatives, assigns, successors and designees, up to the time of complete execution of this AGREEMENT by all parties. This releases any and all claims, including those that McELWAIN, his family, designees, representatives and assigns are not aware and those not mentioned in this Agreement. This AGREEMENT applies to claims resulting from anything that has happened from McELWAIN's first (1st) date of application for employment with the COUNTY through the date of complete execution of this AGREEMENT by all parties. McELWAIN specifically releases the following claims:

a. Any collective bargaining agreement with the COUNTY covering McELWAIN and/or any other resolution, ordinance, policy, practice or procedure addressing, specifically or generally, McELWAIN'S employment with the COUNTY;

b. The National Labor Relations Act;

c. Title VII of the Civil Rights Act of 1964;

d. Sections 1981 through 1988 of Title 42 of the United States Code (Civil Rights Act of 1871);

e. Civil Rights Act of 1991;

f. The Americans with Disabilities Act ("ADA");

g. The Rehabilitation Act of 1973;

h. The Age Discrimination in Employment Act ("ADEA");

i. The Fair Labor Standards Act ("FLSA");

j. The Occupational Safety and Health Act ("OSHA") and the New Jersey Public Employee Occupational Safety and Health Act ("NJPEOSHA");

k. The Equal Pay Act;

l. The Employee Retirement Income Security Act ("ERISA");

m. The New Jersey Law Against Discrimination ("LAD");

n. The New Jersey Conscientious Employee Protection Act ("CEPA");

o. The Family and Medical Leave Act (Federal) and the Family Leave Act (New Jersey);

p. The Federal and New Jersey State Wage and Hour Acts;

q. The Federal and New Jersey State Equal Pay Law;

r. The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA");

s. The New Jersey Civil Rights Act;

t. The New Jersey Employer-Employee Relations Act;

u. Any other Federal, State and/or local civil rights law or any other local, State or Federal laws, regulations, statutes or ordinances involving labor/employment or other applicable matters;

v. Any claims under public policy, contract (express, written, implied or oral), tort and/or common law;

w. Any claims for terminal, vacation, sick and/or personal leave with or without pay or payment pursuant to any practice, policy, handbook or manual of the COUNTY;

x. Any allegation for costs, fees or other expenses, including but not limited to attorneys and/or representatives' fees; and/or,

y. ANY AND ALL CAUSES OF ACTION, CLAIMS OR DAMAGES, WHETHER KNOWN OR UNKNOWN AS OF THE DATE OF EXECUTION OF THIS AGREEMENT, ARISING FROM OR RELATING IN ANY WAY TO ANY AND/OR ALL PORTIONS OF McELWAIN'S EMPLOYMENT WITH THE COUNTY, FROM THE FIRST (1ST) DATE OF HIS EMPLOYMENT APPLICATION

WITH THE COUNTY THROUGH AND INCLUDING THE DATE OF COMPLETE EXECUTION OF THIS AGREEMENT BY ALL PARTIES.

This covers any and all amendments and supplements to any and/or all such laws, statutes, rules and/or regulations. Workers' Compensation claims, if any, shall be preserved by operation of N.J.S.A. 34:15-39, if applicable.

8. All of the terms and conditions herein are specific to this AGREEMENT and shall not serve as a precedent for any other future agreements with any other applicant/employee/official/officer of the COUNTY nor used as an indication of future actions of the COUNTY.

9. McELWAIN agrees that the within waiver and release in favor of the COUNTY shall also include his waiver and release from joining or being included in any class or collective action litigation in which any claim is asserted against the COUNTY by McELWAIN, involving any event that has occurred on or before McELWAIN's execution of this Agreement, unless McELWAIN is found to be an indispensable party and ordered by a court to become a party to any such action. A copy of any such Order will be provided to the COUNTY for its records and response.

10. The waiver by McELWAIN or the COUNTY of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

11. This AGREEMENT contains the full agreement of McELWAIN and the COUNTY and may not be modified, altered, changed or terminated, except upon the express prior written consent of McELWAIN and the COUNTY, which consent must be in writing and signed by McELWAIN and the COUNTY and/or their duly authorized agents.

12. If any term, provision or condition of this AGREEMENT is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this AGREEMENT.

13. This AGREEMENT shall be construed and interpreted in accordance with the laws of the State of New Jersey.

14. This AGREEMENT shall become effective immediately as to McELWAIN following execution by McELWAIN and shall become effective upon the COUNTY after approval and signature by all applicable COUNTY officials.

15. McELWAIN and the COUNTY shall bear all costs and expenses arising from the actions of their own counsel and/or representatives in connection with this AGREEMENT.

16. This AGREEMENT shall be binding upon and inure to the benefit of the parties and the officials (elected and/or appointed), officers (elected and/or appointed), directors, attorneys and/or representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

17. All notices, demands and requests that are required and/or desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

FOR THE COUNTY OF BERGEN:

Eric M. Bernstein, Esquire
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
34 Mountain Boulevard, Building A
P.O. Box 4922
Warren, New Jersey 07059-4922

WITH A COPY TO:

Julien X. Neals, Esq., County Counsel and Acting County Administrator
One Bergen County Plaza, 5th Floor
Hackensack, New Jersey 07601

FOR JOSEPH M. McELWAIN:

JOSEPH M. McELWAIN
42 Hiawatha Court
Midland Park, NJ 07432

18. McELWAIN understands and agrees that the COUNTY could have given him twenty-one (21) calendar days from the date of his receipt of this AGREEMENT to consider and review this AGREEMENT with his attorney and/or representative. By his signature below, McELWAIN agrees to waive the twenty-one (21) calendar day provision. Following his execution of this AGREEMENT, McELWAIN has a period of seven (7) calendar days to revoke this AGREEMENT. Revocation of the AGREEMENT must be undertaken by advising the COUNTY'S attorney in writing by 5:00 P.M. on the seventh (7th) calendar day following McELWAIN'S execution of this AGREEMENT. Failure to advise shall be considered a waiver. If the AGREEMENT is revoked, this AGREEMENT becomes null and void and the COUNTY will proceed with the OAL Action.

19. McELWAIN acknowledges and agrees that he has been fully and fairly represented by his labor union, Local 755 USWU, IUJAT, and its employees, officers and attorneys, in all matters relating to his employment with the County and separation therefrom, including, but not limited to, the making and drafting of this agreement, and that McELWAIN generally releases the Union and waives all claims asserted or assertable against the Union and its officers, employees and attorneys.

20. In entering into this AGREEMENT, McELWAIN has relied upon the legal advice of his attorney and/or representative, who is the attorney and/or representative of his own choosing, as to the terms of this AGREEMENT, which terms have been fully explained by his attorney and/or representative and fully understood and voluntarily accepted by McELWAIN. By executing this AGREEMENT, McELWAIN warrants and affirms that, at the time of said execution, he was not suffering from any mental or psychological disorder, nor was he under the influence of alcohol or any drug and/or medication, prescribed by a physician or otherwise, which would prevent him from understanding the terms of this AGREEMENT. Furthermore, McELWAIN, by executing this AGREEMENT, warrants and affirms that he was not under any mental duress and was not coerced by any individual or other party to enter into this AGREEMENT. McELWAIN expressly acknowledges, represents and warrants that: (a) he has carefully read this AGREEMENT; (b) he fully understands the terms, conditions, and significance of this AGREEMENT; (c) he has had ample time to consider and negotiate this AGREEMENT; (d) he has had a full opportunity to review this AGREEMENT; (e) he is able to make an informed decision and is not physically, medically or mentally incapacitated so that he is able to make an informed decision to accept the AGREEMENT; and, (f) he has executed this AGREEMENT voluntarily and knowingly, and with the advice of his own counsel and/or representative, if applicable.

IN WITNESS WHEREOF, JOSEPH M. McELWAIN and THE COUNTY OF BERGEN have hereunto set their hands this 19 day of December 2017.

JOSEPH M. McELWAIN

Joseph M. McElwain

JOSEPH M. McELWAIN

Dated: 12/19/17

Witness:

Dated: 12/19/17

COUNTY OF BERGEN

Dated: 1/3/18

Attest:

Dated: 1/3/18

STATE OF NEW JERSEY :

: SS.:

COUNTY OF BERGEN :

I, Kelli Tesoroni, a Notary Public, do hereby certify that JOSEPH M. McELWAIN, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 19 day of December, 2017.

KELLI TESORONI
Notary Public - State of New Jersey
My Commission Expires Aug 11, 2021

Notary Public

In the Matter of Vincent Piserchio, Jr.,
City of Orange Township

CSC DKT. NO. 2017-1866
OAL DKT. NO. CSR 19003-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 21, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 19003-16
Agency DKT NO. 2017-1866

IN THE MATTER OF VINCENT PISERCHIO JR.,
CITY OF ORANGE TOWNSHIP.

Michael G. Kane, Esq., appearing for appellant

Philip G. George, Esq., for respondent

Record Closed: January 24, 2018 Decided: January 25, 2018

BEFORE **DANIELLE PASQUALE**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on December 14, 2016, for determination as a contested case pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 25, 2018
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 1-30-18

Mailed to Parties: JAN 30 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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attachment

PLEASE CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THIS LAST CHANCE SETTLEMENT AGREEMENT AND GENERAL RELEASE, YOU WILL GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE ("AGREEMENT"), made this 24th day of January, 2019 by and between the City of Orange Township, a governmental entity created under the laws of the State of New Jersey, with its principal offices located at City of Orange Township City Hall, 29 North Day Street, City of Orange Township, New Jersey 07050 ("CITY") and Vincent J. Piserchio, an individual with a mailing address of 645 Ridgedale Avenue, East Hanover, NJ 07936 ("PISERCHIO"), sets forth the terms and conditions of this AGREEMENT between the CITY and PISERCHIO as follows:

1. The CITY, as defined and used herein, shall at all times mean the CITY OF ORANGE TOWNSHIP, its departments, divisions, affiliates, predecessors, successors, representatives and assigns of any and/or all of them, their present and former directors, officials (elected and/or appointed), officers (elected and/or appointed), representatives, associates, partners, servants, employees, agents, attorneys, designees, successors, heirs, executors and administrators (all of them past, present and future), whether in their individual or official capacities, and any and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. PISERCHIO, as defined and used herein, shall mean VINCENT J. PISERCHIO, his heirs, family (of any relation by blood and/or marriage), representatives, privies, executors, administrators, designees, assigns, successors-in-interest and predecessors-in-interest.

3. The parties agree that this AGREEMENT is contingent upon and subject to execution by PISERCHIO and approval and execution by the CITY.

4. In consideration of the mutual promises of this AGREEMENT and for other good and valuable consideration, the sufficiency of which the parties hereby acknowledge, the parties agree to resolve all pending disciplinary administrative and other legal actions (actual, pending and/or possible) actions between them under the terms of this AGREEMENT.

a. PISERCHIO was employed by the CITY in the title of Firefighter.

b. PISERCHIO has been involved in incidents involving the abuse of substances in the past while employed by the CITY which have not been the subject of any disciplinary action.

c. On or about September 14, 2016, the CITY served PISERCHIO with a Preliminary Notice of Disciplinary Action which charged him with violations of *N.J.A.C.* 4A:2-2.3(a), including (a)(1) (Incompetency, inefficiency or failure to perform duties; (a)(3) (Inability to perform duties); (a)(4) (Chronic or excessive absenteeism or lateness); (a)(6) (Conduct unbecoming a public employee); (a)(7) (Neglect of duty); and, (a)(12) (Other sufficient cause), in addition to violations of the City of Orange Township Personnel Policies.

d. On or about September 14, 2016, PISERCHIO was suspended without pay pending a hearing on said charges.

e. The said charges and specifications arise from an arrest of PISERCHIO by the Parsippany Troy Hills Police Department on September 4, 2016 for alleged violations of *N.J.S.A.* 39:4-50 (driving while intoxicated); *N.J.S.A.* 39:4-49.1 (possession of drugs in a motor vehicle); *N.J.S.A* 39:4-96 (reckless driving); *N.J.S.A.* 2C:35-10(b)(under the influence of drugs, disorderly persons); *N.J.S.A.* 2C:35:10(a)(1)(possession of heroin, third degree); and, *N.J.S.A.* 2C:35-10(a)(4)(possession of marijuana under 50 grams, disorderly persons).

f. The charge of *N.J.S.A.* 2C:35-10(a)(1)(possession of heroin, third degree) was dismissed by the Morris County Prosecutor and the remaining matters remanded to the Parsippany Troy Hills Municipal Court for further proceedings.

g. At a hearing on the matters on August 31, 2017, the remaining criminal charges were dismissed.

h. On or about November 11, 2016, the CITY removed PISERCHIO from his position after PISERCHIO did not request a hearing on such.

i. On or about December 12, 2016, PISERCHIO filed an appeal with the State of New Jersey Civil Service Commission, pursuant to Docket No. CSR 19003-2016N, which is currently pending before the Office of Administrative Law as a contested matter.

5. In order to avoid the time and expense of such proceedings, PISERCHIO and the CITY, through their respective attorneys and/or representatives, agree to enter into the within AGREEMENT upon the following terms and conditions, which are now to be made effective:

a. PISERCHIO hereby resigns in good standing from his position as Firefighter with the City of Orange Township Fire Department, effective December 22, 2017.

b. A Final Notice of Disciplinary Action ("FNDA") stating that PISERCHIO has resigned in good standing shall be generated and served upon Piserchio pursuant to this AGREEMENT, once this AGREEMENT has been executed by all parties. PISERCHIO agrees to accept service of the FNDA and such shall be deemed as good service. A copy shall be simultaneously served upon PISERCHIO's attorney and such shall be deemed as good service.

6. PISERCHIO and the CITY acknowledge that the parties enter into this AGREEMENT solely to avoid expensive and burdensome disciplinary/administrative proceedings. This AGREEMENT is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between PISERCHIO and the CITY as set forth herein or to enforce the terms of this AGREEMENT. No party hereto admits to any wrongdoing and/or any liability as to any and/or all of their actions regarding each other.

7. PISERCHIO releases, acquits, gives up and forever discharges any and all claims and rights which he may have against the CITY and any and all of its officials (elected and/or appointed), officers, employees, representatives, assigns, successors and designees, up to the time of complete execution of this AGREEMENT by all parties. This releases any and all claims, including those of which PISERCHIO, his family, designees, representatives and assigns are not aware and those not mentioned in this Agreement. This AGREEMENT applies to claims resulting from anything which has happened from PISERCHIO's first date of application for employment with the CITY through the date of complete execution of this AGREEMENT by all parties. PISERCHIO specifically releases the following claims:

a. Any collective bargaining agreement with the CITY covering PISERCHIO and/or any other resolution, ordinance, policy, practice and/or procedure addressing, specifically or generally, PISERCHIO's employment with the CITY;

b. The National Labor Relations Act;

c. Title VII of the Civil Rights Act of 1964;

d. Sections 1981 through 1988 of Title 42 of the United States Code (Civil Rights Act of 1871);

e. Civil Rights Act of 1991;

f. The Americans with Disabilities Act ("ADA");

g. The Rehabilitation Act of 1973;

h. The Age Discrimination in Employment Act ("ADEA");

i. The Fair Labor Standards Act ("FLSA");

j. The Occupational Safety and Health Act ("OSHA") and the New Jersey Public Employee Occupational Safety and Health Act ("NJPEOSHA");

k. The Equal Pay Act;

l. The Employee Retirement Income Security Act ("ERISA");

m. The New Jersey Law Against Discrimination ("LAD");

n. The New Jersey Conscientious Employee Protection Act ("CEPA");

o. The Family and Medical Leave Act (Federal) and the Family Leave Act (New Jersey);

p. The Federal and New Jersey State Wage and Hour Acts;

q. The Federal and New Jersey State Equal Pay Law;

r. The New Jersey Civil Rights Act;

s. The New Jersey Employer-Employee Relations Act;

t. Any other Federal, State and/or local civil rights law or any other local, State or Federal laws, regulations, statutes or ordinances involving labor/employment or other applicable matters;

u. Any claims under public policy, contract (express, written, implied or oral), tort and/or common law;

v. Any claims for terminal, vacation, sick and/or personal leave with or without pay or payment pursuant to any practice, policy, handbook or manual of the CITY;

w. Any allegation for costs, fees or other expenses, including but not limited to attorneys' fees; and/or,

x. ANY AND ALL CAUSES OF ACTION, CLAIMS OR DAMAGES, WHETHER KNOWN OR UNKNOWN AS OF THE DATE OF EXECUTION OF THIS AGREEMENT, ARISING FROM OR RELATING IN ANY WAY TO ANY AND/OR ALL PORTIONS OF PISERCHIO'S EMPLOYMENT WITH THE CITY, FROM THE FIRST (1st) DATE OF HIS EMPLOYMENT WITH THE CITY THROUGH AND INCLUDING THE DATE OF COMPLETE EXECUTION OF THIS AGREEMENT BY ALL PARTIES.

This covers any and all amendments and supplements to any and/or all such laws, statutes, rules and/or regulations.

8. PISERCHIO agrees that the within waiver and release in favor of the CITY shall also include his waiver and release from joining or being included in any class or collective action litigation in which any claim is asserted against the CITY, involving any event that has occurred on or before PISERCHIO's execution of this Agreement, unless PISERCHIO is found to be an indispensable party and ordered by a court to become a party to any such action. A copy of any such Order will be provided to the CITY for its records and response.

9. The waiver by PISERCHIO and the CITY of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

10. This AGREEMENT contains the full agreement of PISERCHIO and the CITY and may not be modified, altered, changed or terminated, except upon the express prior written consent of PISERCHIO and the CITY, which consent must be in writing and signed by PISERCHIO and the CITY and/or their duly authorized agents.

11. If any term, provision or condition of this AGREEMENT is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this AGREEMENT.

12. This AGREEMENT shall be construed and interpreted in accordance with the laws of the State of New Jersey.

13. PISERCHIO and the CITY agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and intent of this AGREEMENT.

14. This AGREEMENT shall become effective immediately as to PISERCHIO following execution by PISERCHIO and shall become effective upon the CITY after approval and execution by all applicable CITY officials.

15. PISERCHIO and the CITY shall bear all costs and expenses arising from the actions of their own counsel and/or representatives in connection with this AGREEMENT.

16. This AGREEMENT contains the entire agreement between PISERCHIO and the CITY with regard to all matters and shall be binding upon and inure to the benefit of their officials (elected and/or appointed), officers (elected and/or appointed), directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

17. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

FOR THE CITY OF ORANGE TOWNSHIP:

Eric M. Bernstein, Esquire
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
34 Mountain Boulevard, Building A
P.O. Box 4922
Warren, New Jersey 07059-4922

WITH A COPY TO:

Christopher Hartwyck, Business Administrator
Orange Township City Hall
29 North Day Street
Orange, New Jersey 07050

FOR VINCENT J. PISERCHIO:

Vincent J. Piserchio
645 Ridgedale Avenue
East Hanover, NJ 07936

WITH A COPY TO:
Eric W. Feinberg, Esquire
The Anthony Pope Law Firm, P.C.
Military Park Building
60 Park Place, Suite 703
Newark, New Jersey 07102

18. PISERCHIO understands and agrees that the CITY has given him twenty-one (21) calendar days from the date of his receipt of this AGREEMENT to consider and review this AGREEMENT with his attorney and/or representative. By his signature below, PISERCHIO waives this twenty one (21) calendar day provision. Following his execution of this AGREEMENT, PISERCHIO has a period of seven (7) calendar days to revoke this AGREEMENT. Revocation of the AGREEMENT must be undertaken by advising the City's attorney of the revocation in writing received within seven (7) calendar days of PISERCHIO'S execution of this Agreement. If PISERCHIO revokes this AGREEMENT, the disciplinary hearing appeal will be reinstated and the CITY will seek to uphold PISERCHIO'S termination.

19. In entering into this AGREEMENT, PISERCHIO has relied upon the legal advice of his attorney and/or representative, who is the attorney and/or representative of his own choosing, as to the terms of this AGREEMENT, which have been completely read and explained by his attorney and/or representative and those terms are fully understood and voluntarily accepted by PISERCHIO. By executing this AGREEMENT, PISERCHIO also warrants and affirms that, at the time of said execution, he was not suffering from any mental or psychological disorder, nor was he under the influence of alcohol or any drug and/or medication, prescribed by a physician or otherwise, which would prevent his from understanding the terms of this AGREEMENT. Furthermore, PISERCHIO, by executing this AGREEMENT, warrants and affirms that he was not

under any mental duress and was not coerced by any individual or other party to enter into this AGREEMENT. PISERCHIO expressly acknowledges, represents and warrants that: (a) he has carefully read this AGREEMENT; (b) he fully understands the terms, conditions, and significance of this AGREEMENT; (c) he has had ample time to consider and negotiate this AGREEMENT; (d) he has had a full opportunity to review this AGREEMENT; (e) he is able to make an informed decision and is not physically, medically or mentally incapacitated so that he is able to make an informed decision to accept the AGREEMENT; and, (f) he has executed this AGREEMENT voluntarily and knowingly, and with the advice of his own counsel and/or representative.

IN WITNESS WHEREOF, VINCENT J. PISERCHIO and THE CITY OF ORANGE TOWNSHIP have hereunto set their hands this 24th day of January, 2018

VINCENT J. PISERCHIO

VINCENT J. PISERCHIO

Dated: 1/12/18

Attest:

attorney At Law

Dated: 1/12/18

CITY OF ORANGE TOWNSHIP

By: Christopher M. Hartwyk

Dated: 1/17/18

Attest:

Witness

Dated: 1/17/18

STATE OF NEW JERSEY :

: SS.:

COUNTY OF ESSEX :

I, Eric Fenberg, a Notary Public, do hereby certify that Vincent J. Piserchio, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 12 day of January, ~~2017.~~ 2016

Notary Public
Attorney at Law

3018-1005

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
City of Orange Township	29 North Day Street, Orange, NJ 07050 / (973) 266-4010	12/26/2017

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Eric M. Bernstein, Esq. Eric M. Bernstein & Associates, L.L.C.	34 Mountain Blvd., Bldg. A., P.O. Box 4922, Warren, NJ 07059 / (732) 805-3360 / embernstein@embalaw.com

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Vincent Piserchio, Jr.	Fire Fighter	100061

Address/ Phone Number	Pension Number
10 Callahan Street, East Hanover, NJ 07936 / (973) 615-1124	

On 9/16/16 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☐ You requested a hearing which was held on _____ ☒ You did not request a hearing

☐ You requested a hearing and did not appear at the designated time and place

Sustained Charges:	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
Petitioner resigned in good standing effective December 22, 2017, accepted as effective on December 22, 2017.	On condition of and acceptance of resignation in good standing, all charges were withdrawn.
☐ *If checked, charges are continued on attached page.*	☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☒ Other Disciplinary Action

☐ Fine _____ (amount) which is equal to _____ (number) (number of working days)

Appointing authority or authorized agent's signature and title.

Signature Christopher M. Rodriguez Title City of Orange Township Business Administrator

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☐ Receipt Number _____

☐ Signature of Server _____ ☐ Date of personal service _____

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DPF-31B Revised 03-24-11

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

Angiulo, Nicholas

From: Angiulo, Nicholas
Sent: Wednesday, March 14, 2018 12:19 PM
To: 'Phil George'; 'efeinberg@anthonypopelawfirm.com'
Cc: Messina, JoAnn; 'Lena Taylor'; 'Chris Hartwyk'
Subject: RE: Vincent Piserchio V. City of Orange Township - Settlement

Importance: High

Mr. Feinberg and Mr. George:

As I have not received any further responses, unless there is an objection, the Commission will consider the period of time in question as a leave of absence without pay. This will allow the matter to be acknowledged by the Commission at its next meeting.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Thursday, March 1, 2018 8:43 AM
To: Phil George <PGeorge@embalaw.com>; efeinberg@anthonypopelawfirm.com
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>; Lena Taylor <ltaylor@ci.orange.nj.us>; Chris Hartwyk <chartwyk@ci.orange.nj.us>
Subject: RE: Vincent Piserchio V. City of Orange Township - Settlement
Importance: High

Mr. Feinberg and Mr. George:

Per my discussion with Mr. George last week, the below clarification does not sufficiently quantify the period of time in my initial email. In that regard, it is clear that the appellant was not working during that time and was not in pay status. Accordingly, as I initially suggested, it would be appropriate to categorize that period of time as a leave of absence without pay if the parties agree.

Please let me know as soon as possible as we would like to have this matter presented to the Commission for acknowledgment at its next meeting.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Phil George [mailto:PGeorge@embalaw.com]
Sent: Wednesday, February 21, 2018 2:10 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; efeinberg@anthonypopelawfirm.com
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>; Lena Taylor <ltaylor@ci.orange.nj.us>; Chris Hartwyk <chartwyk@ci.orange.nj.us>
Subject: RE: Vincent Piserchio V. City of Orange Township - Settlement

Thank you for the followup, Mr. Angiulo. According to the file and the recitation in the settlement agreement, Art. 4(c-d), the criminal charges were filed on September 6, 2016, he was suspended without pay on September 14, 2016 and he was removed on November 11, 2016 by the appointing authority. Therefore, the gap time of September 14-November 11, 2016 was a suspension without pay prior to removal. On appeal to Civil Service and transfer to OAL as contested case, there was no interim relief granted altering that status. Therefore, he remained removed until the first settlement agreement, and following some issues with compliance with the conditions of that first Settlement Agreement, he ultimately resigned in good standing, which is the settlement now before the Commission for its review and approval.

If you need anything else in regard to this matter, please do not hesitate to call or send a note.

Phil George, Esquire
Eric M. Bernstein & Associates, LLC
34 Mountain Boulevard, Building A
Warren, NJ 07059
(732) 805-3360
(732) 805-3346 Facsimile

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Wednesday, February 21, 2018 10:13 AM
To: efeinberg@anthonypopelawfirm.com; Phil George <PGeorge@embalaw.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: Vincent Piserchio V. City of Orange Township - Settlement
Importance: High

Mr. Feinberg and Mr. George:

I have not yet received response from either party in the below matter. This matter cannot proceed to the Commission absent clarification.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Monday, February 12, 2018 12:41 PM
To: 'efeinberg@anthonypopelawfirm.com' <efeinberg@anthonypopelawfirm.com>; Phil George (PGeorge@embalaw.com) <PGeorge@embalaw.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>

Subject: Vincent Piserchio V. City of Orange Township - Settlement
Importance: High

Mr. Feinberg and Mr. George:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Vincent Piserchio from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Piserchio agrees to resign in good standing from his position effective December 22, 2017 in exchange for withdrawal of the charges. However, the settlement does not reflect how to record the time period from his original September 6, 2016 removal date to his resignation date. Before the matter can be acknowledged by the Commission, we require all periods of time to be accounted for in an employee's personnel record. In this regard, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

STATE OF NEW JERSEY

In the Matter of Garry Pitts
Juvenile Justice Commission,

CSC DKT. NO. 2018-752
OAL DKT. NO. CSV 14882-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 14882-17

AGENCY DKT. NO. 2018-752

IN THE MATTER OF GARRY PITTS,
JUVENILE JUSTICE COMMISSION.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: January 18, 2018 Decided: January 18, 2018

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Garry Pitts, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case October 6, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 18, 2018
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 1/22/18

Date Mailed to Parties: 1/23/18

/nd

OAL DKT. NO. CSV 14882-2017S
AGENCY DKT. NO. 2018-752

SETTLEMENT AGREEMENT

IN THE MATTER OF

Juvenile Justice Commission

AND

Garry Pitts

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 8/22/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	6. Conduct Unbecoming	10 Days Susp.	9-11-2017
2.	7. Neglect of duty		THRU
3.	12. Other Sufficient Cause		9-27-2017
4.	12CP.09.01 Juvenile Supervision	10 Days Susp.	
5.			

B. The Appellant Garry Pitts withdraws his/her appeal and request for a hearing, and the Respondent Department of Juvenile Justice Commission agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	Conduct unbecoming	Sustained	8 Days Susp.
2.	Neglect	Sustained	
3.	Other Sufficient Cause	Sustained	8 Days Susp

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 10 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 2 Days Back Pay.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Juvenile Justice Commission (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Juvenile Justice Commission will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Gary Pitts 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Juvenile Justice Commission, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 14882-2017S

CERTIFICATION

I, Gary Pitts, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1-18-2017
DATE

Gary L. Pitts
NAME

OAL DKT. NO. CSV 14882-2015

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1.18.2017	Gary L. Little
DATE	Appellant
1-18-2018	
DATE	Respondent
1-18-18	Robert L. Little
DATE	ON BEHALF OF APPELLANT
DATE	ON BEHALF OF

3-27-18

STATE OF NEW JERSEY

In the Matter of Damon Rich City of Newark, Department of Economic and Housing Development	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2017-1939 OAL DKT. NO. CSV 07570-17	:	

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07570-17

AGENCY DKT. NO. 2017-1939

IN THE MATTER OF DAMON RICH, CITY OF NEWARK, DEPARTMENT OF ECONOMIC AND HOUSING DEVELOPMENT

Lynsey Stehling, Esq., for appellant Damon Rich (Law Offices of Daniel J. Zirrith, attorneys)

France Casseus, Assistant Corporation Counsel appearing pursuant to for respondent City of Newark (Kenyatta K. Stewart, Esq., Acting Corporation Counsel)

Record Closed: December 29, 2017 Decided: January 3, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 30, 2017, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a settlement conference on December 11, 2017, and during that time, the parties engaged in settlement discussions and agreed to settle the matter. The signed Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on December 29, 2017 and is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 3, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Date Mailed to Parties: JAN 5 2018

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DAMON RICH, Appellant, -v- CITY OF NEWARK, Respondent,	:	RECEIVED **STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** 09 STATE OF NEW JERSEY OFFICE OF ADMIN. LAW **OAL DOCKET NO.: CSV 07570-2017N** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is made and entered into between Damon Rich ("Rich" or "Appellant"), Newark Council 21 ("Union") and the City of Newark ("City" or "Respondent") (Rich, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from Rich's removal from the City's Department of Economic & Housing Development ("NHD") on or about March 13, 2015.

In consideration of the promises contained herein, the parties have agreed to resolve all issues and herein referenced as follows:

1. Rich hereby resigns from his position with the City effective March 13, 2015. The City will rescind the removal and update its records to reflect a resignation in good standing.
2. The City agrees to pay Rich the amount of Eighty-Two Thousand Five Hundred Dollars ($82,500.00) for any and all back pay/ monies due to Rich in final satisfaction of all of Rich's claims in the above matter, in further execution of this settlement agreement.
3. The Settlement payment referenced above will be reflected on Internal Revenue forms. The City makes no representation as to the tax

consequences of any payment hereunder. The City shall comply with all provisions of the law relating to the settlement payment.

4. Rich acknowledges and agrees that he will be responsible for the payment of all applicable state, federal and local taxes with respect to the payments under this Agreement, and assumes full responsibility and liability with respect to same.
5. Rich and the Union are aware payment of the above amount is subject to the approval of the City Council.
6. The City will make its best efforts to ensure any payment that is due pursuant to this Agreement is made within forty-five (45) days from the date of approval of the City Council.
7. The Parties mutually agree that they will not make any disparaging statement(s) against the other party and/or its agents.
8. The Parties acknowledge under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
9. Rich and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
10. Rich and the Union each further agree that there is no consideration due Rich, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.
11. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.
12. Rich and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual

action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the facts/circumstances related to the pending action, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

13. Rich is bound by this Agreement. Anyone who succeeds to Rich's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.

14. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

15. Rich and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

16. This Agreement contains the sole and entire agreement between Rich, Council 21 and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Rich specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

17. Rich agrees and acknowledges that he has been fully and fairly represented by his Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

18. Rich agrees and acknowledges that he has had full opportunity to review this Agreement with his counsel and/or union representation and he enters into same knowingly and voluntarily.

19. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

20. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

21. By signing this Settlement Agreement, Rich states that:

    a. He has read it;

    b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

    c. He accepts the terms;

    d. His representative negotiated this Agreement with his knowledge and consent;

    e. He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

12/11/17
Date

BY: _____
City of Newark, Department of Economic & Housing Development

12/11/17
Date

BY: _____
Union Attorney/Representative

12/11/17
Date

_____
Damon Rich

Approved as to Form and Legality:

12/11/17
Date

_____
Law Department

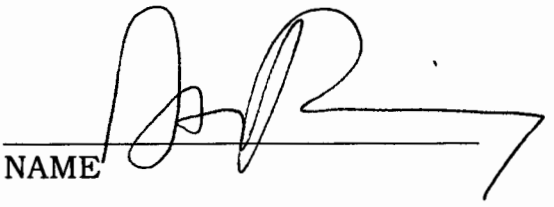
CERTIFICATION

I, Damon Rich, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/11/17
DATE


NAME

S-27-18

A-11

STATE OF NEW JERSEY

In the Matter of Sheila Richardson
Union County, Department of
Human Services

CSC DKT. NO. 2016-1614
OAL DKT. NO. CSV 07573-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Sheila Richardson, Juvenile Detention Officer, Union County, Department of Human Services, removal effective October 23, 2015, on charges, was heard by Administrative Law Judge Joann LaSala Candido, who rendered her initial decision on November 6, 2017. Exceptions were filed by the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Sheila Richardson.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07573-17
AGENCY DKT. NO. 2016-1614

IN THE MATTER OF SHEILA RICHARDSON, UNION COUNTY DEPARTMENT OF HUMAN SERVICES,

---

Sheila Richardson, appellant, appearing pro se

Rachel M. Caruso, Esq., for respondent (Union County Department of Human Services)

Record Closed: September 26, 2017 Decided: November 6, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Respondent, Union County Department of Human Services, removed appellant, Sheila Richardson (Richardson or appellant), a juvenile detention officer at the Union County Juvenile Detention Center (Detention Center), for acting unprofessionally towards a superior officer when failing to follow her commands and facility protocols for the detainees during wake-up and hygiene process.

PROCEDURAL HISTORY

On or about October 23, 2015, respondent served appellant with a Preliminary Notice of Disciplinary Action charging appellant with incompetency, inefficiency or failure to perform duties; insubordination; conduct unbecoming a public employee; neglect of duty; and other sufficient cause when violating Detention Center/Housing unit policies, procedures, post orders and directives, and took the disciplinary action of removal. Respondent did not issue a Final Notice of Disciplinary Action.[1] Richardson was removed from employment, including the payroll, on October 15, 2016.

Following appellant's appeal to the Civil Service Commission, the matter was transmitted to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13, where it was filed on May 30, 2017, for determination as a contested case. A prehearing conference was held wherein the hearing date was scheduled. The matter was heard on September 26, 2017, at which time the record closed.

ISSUE

At issue is whether respondent proved by a preponderance of the credible evidence that appellant engaged in the alleged conduct, and, if so, whether it constitutes conduct unbecoming a public employee, insubordination, neglect of duty, violation of Detention Center/Housing unit policies, procedures, post orders and directives and other sufficient cause to warrant removal.

[1] On appeal from the departmental hearing, the standard of review is de novo. In re Darcy, 114 N.J. Super. 454, 459 (App. Div. 1971) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 561; E. Paterson v. Civil Serv. Dep't of N.J., 47 N.J. Super. 55, 64, (App. Div. 1957)). An employee must be given fair notice of the charges against him so that he may have a fair opportunity to defend himself against the charges. W. New York v. Bock, 38 N.J. 500, 522 (1962). The hearing is limited to the charges made below. Ibid. (citing Kramer v. Civil Serv. Comm'n., 120 N.J.L. 599 (Sup. Ct. 1938); Orange v. DeStefano, 48 N.J. Super. 407, 419 (App. Div. 1958); cf. Marro v. Dep't of Civil Serv., 57 N.J. Super. 335, 344-45 (App. Div. 1959)). This de novo review before the OAL will only address charges listed on the Preliminary Notice of Disciplinary Action.

TESTIMONY

Michelle Perez

Michelle Perez, assistant superintendent at the Detention Center, testified on behalf of respondent. She confirmed that Richardson worked the 11:00 p.m. to 7:00 a.m. shift on October 22, 2015. The residents housed in Unit F were considered the "honor unit" for their good behavior. Perez testified that at approximately 6:27 a.m. on October 23, 2015, Richardson swiped her personal access security card one time at the resident housing door so that the door unlocked, but she did not physically look inside to make sure the resident was safe. Wake up and hygiene call for the residents began around 6:30 a.m. Richardson had the television on, which was very loud. While an officer is permitted to have the television on, it must be kept at a low volume so that detainees still sleeping are not disturbed. Richardson kept the volume up very loud even after the residents came out of their rooms. This is against safety policy since appellant would not have been able to hear if a resident needed help.

At 6:29 a.m., Richardson threw the resident's jumper into their room without entering the room and handing it to their, which is again against safety measures, as the resident could harm himself. As a housing unit officer, Richardson is responsible for ensuring security, safety and sanitation, and is required to adhere to schedules and document Unit occurrences by entering them in the unit log book. A resident is to be out of bed within ten minutes of being awakened and is to be provided with a toothbrush, toothpaste, and washcloths within ten minutes after awaking. (R-11.) She was also supposed to wait outside a bathroom door if a resident is using the facility. (R-15.) Although Richardson did wake the residents, she failed to timely hand out hygiene packs and did not wait outside the bathroom. She also allowed residents to return to their rooms and close their doors, again creating a safety issue.

At 6:37 a.m. Richardson went to residents' doors to swipe her access card, which unlocks the door so that the residents who did not come out can then come out for hygiene. But again, she did not check to see if the residents were okay. She also permitted two residents to go into the same room, which is against safety protocol.

Richardson called for a supervisor at the request of the residents and Chief Allen came to the Unit and observed no threat to Richardson of any kind. Allen turned off the television. Allen questioned Richardson why some of the residents did not get their hygiene packet. Allen directed the residents in a normal tone of voice to come out and take care of their hygiene. Allen then closed the residents' doors. Richardson turned the television back on after her supervisor turned it off.

Richardson called for assistance once Allen left claiming the residents were loud and not listening to her directives and Senior Juvenile Detention Officer Johnson and first-shift officers responded to Unit. Nothing was viewed as threatening. Residents told the officers they do not know why Richardson called for help. The residents appeared loud on the video when speaking to Richardson but nothing threatening. Officers exited after a few minutes. The residents lined up at 7:13 a.m. to go to breakfast. Richardson was not released from duty and was mandated to stay but refused the mandate and left the building.

Perez found that Richardson did not conduct herself in a professional manner and did not keep control of her unit, calling for a supervisor when there was no apparent threat. She disregarded the residents' safety by not checking on them when swiping her card and by not providing residents with hygiene packets. She did not have the residents' jumpers hanging outside of their room. Richardson also failed to make sure all residents were awake and out of their room within ten minutes of swiping her access card. She did not complete the handwritten logbook after each occurrence, such as logging when Allen arrived, when a resident used the rest room, when she asked for a supervisor, or when she gave out the hygiene materials.

In making her findings, Perez relied upon Resident Incident Reports submitted by the residents of Unit F where appellant was assigned. (R-6, R-7, R-8.) A video surveillance tape, which she relied upon during her investigation, was played during her testimony. (R-17.) Perez also investigated a statement made by a resident that Richardson said to the residents' "do not worry about me, I'm going home, you need to worry about getting out of jail," and found this to have occurred. She also noted

complaints from residents that the volume of the television was so loud that the residents could not sleep and that Richardson threw the jumpers in their face rather than handing them.

Chief Tekki Allen

Chief Tekki Allen of the Union County Juvenile Detention Center testified on behalf of respondent. Allen has worked with Richardson for approximately ten years. In the early morning hours of October 23, ~~2018~~ 2015, Allen was on duty and received a call from Richardson who was calling for a supervisor. Allen came into the Unit and observed the residents behaving very loudly and the television was extremely loud. She turned the television off. Allen directed Richardson to start hygiene with the residents. Richardson had a belligerent attitude towards her, being insubordinate, since Allen had to request several times for Richardson to start hygiene. Richardson turned the television back on at a very loud volume despite Allen's order to keep the television off. Richardson did not follow the directive to close a resident's door once the resident came out. Richardson told Allen that it would be too much work for her to walk back and forth closing doors.

Allen testified that when she appeared at appellant's unit, there was no safety issue involved and at no time did ~~appellant~~ Allen feel threatened by the residents. There was no indication the residents were inciting a riot as alleged by Richardson. While the residents were loud, Allen felt that appellant could have gotten them under control with little effort. She did not have to raise her voice in the manner that she did. Allen learned that it was the residents who wanted a supervisor since Richardson antagonized them by saying she is going home and they were not. Richardson told Allen it was too much work to get the residents out of their rooms to prepare for the day. After Allen ensured the residents that they would be getting their hygiene materials, she left the Unit. Allen then instructed the residents once lined up in the hallway to go to breakfast and be quiet since they were still very loud.

Sheila Richardson

Sheila Richardson testified on her own behalf. She stated that on October 23, 2015, at approximately 6:27 a.m. she came into her Unit after returning from lunch. She awakened the residents to get them ready for breakfast by 7:30 a.m. She claims she went back to the residents' door as a courtesy call, something that she was not required to do. Richardson stated that she threw the jumpsuits in their rooms rather than hang them by the door because she did not want to get accused of sexual contact with the residents.

Richardson further testified that the residents asked her to call for a supervisor. She had their hygiene bags on the chairs in the common area but the residents were not going to comply. The residents were disrespectful to her and called her names. They did not follow the rules and claimed that a resident touched the television volume control. She called for assistance because she felt threatened by one of the residents with whom she had had problems. Richardson felt that she properly performed her job on the date in question. She candidly admitted that she left the facility despite not being released by her superior.

Richardson stated that in 2014 she entered into a stipulation of settlement on a previous matter, upon the advice of counsel, that she regretted entering. The terms of the settlement were for a demotion in rank from senior officer to a juvenile detention officer because of a physical confrontation with a subordinate.

CREDIBILITY DETERMINATIONS

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it hangs together with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself, in that it

must be such as the common experience and observation of mankind can approve as probable in the circumstances. In re Perrone, 5 N.J. 514, 522 (1950). A fact finder is free to weigh the evidence and to reject the testimony of a witness when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). In other words, a trier of fact may reject testimony as inherently incredible, and may also reject testimony when it is inconsistent with other testimony or with common experience or overborne by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable choice. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

I **FIND** the testimony offered by respondent's witnesses to be compelling and credible. All witnesses offered consistent versions of the events on October 23, 2015. Their testimony was wholly consistent with the memoranda written by each of the witnesses' right after the incident as well as confirmed by video. Richardson's testimony, on the other hand, was in direct contradiction to the credible testimony offered by respondent's witnesses as well as the video of her conduct and was not deemed credible.

FACTS

Based on the evidence presented, as well as having the opportunity to observe the witnesses and assess their credibility, I make the following **FINDINGS OF FACT**:

1. Sheila Richardson was employed as a juvenile detention officer at the Union County Juvenile Detention Center until her removal on October 23, 2015. She was assigned to the 11:00 p.m. to 7:00 a.m. shift.

2. Richardson, as a housing unit officer, was responsible for the security, safety and sanitation of the Unit to which she was assigned, as well as adhering to schedules and for the entry of every Unit occurrence in the Unit log book.

3. Richardson did not check inside each resident's room when swiping her card.

4. Richardson did not prepare the residents for hygiene within the required ten minutes of waking them. Allen had to request several times for Richardson to initiate hygiene.

5. Richardson did not wait outside of the bathroom when a resident was in there.

6. Richardson did not have the residents' jumpers hanging on the outside of their room and inappropriately threw their jumpers into the cells during wake up.

7. Richardson ignored a direct order from a superior to keep the television off. Instead, she kept the television on very loudly, not at a permissible low volume so as not to not disturb the residents.

8. Richardson did not follow her superior's directive not to leave the resident's door open once the resident came out. Instead, she complained that it was too much work.

9. Richardson was verbally abusive when telling the residents' not to worry about her since she was going home and they need to worry about getting out of jail. This was against policy.

10. Richardson was to document every incident in the logbook during her shift. She failed to enter occurrences such as logging when Allen arrived, when a resident used the rest room, when she asked for an assistant, or when she gave the hygiene materials as she was required to do.

11. Richardson, at the request of the residents, requested a supervisor to come to the Unit. When Chief Allen responded, she found nothing threatening, but that the television was extremely loud.

12. Richardson requested assistance once Allen left and approximately nine officers came to the Unit. Nothing appeared to be a hazard or safety issue. The residents lined up for breakfast.

13. Richardson left her assigned post and the building without being authorized to do so.

LEGAL ANALYSIS AND CONCLUSIONS

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey,

93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."
>
> [Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Respondent charged Richardson with incompetency, inefficiency or failure to perform duties; insubordination; conduct unbecoming a public employee; neglect of duty; and other sufficient cause, violation of detention center/housing unit policies, procedures and post orders and directives. I **CONCLUDE** that these charges have been proven by a preponderance of the credible evidence.

As to the charges of incompetency, inefficiency or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1), the Administrative Code fails to define these grounds for disciplinary action, although they are generally interpreted to mean a failure to perform duties due to malingering, willful refusal, or idleness. See, e.g., Avanti v Dep't of Military and Veterans' Affairs, 97 N.J.A.R.2d (CSV) 564 (1996): Stevenson v Burlington Cty. Mosquito Control Comm'n, 97 N.J.A.R.2d (CSV) 702 (1997); Bright v Arthur Brisbane Child Development Ctr., 97 N.J.A.R.2d (CSV) 586 (1997). Guidance in interpreting the concepts may be found in Black's Law Dictionary 765 (6th ed. 1990), which defines incompetency as "[l]ack of ability, knowledge, legal qualification or fitness to discharge the required duty or professional obligation." "Inefficiency" has been defined as the "quality of being incapable or indisposed to do things required of an officer in a timely and satisfactory manner." Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), adopted, MSB (May 23, 2005), http://njlaw.rutgers.edu/collections/oal/.

Insubordination likewise constitutes sufficient grounds for major discipline under N.J.A.C. 4A:2-2.3(a)(2). The charge of insubordination is a serious one. Since the term is not defined in the Civil Service Act, resort may be made to Black's Law Dictionary 801 (6th ed. 1990), which defines insubordination as "[r]efusal to obey some order which a superior officer is entitled to give and have obeyed. The term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer." This definition would appear to limit insubordination to a willful disregard of instructions or some other affirmative act of disobedience. However, a much broader definition of the term is found at Webster's II New College Dictionary (1995). That definition refers not only to affirmative acts of disobedience, but also acts of non-compliance and non-cooperation. It may, therefore, also include any conduct that constitutes a refusal to submit to supervisory authority. Stanziale v. Cty. of Monmouth Bd. of Health, A-5029-00T5 (App. Div. April 11, 2002), http://njlaw.rutgers.edu/collections/courts/. As stated in Holly v. Hudson County, CSV 3085-02, Initial Decision (February 28, 2003), http://njlaw.rutgers.edu/collections/oal/, insubordination generally involves a violation of a directive or order by an employee.

Richardson was also charged with conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140. Likewise, undefined by the code, neglect of duty, N.J.A.C.

4A:2-2.3(a)(7), means that "an employee has neglected to perform an act required by his or her job title or was negligent in its discharge." Oliveira v. N. State Prison, CSV 7053-01, Initial Decision (September 5, 2002), http://njlaw.rutgers.edu/collections/oal/.

Here, Richardson called for a supervisor at the request of the residents. Chief Allen came to the Unit and did not find the residents to be threatening, only loud. She also observed that the residents had not completed hygiene. Allen prepared the residents for hygiene and left the Unit after ordering appellant to turn off the television. Richardson then called for further assistance because the residents were uncooperative and calling her names. Senior Juvenile Detention Officer Johnson and first shift officers responded to her call. Johnson was able to de-escalate the yelling between appellant and the residents and directed the residents to prepare to go to breakfast. Clearly Richardson was unable to control her Unit. Allen had to direct her several times to prepare the residents for hygiene before she did so.

Because Richardson disregarded the directives of a superior by being asked several times to get the residents ready for hygiene and for not keeping the television off when her superior turned it off, is a willful disobedience of her superior officer and the charge of insubordination is affirmed. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971). Not only did Richardson speak in a disrespectful manner to her superior, but she also exhibited a sarcastic disrespect for the residents when telling them she is going home and they are not.

Furthermore, Richardson did not follow policy and procedures on the morning of October 23, 2015. Residents were to be out of bed within ten minutes of being awakened and prepared for hygiene. The residents did not come out of their rooms within the required ten minutes nor where they provided with toothbrushes, toothpaste, and washcloths within ten minutes after waking the residents. Rather than leaving the residents' jumpers hanging by the door, appellant threw them into their room without regard for their safety. Richardson had to be told by a superior more than once to start

hygiene. She was also supposed to wait outside a bathroom door if a resident was using the facility, which she failed to do.

Based upon all the foregoing, including the credible evidence in the record and the specific findings above, I **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the credible evidence, the charges of incompetency, inefficiency or failure to perform duties; insubordination; conduct unbecoming; and other sufficient cause, in violation of detention center/housing unit policies, procedures and post orders and directives.

Richardson was also charged with neglect of duty, violating N.J.A.C. 4A:2-2.3(a)(7). Neglect of duty can arise from an omission to perform a duty or failure to perform or discharge a duty and includes official misconduct or misdoing, as well as negligence. Steinel v. City of Jersey City, 7 N.J.A.R. 91, 95 (1983), modified on other grounds, Civ. Serv. Comm'n, 7 N.J.A.R. 100 (1983), modified on other grounds, 193 N.J. Super. 629 (App. Div. 1984), aff'd, 99 N.J. 1 (1985). Generally, the term neglect connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977).

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Correction officers, like police, are "held to the highest standards." Peterson v. E. Jersey State Prison, CSV 03927-02 and CSV 5336-02, Initial Decision (December 11, 2003), adopted, Merit System Board (February 11, 2004), http://njlaw.rutgers.edu/collections/oal/. These higher standards can mean that infractions will lead to major discipline for officers that otherwise may not have warranted severe discipline for some other positions. See Chopek v. Bayside State Prison, CSV 00658-01, Initial Decision (May 10, 2002), adopted, Merit Sys. Bd. (June 26, 2002), http://njlaw.rutgers.edu/collections/oal/.

Here, Richardson left the Detention Center despite being mandated to work until released by a supervisor without regard to coverage, which is an extremely serious offense for a detention officer. The officer's position involves public safety and by leaving the facility without authorization, increased the risk of harm to the to the residents and staff. This is contrary to the public interest, and constitutes a serious neglect of duties.

Principles of progressive discipline should be considered in the removal actions of civil service employees. Bock, supra, 38 N.J. 500. The determination of whether a specific act supports removal requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976). The frequency, number and continuity of the employer's warnings indicate the progression of the discipline. Ibid. On appeals from disciplinary action, the Merit Board may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Board is empowered to substitute its own judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Id. at 579. The Board must consider an employee's past record, including both mitigating factors and prior discipline when determining the appropriate penalty to be imposed. Bock, supra, 38 N.J. at 523. The frequency, number and continuity of the employer's warnings, counseling and other measures indicate the progression of the discipline.

Richardson entered into a settlement agreement in April 2014, accepting a demotion for being involved in a verbal and physical confrontation with a subordinate officer. Given the seriousness of the offenses in this matter, and the higher standard applicable to officers, a penalty of removal is appropriate and warranted in this case.

ORDER

Based on the foregoing findings of fact and applicable law, it is **ORDERED** that the charges against appellant be and is hereby **SUSTAINED** and that appellant's appeal be and is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

November 6, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: November 6, 2017

Date Mailed to Parties: NOV 9 2017

ljb

Laura Sachs
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESS LIST

For Appellant:

Sheila Richardson

For Respondent:

Michelle Perez

Tekki Allen

EXHIBIT LIST

For Appellant:

None

For respondent:

R-1 Preliminary Notice of Disciplinary Action dated October 23, 2015

R-2 Correspondence from Sheila Richardson to Civil Service dated October 23, 2015

R-3 Union County Juvenile Detention Center Incident Report #1669-15, authored by Allen, dated October 24, 2015

R-4 Union County Juvenile Detention Center Incident Report, authored by Richardson, dated October 23, 2015

R-5 Union County Juvenile Detention Center Incident Report #1676-15, authored by C. Johnson, dated October 25, 2015

R-6 Union County Juvenile Detention Center Resident Incident Report #1661-15 and Resident Grievance From authored by J.C., dated October 23, 2015

R-7 Union County Juvenile Detention Center Resident Incident Report #1666-15 and Resident Grievance Form authored by C.R., dated October 23, 2015

R-8 Union County Juvenile Detention Center Resident Incident Report #1665-15 and Resident Grievance Form authored by J.O., dated October 23, 2015

R-9 Unit F log book entries from 11:00 p.m. October 22, 2015, to 7:15 a.m. October 23, 2015

R-10 Union County Detention Center Policy and Procedure No. 1.C.2 entitled Standard of Conduct

R-11 Union county Juvenile Detention Center Policy and Procedure No. 4B.1 entitled Housing Unit Routine

R-12 Union County Juvenile Detention Center Incident Report authored by Ms. Boyea, dated October 23, 2015

R-13 Union County Juvenile Detention Center Incident Report, authored by McMillon dated October 26, 2015

R-14 Union County Juvenile Detention Center Incident Report #1645-15, authored by Abney, dated October 22, 2015, and Union County Juvenile Detention Center Operational Report authored by JDO Richardson, dated October 22, 2015

R-15 Union County Juvenile Detention Center Job Description and Post Orders, Post Order #PO-C-05 for Housing Unit Officer Post

R-16 Correspondence from Sheila Richardson to Edward Haas dated October 23, 2015

R-17 Surveillance Video from Juvenile Detention Center on October 22 and 23, 2015

R-18 Final Administrative Action of the Civil Service Commission, issued June 18, 2014, regarding Sheila Richardson, OAL Docket # CSV 13435-13 (for penalty purposes only)

R-19 Correspondence to Sheila Richardson, dated June 21, 2014, with Amended Final Notices of Disciplinary Action relative to thirty-day suspension and demotion (for penalty purposes only)

STATE OF NEW JERSEY

In the Matter of Josephine Roy
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2018-299
OAL DKT. NO. CSV 11521-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11521-17

AGENCY DKT. NO. 2018-299

IMO ROY JOSEPHINE, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

William Nash, Esq., for Roy Josephine, appellant

Jessica Saxton, Deputy Attorney General, for Department of Human Services, Ancora Psychiatric Hospital, respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 9, 2018 Decided: January 26, 2018

BEFORE **CARL V. BUCK, III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on August 10, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Josephine Roy from the action of the respondent, Department of Human Services, Ancora Psychiatric Hospital. At the scheduled hearing on January 19, 2018, the parties filed a fully executed Settlement Agreement. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

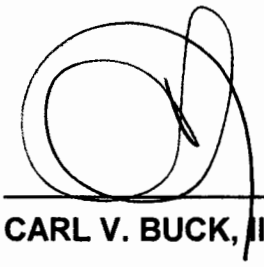
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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



January 26, 2018
DATE

CARL V. BUCK, III ALJ

Date Received at Agency: 1/26/18

Date Mailed to Parties: 1/29/18

/lam

APPENDIX
EXHIBITS

Joint:

J-1 Settlement Agreement

For Petitioner:

None

For Respondent:

None

OAL DKT. NO. CSV 11521-2017 S
AGENCY DKT. NO. 2018-299
SETTLEMENT AGREEMENT

J-1

IN THE MATTER OF
JOSEPHINE ROY
AND
DEPT. OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated July 13, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	Removal (for all charges)	7/14/2017
2. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		
3. Admin. Order 4:08, C-4.2 Verbal abuse of patient, client, resident, or employee		
4. Admin Order 4:08, C-5.2 Inappropriate physical contact or mistreatment of a patient, client, resident, or employee		

5. Admin Order 4:08, C-9.2
   Insubordination; intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor

6. Admin Order 4:08, E-1.2
   Violation of a rule, regulation, policy procedure, order or administrative decision

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. Respondent, Department of Health, will accept a Resignation in good standing from Appellant, Josephine Roy, pursuant to N.J.A.C. 4A:2-6.1 effective July 13, 2017. Appellant, Josephine Roy, agrees not to seek or accept employment with the Department of Health or any of its subsidiaries at any time in the future.

C. The Appellant, Josephine Roy, withdraws her appeal and request for a hearing, and the Respondent, Appointing Authority Department of Health agrees that: the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	Resignation in good standing (resolving all charges)

2. N.J.A.C. 4A:2-2.3(a)12
   Other sufficient cause

3. Admin. Order 4:08, C-4.2
   Verbal abuse of
   patient, client, resident, or employee

4. Admin Order 4:08, C-5.2
   Inappropriate physical contact or
   mistreatment of a patient, client, resident, or employee

5. Admin Order 4:08, C-9.2
   Insubordination; intentional disobedience or
   refusal to accept a reasonable order, assaulting
   or resisting authority, disrespect or use of
   insulting or abusive language to supervisor

6. Admin Order 4:08, E-1.2
   Violation of a rule, regulation, policy
   procedure, order or administrative
   decision

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department of Health from releasing information on this matter to anyone who has a release executed by appellant, or as otherwise consistent with the law. Any information regarding the

underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department of Health with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Josephine Roy's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past

action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1-19-18
DATE

Josephine Roy, Appellant

1-19-18
DATE

ON BEHALF OF Appellant

William A. Nash

1-19-18
DATE

ON BEHALF OF Respondent

1-19-18
DATE

ON BEHALF OF Department of Health

CERTIFICATION

I, Josephine Roy, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1-19-18
DATE

Josephine Roy
Josephine Roy

3-27-18

STATE OF NEW JERSEY

In the Matter of Altinette Sejour-Piercin
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2018-1208
OAL DKT. NO. CSV 17568-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17568-17

AGENCY DKT. NO. 2018-1208

IN THE MATTER OF
ALTINETTE SEJOUR-PIERCIN,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: January 18, 2018 Decided: January 18, 2018

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Altinette Sejour-Piercin, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case November 29, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 18, 2018
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 1/22/18

Date Mailed to Parties: 1/23/18

/nd

OAL DKT. NO. CSV 17568-2017

AGENCY DKT. NO. 20- 2018-1208

SETTLEMENT AGREEMENT

IN THE MATTER OF

Altinette Sejour-Piercin

AND

Hunterdon Developmental Center
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 10/3/17 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.3.1 Job Abandonment	Resignation Not in good standing	4/28/17
2. NJAC 4A:2-6.2(c)		
3. (a) 6 & 12		
4. E.1.1 Violation of Policy		
5.		

B. The Appellant Altinette Sejour-Piercin withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. All charges Withdrawn		
2. Appellant shall be reinstated		
3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 4/28/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant is advised that if there should be the need for a leave in the future she shall ensure any documentation, faxed by her doctor to Human Resources (HR) at Hunterdon Developmental Center is received by contacting HR promptly upon transmission.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1/18/18
DATE

Appellant

1/18/18
DATE

Respondent

1-18-18
DATE

ON BEHALF OF
APPELLANT

1/10/18
DATE

ON BEHALF OF
HDC

OAL DKT. NO. CSV 17568-2017

CERTIFICATION

I, Altinette Sejour-Piercin, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/18/18
DATE

NAME

3-27-18

B-27

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Phyllis Slade,
County of Essex, Department of
Corrections

CSC Docket No. 2015-2912
OAL Docket No. CSV 07129-15

ISSUED: APRIL 20, 2018 (ABR)

The appeal of Phyllis Slade, a County Correction Sergeant with the County of Essex, Department of Corrections, of her 15 working day suspension, on charges, was considered by Administrative Law Judge Joann LaSala Candido (ALJ), who rendered her initial decision on December 19, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on March 27, 2018, did not adopt the ALJ's recommendation to uphold the 15 working day suspension. Rather, the Commission modified the penalty to a 10 working day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that on July 10, 2014, the appellant set off the walk-through metal detector at a security checkpoint at the Essex County Correctional Facility and failed to submit to a proper search with a handheld metal detector and empty her pockets, as directed by the County Correction Officer assigned to the checkpoint. Additionally, it maintained that she was subsequently ordered to the checkpoint for a proper screening and upon her return to that location, she made a threatening statement towards the same County Correction Officer. The appointing authority asserted

that the appellant's actions violated departmental policies concerning security procedures and conduct. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ found that the all Correction Officers and civilians were required to pass through a walk-through metal detector at a security checkpoint when entering the Essex County Correctional Facility. Per departmental procedures, if a person set off a walk-through metal detector when passing through it, a County Correction Officer manning the security checkpoint was required to scan that individual with a handheld metal detector (wand). When the appellant arrived at the checkpoint at the start of her shift on July 10, 2014, the walk-through metal detector she traversed indicated that a metal object was present near her waist. A County Correction Officer assigned to the checkpoint then directed the appellant to empty her pockets and submit to a scan by the wand. The appellant did not comply with those instructions and instead proceeded into a secured area of the facility without obtaining clearance. The ALJ noted that a video confirmed that that the appellant did not submit herself to a search using the wand. The aforementioned County Correction Officer then contacted the Shift Commander, a County Correction Lieutenant, and apprised him of what had transpired at the checkpoint. Thereafter, the Shift Commander ordered the appellant to return to the checkpoint and go through the metal detector again. The appellant complied, returning to the checkpoint, whereupon she emptied her pockets and permitted the aforementioned County Correction Officer to scan her. The ALJ did not make any findings concerning the allegations that the appellant threatened that County Correction Officer.

Based upon the foregoing, the ALJ found that the appellant's initial refusal to submit to a scan with the wand, as instructed, demonstrated conduct unbecoming a public employee for having a total disregard and disrespect for a fellow officer and of departmental policies. Additionally, the ALJ sustained the charge of other sufficient cause based upon her finding that the appellant disregarded the established security policies for the facility. Therefore, the ALJ affirmed the appellant's 15 working day suspension.

In her exceptions, the appellant argues that her 15 working day suspension should be reduced or eliminated, because the ALJ did not sustain the allegations that she made threatening remarks and failed to consider the lack of prior discipline in her 20 year record of service with the appointing authority. Furthermore, the appellant contends that the ALJ failed to consider other mitigating circumstances, including the fact that both the appellant and the aforementioned County Correction Officer knew that the radio and glasses she carried each day in her pockets routinely triggered the metal detectors in the facility.

In reply, the appointing authority argues that the ALJ's findings concerning the appellant's failure to comply with its security procedures alone justify her 15 working day suspension. It submits that its Departmental Policy PS.CUS.054 (Security and Facility Entry Checkpoints) states that "[t]he person being searched shall make every effort necessary to facilitate the search" and it emphasizes that County Correction Officers, as law enforcement officers, are held to a higher standard of conduct compared to other public employees.

The appointing authority also contends that while the ALJ did not make any findings regarding the appellant's alleged use of foul and threatening language towards the County Correction Officer assigned to the checkpoint, the testimony of three of its officers support its claim that the appellant's behavior violated several of its rules governing conduct.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges but does not adopt the ALJ's recommendation to uphold the 15 working day suspension. In determining the proper penalty, the Commission's review is *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Further, the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). The Commission is particularly mindful of this standard when disciplinary action is taken against a supervisory law enforcement officer. Upon an independent review of the record and in consideration of the appellant's prior record of service, the Commission concludes that a 15 working day suspension is too severe of a penalty. In the instant matter, the appellant's disciplinary history does not evidence any formal discipline since she began her service with the appointing authority in 1994. However, the Commission emphasizes that the appellant is employed in a paramilitary setting and is charged with maintaining security, discipline and order in a correctional facility. The precise requirements of such a position are not mere technicalities but are established and must be adhered to in

order to ensure the utmost security of the facility. This is particularly true where, as here, the appellant is serving in a supervisory position. Here, the appellant's failure to adhere to facility security procedures by refusing to empty her pockets and submit to a search by wand after setting off a walk-through metal detector at a secured checkpoint at the Essex County Correctional Facility is a serious matter. The appellant's conduct warrants major discipline. Notwithstanding that the appellant's employment history reveals a lack of formal discipline in her approximately 20 years of service preceding the underlying incident, the Commission finds that a 10 working day suspension on these charges is appropriate.

Since the penalty has been modified, the appellant is entitled to five days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission agreed with the ALJ's determination sustaining most of the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Commission finds that the appointing authority's action in imposing a 15 working day suspension was not justified. Therefore, the Commission modifies the 15 working day suspension to a 10 working day suspension. The Commission further orders that the appellant be granted five days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07129-15
AGENCY DKT. NO. 2015-2912

IN THE MATTER OF PHYLLIS SLADE, ESSEX COUNTY DEPARTMENT OF CORRECTIONS.

Gail Oxfeld Kanef, Esq., for appellant (Oxfeld Cohen, P.C.)

Jill Caffrey, Assistant County Counsel, for respondent Essex County

Record Closed: December 14, 2017 Decided: December 19, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Appellant, Phyllis Slade, a Correction Officer, appealed the disciplinary action of a fifteen-day suspension by Essex County Department of Corrections (DOC or Appointing Authority.) for non-compliance of policy and procedure while coming through the security check point at the start of her shift on July 10, 2014.

PROCEDURAL HISTORY

On May 15, 2015, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held by Administrative Law Judge Bedrin-Murray on August 8, 2017. The parties submitted their post-hearing briefs on November 2, 2017. The matter was reassigned to me on December 11, 2017. I held a telephone conference with counsel on December 14, 2017, and it was agreed that I would decide the matter after review of the file with the exhibits entered into evidence. The appointing authority sustained the following:

CHARGES

CHARGE(S): N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a public employee and N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause; Violation of Department Policy PS.CUS.054 Security at Facility Entry Points; PS.CUS.006.27 Security Checkpoint Officer) (Violation of Departmental Rules and Regulations 3:1.14 Conduct; 3:2.1 General Conduct on Duty; #:2.12 Search;3:9.5 Courtesy and Civility).

SPECIFICATION(S): The suspension is based upon the following allegations: On July 10, 2014, appellant acted in an unprofessional manner while entering the facility at the security check-point. Officer Albert Aponte attempted to screen Sgt. P. Slade upon entering the facility; at which time, Sgt. P. Slade rushed passed the checkpoint. Officer A Aponte reported the incident to shift Commander Lieutenant Mike Caggiano. Lt. M. Caggiano ordered Sgt. Slade to return to the checkpoint to be properly screened. Sgt. Slade returned to the checkpoint and made a threatening

statement towards Officer Aponte. Sgt. Slade stated to Officer Aponte, "this is bullshit; I'll punch you in the face; I'll f***ing hurt you." This was witnessed by Officer Chris Kraynanski, Officer Brian Hanlon and Sergeant Mike Robertiello; who all wrote statements confirming Sgt. Slade's actions. Investigating Lieutenant Joe Badgley; along with video surveillance footage, confirmed Sgt. Slade's actions and statements given by the witnesses. Sgt. Slade's actions were unwarranted, unnecessary and unprovoked.

FINDINGS OF FACTS

Based on the moving papers, certifications, and other relevant evidence I **FIND** as **FACT:**

1. On December 5, 1994, the Appointing Authority hired Appellant, Phyllis Slade in the position of Correction Officer. She was promoted to sergeant in 2012.
2. All Correction Officers and civilians must pass through a security checkpoint before entering the facility. Sergeant Alberto Aponte is assigned to work this checkpoint. Aponte will utilize a wand if the metal detector beeps. He received training on the use of metal detectors and the detection of contraband.
3. On July 10, 2014, Appellant arrived at the facility at 5:46:50 a.m. at the start of her shift and set off the metal detector at waist level while walking through. Appellant would not permit Aponte to use the wand and she refused to empty her pockets. He contacted Shift Commander Lieutenant Cadgiano to advise that Appellant did not clear the metal detector and refused to be scanned.
4. At approximately 6:13 a.m., Appellant was ordered by Cadgiano to return to the checkpoint area to go through the metal detector again. The Appellant complied this time and emptied her pockets and permitted Aponte to scan her.
5. The video clearly confirms that Appellant did not avail herself to the hand held metal detector when she entered the security checkpoint while all other officers did pursuant to policy 3:2.12 whereby all persons are subject to search when

entering the institution. Appellant violated this policy when entering the security checkpoint and not permitting the officer to use the hand-held metal detector when the walk through detector beeped.

JOINT STIPULATIONS OF FACT

1. On December 5, 1994, Essex County Department of Public Safety and Corrections hired Phyllis Slade as a Correction Officer. Slade was promoted to Sergeant in 2012.

2. On September 10, 2014, Slade was served with a Preliminary Notice of Disciplinary Action Form dated September 10, 2014.

3. A Disciplinary Hearing was held on December 17, 2014.

4. On April 16, 2015, Slade was served with a Final Notice of Disciplinary Action dated March 18, 2015, suspending Slade for fifteen days.

5. Slade served the suspension on April 22-26, April 29-30, May 1-3 and May 6-10, 2015.

DISCUSSION

Under N.J.A.C. 4A:2-2.3 (a)(6) a public employee can be disciplined for conduct unbecoming a public employee. Whether an employee's behavior "constitutes conduct unbecoming a public employee is primarily a question of law." Karins v. Atlantic City, 152 N.J. 532, 553 (1998). Conduct unbecoming is an extremely fact specific issue and describes any conduct that undermines public confidence in municipal employees or services. Id. at 554. The appointing authority must establish the employee engaged in conduct unbecoming a public employee by a preponderance of the credible evidence. Washington v. City of Trenton, CSV 4211-03, Initial Decision (November 3, 2005), adopted, Merit Sys. Bd. (December 13, 2005) <http://njlaw.rutgers.edu/collections/oal/final/csv4211-03.pdf>.

The Codification Policy Custody .054 entitled "Security at the Facility Center Points" revised on January 10, 2014 reads in part that should an individual entering and not

clear the metal detector, then handheld metal detector shall be used to scan for contraband. The person subject to the search shall make every effort necessary to facilitate the search. It is evident from the video presented that Appellant deliberately did not stop for Aponte to utilize the hand-held detector when the metal detector beeped showing an issue at Appellant's waist area. This clearly represents conduct unbecoming for having a total disregard and disrespect of a fellow officer and of policy and procedure when not making herself available for a mandatory hand-held metal detector search after beeping while going through the metal detector. I therefore **CONCLUDE** that respondent has satisfied its burden of proving, by a preponderance of the credible evidence conduct unbecoming a public employee.

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against appellant. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>. The FNDA states that the charge for other sufficient cause is sustained for violating Department Policy PS.CUS.054 Security at Facility Entry Points; PS.CUS.006.27 Security Checkpoint Officer) (Violation of Departmental Rules and Regulations 3:1.14 Conduct; 3:2.1 General Conduct on Duty; #:2.12 Search;3:9.5 Courtesy and Civility). Because I find the respondent to have proven the above-named charges by a preponderance of the credible evidence, that Appellant disregarded policy set in place for the security of the Institution, I **CONCLUDE** that respondent has satisfied its burden of proving, by a preponderance of the credible evidence of other sufficient cause.[1]

Based upon all of the foregoing, including the evidence and certifications submitted, I **CONCLUDE** that Appellant violated the policy of the Institution when she purposely did not permit the security officer to perform his job by using the hand held

[1] Because the video entered into evidence had no audio, I am unable to determine what was uttered by Appellant at the time she was ordered to come back to the security area and I make no findings as to same.

detector after appellant beeped while walking through the metal detector, and I further **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the credible evidence, the charges against appellant.

ORDER

It is hereby **ORDERED** that the fifteen-day suspension of appellant is hereby **AFFIRMED** and her appeal is **DISMISSED**.

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

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

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

December 19, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: December 19, 2017

Date Mailed to Parties: December 22, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

Witnesses:

For Appellant:

Phyllis Slade

For respondent:

Alfaro Ortiz
Alberto Aponte
Michael Robertiello
Christopher Kraynanski
Herbert Hamlin

Exhibits

For Appellant:

P-1 Video dated July 10, 2014
P-2 Appellant's Statement dated July 10, 2014

For respondent:

R-1 Preliminary Notice of Disciplinary Action dated September 10, 2014
R-2 Final Notice of Disciplinary Action dated March 18, 2015
R-3 Aponte Incident Report dated July 10, 2014
R-4 Robertiello Incident Report dated July 10, 2014
R-5 Kraynanski Incident Report dated July 10, 2014
R-6 Rules and Regulations Manual
R-7 Policy
R-8 Security at Facility Entry Points Policy

STATE OF NEW JERSEY

In the Matter of Ana Suero
City of Newark,
Department of Public Safety

CSC DKT. NO. 2018-1248
OAL DKT. NO. CSV 17463-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 17463-17
AGENCY DKT. NO. 2018-1248

IN THE MATTER OF ANA SUERO, CITY OF NEWARK DEPARTMENT OF PUBLIC SAFETY,

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Anthony Fusco, Jr., Esq. for appellant (Fusco & Macaluso, LLC)

Joyce Clayborne, Esq., for respondent (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: January 11, 2018 Decided: January 11, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on November 27, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. An in person prehearing was scheduled for January 11, 2018. During the pendency of the prehearing, the parties resolved all issues in dispute. The parties prepared and submitted a Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 11, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

1-17-18

Date Received at Agency:

Date Mailed to Parties: JAN 17 2018

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

January 11, 2018

CSV-17463-17

ANA Suero

v.

City Of Newark
Dept. Of Public Safety

Appointing Authority agrees to accept a resignation in good standing and same will be annuded in Suero's personnel record and FINAL NOTICE.

Appellant waives any back pay and all claims with regard to this matter.

Appellant will not reapply to City OF Newark and Newark will not Object to appellant's application in any Other county

Anthony J. Fusco, Esq.
For appellant

Joyce Clayborne, Esq.
Joyce Clayborne, ESQ.
for respondent
CITY OF NEWARK
LAW DEPT.

ANA Suero

STATE OF NEW JERSEY

In the Matter of Muhammed Sulaimon
Department of Military and Veterans Affairs

CSC DKT. NO. 2017-3042
OAL DKT. NO. CSV 05288-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 05288-17
AGENCY DKT. NO. 2017-3042

IN THE MATTER OF MUHAMMED SULAIMON, NEW JERSEY DEPARTMENT OF MILITARY AND VETERANS AFFAIRS.

Marcia N. Leach, Esq., appearing pursuant to N.J.A.C. 1:1-5.4(a)6, for appellant

Susan C. Sweeney, Administrator Employee Relations, appearing pursuant to N.J.A.C. 1:1-5.4(a)2, for respondent

Record Closed: December 18, 2017 Decided: Janauary 2, 2018

BEFORE **SARAH G. CROWLEY** ALJ:

This matter concerns the appeal of Muhammed Sulaimon from the action of the respondent, New Jersey Department of Military and Veterans Affairs authority. The appeal was filed with the Office of Administrative Law (OAL) on April 19, 2017, pursuant to N.J.S.A. 40A:14-202(d).

The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 2, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 1/8/18

Date Mailed to Parties: 1/8/18

STATE

OAL DKT. NO. CSV 05298-2017S
AGENCY DKT. NO. 20-17-3942
SETTLEMENT AGREEMENT

IN THE MATTER OF

Muhammed Sulaimon

AND

DMAVA

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 3/28/2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1.	Release @ Conclusion of Working Test period	
2.	Termination Effective 3/28/17	
3.		
4.		
5.		

B. The Appellant M. Sulaimon withdraws his/her appeal and request for a hearing, and the Respondent Department of DMAVA agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.	Resignation in Good Standing Effective 3/28/2017	
2.	Appellant agrees not to seek or accept further employment at DMAVA	

OAL DKT. NO. CSV 05288-2017S

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of N/A days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

X resignation in good standing effective 3/28/17

____ general resignation

which shall be effective 3/28/17 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

OAL DKT. NO. CSV 05288-20175

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of DMAVA will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of M. Sulaiman 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age

Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 05288-20175

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12-18-17
DATE

Appellant

12/18/2017
DATE

Respondent DMAVA
Susan Sweeney, Admin. OER

12/18/17
DATE

ON BEHALF OF
Mohammed Sulaiman, Appellant

DATE

ON BEHALF OF

OAL DKT. NO. CSV 05288-2017S

CERTIFICATION

I, M. Sulaiman, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/18/17
DATE

M. Sulaiman
NAME

3-27-18

A-14

STATE OF NEW JERSEY

In the Matter of Tequila Thompson, Albert C. Wagner Youth Correctional Facility, Department of Corrections

CSC DKT. NO. 2013-627
OAL DKT. NO. CSV 13667-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 29, 2018 BW

The appeal of Tequila Thompson, Correction Sergeant, Albert C. Wagner Youth Correctional Facility, Department of Corrections, 30 working day suspension, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders, who rendered her initial decision on October 23, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 27, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 30 working day suspension to a 15 working day suspension.

Since the penalty has been modified, the appellant is entitled to 15 working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino*

(MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority. Per *N.J.A.C.* 4A:2-2.10, the amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF MARCH, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13667-12
AGENCY DKT. NO. 2013-627

IN THE MATTER OF TEQUILA THOMPSON,
ALBERT C. WAGNER YOUTH
CORRECTIONAL FACILITY,
DEPARTMENT OF CORRECTIONS.

Patricia B. Quelch, Esq., for appellant Tequila Thompson (Helmer, Conley & Kasselman, attorneys)

Susan Sautner, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2), for respondent Albert C. Wagner Youth Correctional Facility, Department of Corrections

Record Closed: October 5, 2017 Decided: October 23, 2017

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

STATEMENT OF THE FACTS

Appellant Tequila Thompson appeals the action by respondent Albert C. Wagner Youth Correctional Facility (the Facility) suspending her for thirty days on grounds that on two consecutive days she violated the facility's security and safety rules through serious mistakes by returning an inmate to his housing unit after the inmate had obviously been subject to questioning by correction officers. She also is charged with

failing to file a required Use of Force Report. Sergeant Thompson contends that she acted appropriately at all times, such that no discipline is warranted.

PROCEDURAL HISTORY

On May 9, 2012, Sergeant Thompson was served with a Preliminary Notice of Disciplinary Action. She requested a departmental hearing, which was held on August 6, 2012. On August 24, 2012, a Final Notice of Disciplinary Action sustaining the charges and imposing the thirty-day suspension at a date to be determined was issued. The thirty days were served in May, June, and July 2013. She timely appealed the suspension to the Civil Service Commission (CSC), which determined to transmit the contested case to the Office of Administrative Law (OAL), where it was filed on September 26, 2012. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to Administrative Law Judge Patricia M. Kerins, who heard the case on September 13, 2013, January 17, 2014, and October 28, 2014. The record was left open for closing statements, and closed on March 25, 2015. Following numerous extensions, an additional extension was granted to allow time to contact the parties pursuant to N.J.A.C. 1:1-14.13 to determine if the parties could settle or wished to relitigate the matter upon transfer to a new judge. The answer having been in the negative, the undersigned was assigned the case. An additional extension was granted to allow time to procure transcripts, review the record, and write the initial decision. The record was reopened on October 3 for information on appellant's start date with the Department of Corrections, and whether the thirty-day suspension had been served. The information having been received and marked as P-7, the record closed again on October 5, 2017.

FACTUAL DISCUSSION

With regard to the first incident, the parties agree on limited facts. On March 26, 2012, Sergeant Thompson was responsible for overseeing the B wing, which has approximately 42 to 44 cells housing 42 to 50 inmates on three floors, with an officer assigned to each floor. (Tr. September 13, 2013, at 13.) It housed mostly medium-security inmates, along with some maximum-custody inmates. Among them were some

inmates with mental problems creating special needs requiring separate attention, such as ensuring receipt of medication. Senior correction officer (SCO) Lakeya White was the primary officer on duty on tier B-1 on March 26, 2012. At about 5:15 p.m., Officer White notified the sergeant that she was having a problem getting an inmate to move into his cell for lockup. Sergeant Thompson arrived, along with a correction officer recruit (COR), Feliciano. The inmate, who had special needs, was handcuffed and escorted to the day room. (Id. at 27.) Shortly afterward, Correction Officer Gonzalez relieved COR Feliciano, who was assigned to a search detail. Officer Gonzalez brought along a pair of keys to the handcuffs, having retrieved them from central control. The inmate was then released back to his cell. SCO White complained about the return of the inmate to the tier to two lieutenants in charge that evening. Sergeant Thompson also spoke to them.

Sergeant Thompson did not testify in her own behalf. Only one witness with firsthand knowledge of the March 26 incident testified, and that person was SCO White. No one with firsthand knowledge of the March 27 incident testified. Aside from the testimony by SCO White and the two lieutenants, the respondent Department of Corrections relied entirely on testimony from an investigating lieutenant; from a major who helped to determine that discipline should be imposed; on an investigation report, and on written reports to support its factual position.

SCO White testified that on March 26, inmate A.C. returned from dinner mess and then refused multiple orders from her to walk into his cell, so she could then lock the door. (Tr. January 17, 2014, at 9.) Instead, he kept telling her to hold on and wait, which was unacceptable. She contacted Sergeant Thompson, her immediate superior, who initially told her to take the inmate to a space known as the dugout. (Id. at 41.) During this time, the inmate was standing at another inmate's door, continuing to talk. (Id. at 41, 42.) SCO White replied that Sergeant Thompson had to come to the unit to see for herself, and the appellant did, accompanied by COR Feliciano. (Id. at 40.) Sergeant Thompson placed A.C. in handcuffs, escorted him down the unit, and placed him in the day room. (Id. at 12.) SCO White was not sure whether the day room is visible from any cell; she thought perhaps from cell one. (Id. at 14.) Although SCO White expected Sergeant Thompson to take the inmate to detention for the night as a

means of enforcing the need for inmates to follow orders from SCO White, the sergeant instead returned inmate A.C. to the tier, saying she had to do so because he was a special-needs inmate. SCO White became very upset because she felt that Sergeant Thompson was not supporting her. (Id. at 19.) She explained that because placement in handcuffs generally leads to detention, the fact that it did not on a particular occasion could be misinterpreted by other inmates to mean that a particular inmate has special privileges. (Id. at 18.) Further, since the inmate will undoubtedly be unhappy with the original officer, returning the inmate to the unit opens the possibility of retaliation against the officer. (Id. at 19.) According to SCO White, she was the one left to return the inmate to the cell, and she was afraid. "I had the [gate] key in my hand just in case he tried to do anything physical to me." (Id. at 32.) Although SCO White could have written a charge against the inmate for failing to follow her orders, she felt that it would have been pointless because the sergeant had not placed the inmate in detention. (Id. at 20.) SCO White later spoke again with Sergeant Thompson, who told her she needed to be clearer in why she wanted to pursue charges against the inmate. However, SCO White felt that she had been clear that the inmate persistently delayed locking-in when she directed him to do so. (Id. at 24.) She also complained to two lieutenants, Bradley and Hull, who took her off the unit for the rest of the night because of her upset. (Id. at 26.) However, they were so focused on her emotional level that she never had the opportunity to explain fully about the inmate being returned to the tier after being put in handcuffs. (Id. at 27.) The next day, she spoke to Lt. Phillip DiPetta, who told her this was a serious enough incident to merit filing a report. (Id. at 29, 30.)

Lt. Bertha Hull, who had been with the Department of Corrections since 1996, testified that she worked on the third shift as lieutenant for the Administrative Segregation Unit, and was called in on overtime on March 26, 2012. She arrived around 7:30 p.m. to find SCO White in the control center, crying. (Id. at 63.) Lieutenant Hull said that SCO White never mentioned to her that the inmate had been handcuffed. Had she done so, Lieutenant Hull would have expected Sergeant Thompson to have filed a Use of Force Report. Also, "the shift commander is . . . responsible for what happens after the handcuffs have been placed on an inmate for a use-of-force incident." (Id. at 70.) Had Lieutenant Hull been aware of the handcuffing, she would have sent a different sergeant to get the inmate and place him in pre-hearing detention status for

failure to comply. (Id. at 74.) The lieutenant explained that in general, once a person has been handcuffed for not complying with orders, the person would be removed from the general population to allow investigation into the reasons for the noncompliance. (Id. at 70, 71.) For example, a refusal to lock-in is generally followed by a medical check, which could result in constant watch if depression and potential suicide are concerns, or just placement in detention, based on what the medical evaluation determines. (Id. at 72.) If the inmate is identified as special needs, it is possible that the person did not take his medication. (Id. at 70.) In her view, "If we've gone the step to restrain him and place him in handcuffs, obviously, there's something that needs to be immediately addressed. He can always be cleared and go back to his unit a few days later, after all the process has been completed." (Ibid.) A return to the unit shortly after handcuffing could leave others in the unit to believe that the inmate is getting preferential treatment for some reason. (Id. at 73.)

Lt. Cynthia Bradley had been a lieutenant at Albert C. Wagner since 2005. On March 26 she worked part of the second shift as area lieutenant, which involved supervising all the areas of the jail, and then she filled in as shift commander when another lieutenant had an emergency that necessitated leaving. When Sergeant Thompson approached her that night, the sergeant did not tell her she had handcuffed the inmate. She left Lieutenant Bradley with the impression that SCO White was given to using reasons such as refusal to lock-in as a means of having inmates that she did not like or could not handle well removed from the unit. (Id. at 89.) Had Lieutenant Bradley known that the inmate had been cuffed, it would have changed the scenario because now when the inmate returns, other inmates wonder, "[W]hat did he give up in order to not have to be locked up?" (Id. at 91.) She said the handcuffing requires a Use of Force Report because the failure to lock-in is not a routine reason for placing an inmate in cuffs. (Id. at 92.) Without the report to document what occurred, "it can be construed as saying we're just throwing cuffs on anybody and . . . it could be shown as a form of punishment." (Id. at 93.) In addition, an officer would write up a charge, such as refusing a housing assignment. Later, when SCO White appeared, she did tell Lieutenant Bradley about the cuffing. At that point, the lieutenant felt that she did not know what was occurring, as she now had two different accounts of the same incident. She determined to back the sergeant's decision for the moment, on the theory that the

appellant had a reason for putting the inmate back on the tier. (Id. at 96, 97.) She acknowledged that there is "nothing written saying you've got to take him off the unit," but had she been sure that the inmate had been cuffed, she would have removed him immediately. (Id. at 98.)

According to Brian Boyle, shift commander relief and area lieutenant relief, who investigated the incidents, the Facility's "Use of Force—On Duty" policy (R-16) requires the immediate filing of a CUS-1 Special Custody Report "following all instances in which . . . physical, mechanical or deadly force has been used" with the shift supervisor. Handcuffs count as mechanical force. The person responsible for filling out the Use of Force form is "the highest-ranking supervisor on the scene," who in this instance was Sergeant Thompson. (Id. at 47.) If the officer who handcuffed the inmate was not the highest-ranking supervisor, then that person is responsible for filing a special report form. Both reports should be written "as soon as practical," but neither were done in this instance, Boyle said. (Id. at 48.) He did, however, acknowledge that "[t]here are many times where it's realized that the inmate was not involved in something, and then that inmate is immediately released from the restraints." (Id. at 122.) Although the written policy would indicate that a Use of Force form still needed to be filed, Lieutenant Boyle indicated by common practice, officers often do not. Lieutenant Boyle also stated that Officer White should have logged the incident into the B Unit Logbook, which is the custodial officer's official record of what happened on that date. (Id. at 60, 61.)

According to Lieutenant Boyle's report, Sergeant Thompson told him that SCO White did not give her a tangible reason to lock up the inmate, and that she, not SCO White, walked the inmate back to his cell and locked him in. She also stated that she told Lieutenant Bradley everything.

According to Lieutenant Boyle, Sergeant Thompson should have told her superior, Lieutenant DiPetta, on the 27th about the incident with the same inmate on the 26th. Additionally, by returning the inmate to his cell on the 26th and then again on the 27th, she compromised the safety of the inmate. (Id. at 95.) When the inmate was released back twice, "a lot of the inmates . . . could automatically assume that he is a snitch . . . giving information to the custody staff." (Id. at 95, 96.) Sergeant Boyle said

he is not aware of a standard protocol as to when or how an inmate can be interviewed. (Id. at 131.) Nor is there a written protocol that mandates that an inmate has to be placed in pre-hearing detention. (Id. at 134, 135.)

Major Gerard Caldarise was assigned to the Garden State Youth Correctional Facility at the time of his testimony, but was the security major at Albert C. Wagner in March 2012. Major Caldarise stated that "Every time—what we do—understand that it's not written anywhere, but standing procedure, if you lock an inmate up [in handcuffs] on your housing unit, even if he's not going to catch charges, you move him off the housing unit." (Id. at 135.) Usually, the inmate is put in lockup for a day, then sent to a different housing unit, to keep other inmates from thinking he is a snitch. (Id. at 136.) Additionally, as regards SCO White, Major Caldarise felt that the failure to remove undermined her authority. "She kind of loses some . . . control of the unit because they see that the sergeant's not supporting her." (Ibid.) In this instance, in Major Caldarise's opinion, the failure to remove the inmate resulted in what he understood to be an assault on the inmate the next day. (Ibid.) Major Caldarise said that pulling the inmate out of the line on the next day was an error because this action was apparent to the rest of the inmates on his tier. Appellant should have allowed inmate A.C. back into the housing unit, then him called, "either by the hospital, the medical officer," or another unit to create an excuse to remove him without raising suspicion. (Id. at 144.) In Major Caldarise's view, the appellant's actions merited discipline because they resulted "in an inmate being assaulted, and one of . . . our main jobs is to make sure that they are safe." (Id. at 149.)

Major Sheree Culvert testified on behalf of Sergeant Thompson. Having personally conducted many investigations, she was aware of the procedures and was certain that an officer had to be given Weingarten Rights by someone above the rank of that person. (Tr. January 17, 2014, at 19.) Before investigations are begun, there is usually a specific focus. Major Culvert stated, "So, in other words, [a] lieutenant as . . . a shift commander would say, 'Something's not right here. I need to have this investigated.'" (Id. at 21.) Major Culvert testified that inmates in close custody must be in handcuffs whenever they are moved, and such movements do not require a Use of Force Report. (Id. at 26.) She did not believe that the handcuffing of an inmate for not

locking-in was necessarily a significant enough act to require a Use of Force Report. (Id. at 43.) Rather, it depends on the totality of the circumstances. "I don't believe that we actually have written within our policies routine or non-routine." (Ibid.) She likened the refusal to lock in at the Wagner facility, which houses "a younger population," to "telling your child to go to their room and them sitting in front of the door, saying, 'I'm not going in my room.'" It is not obedient, but it is also "not being totally disobedient." (Id. at 44.) She also said that when an officer observes another correction officer using force, the observing officer is not required to file a Use of Force form. (Id. at 27.) However, if it is the sergeant physically applying handcuffs to an inmate, the sergeant would be the one who should fill out the Use of Force Report. (Id. at 45.) Major Culvert said that the level of the thirty-day suspension brought questions to her mind, given the presence of a commendation and no prior discipline. (Id. at 37.)

Based on SCO White's credible testimony, I **FIND** that in response to a request from her, Sergeant Thompson came to the unit, removed inmate A.C. to the day room, which is visible to at least one of the inmate cells on the tier, questioned the inmate, and then had him returned to the cell. I **FIND** that although there was no written protocol requiring this to be done, SCO White was upset that neither Sergeant Thompson nor the other officer returned the inmate to the tier; she was the one who locked him back in his cell. I **FIND**, based on the credible testimony of the two lieutenants to whom SCO White and Sergeant Thompson spoke on that night, that both lieutenants understood there was a disagreement between Sergeant Thompson and SCO White over the inmate, and that, eventually, Lieutenant Bradley had knowledge that the inmate was still in his cell, but did not order his removal elsewhere.

With regard to the incident on March 27, 2012, appellant filed a motion to dismiss the charges, based on a lack of competent, credible evidence. Appellant accurately points out that none of the Department's witnesses had firsthand knowledge of the second incident. The Department argues that appellant's own statements provided through the exhibits and the testimony of others are sufficient to establish its factual case. Respondent also notes that the appellant was available to testify, but chose not to do so, and has requested a negative inference from the failure to testify.

First, with regard to the descriptions of events recounted by Lieutenant Boyle, and recorded in her own reports to the facility, I **CONCLUDE** that Sergeant Thompson's statements are admissions pursuant to N.J.R.E. 803(b)(1), a statement by a party-opponent, and are therefore admissible as competent evidence.

Appellant filed a Preliminary Incident Report related to the March 27, 2012, incident. In it, she explained that at 3 p.m. SCO Emmert informed her that he had found contraband in the cell that housed inmate A.C. (R-4.) Per Lieutenant DiPetta's orders, she "pulled the inmate in to B shop" when he was returning with the B wing inmates from the recreation yard, and she questioned him. When she called Lieutenant DiPetta with the information on drug movement from the prison, she informed him that "the inmate was back on his unit, was issued charges, and the items were confiscated." (R-4.) The report goes on to state that at 7 p.m. SCO Emmert notified appellant that the inmate had asked to see her. SCO Emmert said when he opened the door and asked the inmate why, "he noticed the inmate's face was red and swollen." Sergeant Thompson reported to the tier, and the inmate told her he had been assaulted in his room by several inmates and could not identify any of them. She escorted him off the floor, and he told her he was assaulted because he did not go to lockup after a lighter was found in his room. The inmate was then taken to the prison nurse for evaluation. (Ibid.)

Lieutenant Boyle's report, to which he testified, contains a statement by Sergeant Thompson that on March 27, 2012, she removed inmate A.C. (who was involved in the March 26 incident) from the returning recreation movement of inmates from his tier and had him placed in the A shop holding cage. There he was interviewed. The report indicates that both actions were taken in response to an order from Lieutenant DiPetta. (R-2.) According to Lieutenant Boyle's report, appellant told him that Lieutenant DiPetta stated, "as soon as that inmate comes in, find out where he got that lighter from." The report states that Sergeant Thompson told Lieutenant Boyle she could not remember who actually pulled the inmate over to A shop for the interview. The report states that the appellant said the inmate denied having a lighter but started to give information about drugs in the institution. "She stated that she informed Lieutenant DiPetta and that Lieutenant DiPetta then wanted her to try and identify the inmates named and then to

bring the information back to him to see it before it was forwarded to SID." (Ibid.) Sergeant Thompson argues that the decision to return the inmate to the tier was made by Lieutenant DiPetta, but there is no competent, credible evidence in the record to support that argument.

Therefore, based on the admissions, I **FIND** as **FACT** that on March 27, in response to an order from Lieutenant DiPetta to interview the inmate as soon as he came in from recreation, Sergeant Thompson saw to it that A.C. was pulled out of the line of inmates returning from recreation. I **FIND** that he was then interviewed and Sergeant Thompson either directed or allowed his return to the tier on which he was housed. I **FIND** that neither statement indicates that the lieutenant ordered her to pull the inmate in front of all the other inmates, and, similarly, neither statement establishes that she was directed to place him back with the other inmates who saw him taken away. Rather, she was told to get information and get it back to the lieutenant. Therefore, I **FIND** as **FACT** that the determination on how to pull the inmate and where to put him after the interview was left to Sergeant Thompson, and that she herself made the decisions or went along with decisions made by those reporting to her.

Whether inmate A.C. actually was subject to an assault is not established, because the comment about how he was injured was hearsay within Sergeant Thompson's report, and there is no other competent evidence as to what exactly occurred. The most that can be said is that, based on the nurse's medical report, which qualifies as a public record under N.J.R.E. 803(c)(8), A.C. presented with three scratches on the left side of face, one about one centimeter long. (R-11.) How he got them is unknown.

With regard to the negative inference, the general rule is that

> failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him. 2 Wigmore, Evidence, § 285 (3d ed. 1940). But such an inference cannot arise except upon certain conditions and the inference is always open to destruction by explanation of

> circumstances which make some other hypothesis a more natural one than the party's fear of exposure. This principle applies to criminal as well as civil trials, to the State as well as to the accused. Id. §§ 285, 290 (citations omitted).
>
> [State of New Jersey v. Clawans, 38 N.J. 162, 170–71 (1962).]

See also Duratron Corp. v. Republic Stuyvesant Corp., 95 N.J. Super. 527, certif. denied, 50 N.J. 404 (1967). Indeed, a negative inference may even be drawn in a civil or administrative proceeding where the person has pleaded the Fifth Amendment. "But the inference may be drawn only if there is other evidence supporting an adverse finding; it must not alone constitute the evidence of guilt. Also, no inference may be drawn if the penalty imposed at the conclusion of the proceeding is so severe as to effectively destroy the privilege, such as disbarment or the loss of professional reputation." State Dep't of Law & Pub. Safety, Div. of Gaming Enforcement, 216 N.J. Super. 579, 587 (1987) (citations omitted).

Here, there already is sufficient competent evidence to demonstrate that the March 26 and March 27 decisions at issue were made by Sergeant Thompson. Thus, I **CONCLUDE** that, for the little it adds here, the negative inference may be drawn.

I **FIND**, based on Lieutenant Boyle's credible testimony and the Use of Force—On Duty policy, effective February 1, 2011, and still in force at the time of the two incidents, that "mechanical restraints" are included among the items identified as "Non-deadly force," and handcuffs are a mechanical restraint. The section entitled "Reporting Use of Force" states that "Immediately following all instances in which . . . physical, mechanical or deadly force has been used, each staff member who participated in or witnessed the event shall write a Special Custody Report (CUS-100) to the area supervisor or Shift Commander as applicable. Additionally, it shall be the responsibility of the ranking custody supervisor on the scene to insure that a 'Use of Force Report' (CUS—102) is completed and submitted as appropriate." (R-16.) The following section, entitled "Reports," states:

> Immediately following any incident in which force has been used, each staff member who participated in or witnessed the event shall write a special report to the shift supervisor. The report shall contain:
>
> a. A description of the events leading up to the use of force;
>
> b. A description of the incident;
>
> c. The type of force used;
>
> d. The reason(s) for employing force;
>
> . . . .
>
> g. Other relevant facts or comments about the incident or conduct of employees or inmates.
>
> [Ibid.]

Lieutenant Bradley was particularly persuasive on the question of why Use of Force Reports are required, explaining that force cannot be used as punishment, and that without documentation of what happened, the facility is open to accusations that force is being used any time a correction officer is unhappy with someone. Based on the comments of lieutenants Boyle, Bradley, and Hull, as well as Major Caldarise, I **FIND** that Thompson was required to file a Use of Force Report on March 26, 2012, and failed to do so. However, I also **FIND**, based on Major Culvert's credible testimony, that there is no written policy on routine versus non-routine handcuffing, and inmate A.C.'s conduct, while a violation of the rules that was subject to discipline, could be viewed along the lines of a child refusing to go to his room, and therefore, reasonably could have been viewed as a routine problem, which is in line with Lieutenant Bradley's non-reactive response to what occurred that night. Thus, it was a violation, but one viewed as serious only in hindsight.

Both Lieutenant Bradley and Major Caldarise acknowledged that no written protocol states when an inmate must be removed from a unit. Major Culvert suggested credibly that the March 26 refusal to lock-in was not a major violation by the inmate, which would help to explain why, based on what she knew, Lieutenant Bradley did not

act to remove the inmate. Based on those facts, I **FIND** that Sergeant Thompson violated no written policy or procedure by returning the inmate to his cell on March 26.

All of the lieutenants, as well as Major Caldarise, testified to the dangers of pulling an inmate out in front of his tier, taking him away, and then returning him. That also is not in written policy form, but their testimony, along with SCO White's statements about her own fears, underlined the ongoing importance of the simple fact that a correctional facility can be a dangerous place and officers are expected to be aware of those dangers. The record, including appellant's own admissions, established that Lieutenant DiPetta did not order the sergeant either to pull the inmate out of the line or to put him back on the tier. He left to her the decision on how to carry out his orders. This is consistent with the fact that she was a sergeant and sometimes the primary shift officer. All of the lieutenants credibly explained that questioning someone and then returning them creates the suspicion in other prisoners that the person is a snitch. Their potential for retaliation makes that return dangerous. Major Caldarise's testimony that the decision to return A.C. to the tier constituted poor judgment on appellant's part was persuasive, independent of whether A.C. was actually attacked or not. Therefore, I **FIND** as **FACT** that although Sergeant Thompson did not violate a specific protocol, she did exercise poor judgment in a way that comprised the safety of an inmate.

LEGAL ANALYSIS AND CONCLUSION

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Here, the appellant is charged with other sufficient cause, in the form of a serious mistake due to carelessness which may result in danger or injury to persons or property,

as well as violation of administrative procedures involving safety and security and violation of a rule, regulation, policy, procedure, order, or other administrative decision.

As noted above, Sergeant Thompson may have committed an error in returning A.C. to the tier on March 26, 2012, but she violated no written policy in doing so, and the internal practice varies with circumstance. Therefore, I **CONCLUDE** that the respondent has not proved the first charge. The second charge of violating an administrative procedure involving safety and security has been proved, in that Sergeant Thompson did not file a Use of Force Report related to the handcuffing on March 26. Presumably the third charge relates to violation of the Internal Management Procedure (R-15), which states that a primary goal of the custody unit is to prevent injury or the loss of life, and ensure a safe environment for staff, visitors, volunteers, and inmates. I **CONCLUDE** that the error in returning the inmate on March 27, 2012, does violate this procedure, as it potentially comprised his safety.

The remaining issue is penalty. Appellant had ten years of unblemished service at the time the incident occurred. The general rule for civil service cases is progressive discipline. W. New York v. Bock, 38 N.J. 500 (1962). Typically, the Civil Service Commission considers numerous factors, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Nonetheless, progressive discipline is not a fixed and immutable rule to be followed without question. Carter v. Bordentown, 191 N.J. 474, 484 (2007). The respondent imposed the thirty-day penalty based on a violation of policy in returning the inmate on March 26, as well as the failure to file the Use of Force Report that day, and the placement of the inmate back in the tier after the questioning of March 27. Here, the Department did not have sufficient evidence to support the existence of a protocol addressing the March 26 decisions to handcuff or to return to the tier. Additionally, the Department did not prove that the inmate actually had been attacked, and although it proved the violation of the Use of Force policy, a fair amount of testimony indicated that the Department does not discipline for every failure to file the form. Thus, a lesser penalty than the thirty days is warranted. Therefore, I **CONCLUDE** that a fifteen-day, as opposed to a thirty-day, suspension is appropriate.

ORDER

The thirty-day suspension imposed by the Department is hereby **REDUCED** to a fifteen-day suspension.

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

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

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

October 23, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: October 23, 2017

Date Mailed to Parties: October 23, 2017

/caa

WITNESSES

For Appellant:

Major Sheree Culvert

For Respondent:

Lieutenant Bryan Boyle
Senior Correction Officer Lakeya White
Lieutenant Bertha Hull
Lieutenant Cynthia Bradley
Major Gerard Caldarise

EXHIBITS

For Appellant:

P-1 Internal Management, SOP #224, Equipment Issue and Key Control, effective February 1, 2010
P-2 Special Custody Report of Sergeant Thompson dated June 10, 2013
P-3 Law Enforcement Personnel Rules and Regulations
P-4 Handbook of Information and Rules
P-5 New Jersey Department of Corrections Policy Statement, Use of Force and Security Equipment, revised October 15, 2009
P-6 New Jersey Department of Corrections Human Resources Bulletin 84-17
P-7 Letter from Patricia B. Quelch, Esq., dated October 5, 2017

For Respondent:

R-1 Final Notice of Disciplinary Action dated October 24, 2012, and Preliminary Notice of Disciplinary Action dated May 9, 2012
R-2 Investigation report of Lt. Brian Boyle, dated March 27, 2012
R-3 No exhibit

R-4 Preliminary Incident Report of Sergeant Thompson concerning March 27, 2012, dated March 27, 2012

R-5 Preliminary Incident Report of Sergeant Thompson concerning March 26, 2012, dated March 27, 2012

R-6 Shift Commander Report dated March 27, 2012

R-7 Shift Commander Report dated March 26, 2012

R-8 Logbook of March 26, 2012

R-9 Special Custody Report dated March 27, 2012

R-10 Special Custody Report of SCO Emmert dated March 27, 2012

R-11 Medical report concerning inmate A.C. dated March 27, 2012

R-12 Disciplinary report regarding A.C. dated March 27, 2012

R-13 Use of Force Report, signed by Sergeant Thompson, dated March 27, 2012

R-14 Pre-Hearing Protective Custody Placement Form for A.C., dated March 27, 2012

R-15 Internal Management Procedure, #402, A & B Wing Sergeant, effective May 1, 2011

R-16 Internal Management Procedure, #232, Use of Force—-On Duty, effective February 1, 2011

R-19 Disciplinary History

R-20 Confiscated contraband (BIC lighter and pipe clamp)

3-27-18

STATE OF NEW JERSEY

In the Matter of Natalie Traylor Ancora Psychiatric Hosptial, Department of Human Services	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2017-3771 OAL DKT. NO. CSV 08215-17	:	

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08215-17
AGENCY DKT. NO. 2017-3771

IN THE MATTER OF NATALIE TRAYLOR,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

William Nash, Esq., for appellant, Natalie Traylor (Nash Law Firm, attorneys)

Jessica M. Saxon, Deputy Attorney General, for respondent, (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: February 13, 2018 Decided: February 20, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on June 12, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Tama B Hughes

February 20, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 2/20/18

Date Mailed to Parties: 2/21/18

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on February 13, 2018

J-1

OAL DKT. NO. CSV 08215-2017S
AGENCY DKT. NO. 2017-771

IN THE MATTER OF
NATALIE TRAYLOR

AND

SETTLEMENT AGREEMENT

ANCORA PSYCHIATRIC HOSPITAL,
DEPARTMENT OF HUMAN SERVICES/
DEPARMENT OF HEALTH

The parties in this appeal, Appellant Natalie Traylor ("Appellant") and Respondent Department of Human Services, Department of Health, Ancora Psychiatric Hospital ("Respondent") have voluntarily resolved all disputed matters and enter into the following Settlement Agreement ("Agreement"), which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **May 16, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C.4A:2-2.3(a)3 –Inability to perform duties– Removal effective 12/22/16.
2. NJ Department of Human Services Disciplinary Action, Administrative Order 4:08: B-10.1 – Inability to discharge one's duty due to mental or physical incapacity.– Removal effective 12/22/16.

B. The parties have agreed to the following:

1. Appellant shall be reinstated to the position of Human Services Technician ("HST") at Ancora Psychiatric Hospital.

2. The charges outlined in the Final Notice of Disciplinary Action will be withdrawn by Respondent.
3. Appellant waives any and all claims for back-pay or attorney's fees from Respondent.
4. Upon approval by the Civil Service Commission, Respondent shall begin procedures for reinstatement of Appellant.
5. After her reinstatement, Appellant shall be re-trained with regard to her job duties and responsibilities and applicable Departmental policies and procedures, including training on resident abuse and neglect.

C. Appellant agrees to withdraw her appeal and request for a hearing.

D. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

E. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, Department of Military and Veterans Affairs, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/7/18
DATE

Natalie Traylor
Natalie Traylor, Appellant

2/7/18
DATE

William Nash, On Behalf of Appellant

2/7/18
DATE

Jessica Saxon, On Behalf of Respondent

DATE

Marc Malfara, On Behalf of DHS

DATE — Natalie Traylor, Appellant

DATE — William Nash, On Behalf of Appellant

DATE — Jessica Saxon, On Behalf of Respondent

2-6-18
DATE — Marc Malfara, On Behalf of DHS

CERTIFICATION

I, Natalie Traylor, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/7/18
DATE

Natalie Traylor
Natalie Traylor

Angiulo, Nicholas

From: Bill Nash <wnash@thenashlawfirm.com>
Sent: Wednesday, February 21, 2018 11:02 AM
To: Angiulo, Nicholas; Jessica.Saxon@lps.state.nj.us
Subject: RE: In the Matter of Natalie Traylor, Department of Human Services, Ancora Psychiatric Hospital - OAL Docket No. CSV 8215-17 and CSC Docket No. 2017-3771 - SETTLEMENT

Good morning Deputy Director Angiulo: Thank you for catching that. It is the intent of the parties that the said time period be recorded as an approved leave of absence without pay.

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Wednesday, February 21, 2018 10:30 AM
To: Bill Nash; Jessica.Saxon@lps.state.nj.us
Subject: In the Matter of Natalie Traylor, Department of Human Services, Ancora Psychiatric Hospital - OAL Docket No. CSV 8215-17 and CSC Docket No. 2017-3771 - SETTLEMENT
Importance: High

Mr. Nash and DAG Saxon:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Natalie Traylor from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Ms. Traylor is to be reinstated and waives back pay, the record does not specifically reflect how to record the time period from the original date of removal (December 22, 2016) to the date of reinstatement. In this regard, before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be specifically accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

STATE OF NEW JERSEY

In the Matter of Madeline Zimmerman New Jersey Memorial Home Vineland, Department of Military ad Veterans Affairs	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NO. 2018-1606 OAL DKT. NO. CSV 998-18	

ISSUED: MARCH 27, 2018 BW

The Civil Service Commission, at its meeting of March 27, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 27, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb, Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 998-18

AGENCY DKT. NO. 2018-1606

IN THE MATTER OF MADELINE ZIMMERMAN,
NJ VETERANS MEMORIAL HOME VINELAND,
DEPARTMENT OF MILITARY AND
VETERAN AFFAIRS.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Susan C. Sweeney, Esq., Administrator, for respondent New Jersey Department of Military and Veterans Affairs, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 20, 2018 Decided: February 20, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Madeline Zimmerman, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case December 18, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

February 20, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 2/21/18

Date Mailed to Parties: 2/21/18

/caa

OAL DKT. NO. CSV 00998-2018 SAL
AGENCY DKT. NO. 2018-1606

SETTLEMENT AGREEMENT

IN THE MATTER OF

Madeline Zimmerman

AND

NJ Vets Home @ Vineland

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 11/20/17 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-2.3(a)6	30 day suspension	11/27/17
2. (a)12		
3. A-1 DD230.05		
4.		
5.		

B. The Appellant Madeline Zimmerman withdraws his/her appeal and request for a hearing, and the Respondent appointing authority NJDMAVA agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. NJAC 4A:2-2.3(a)6	4 DAY Suspension	
2. (a)12		
3. DD230.05(A1)	26 DAYS Back pay owe to	
4.	Appellant	
5.		

OAL DKT. NO. CSV 10998-2018

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 20 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 26.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: —.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority NJ DMAVA will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of M. Zimmerman 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, NJ DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 00898-2018

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/20/18
DATE

Appellant

2/20/18
DATE

Respondent NJ DMAVA
NJ Vets Home @ Vineland

2-20-18
DATE

ON BEHALF OF Appellant

DATE

ON BEHALF OF

OAL DKT. NO. CSV 10998-2018

CERTIFICATION

I, M. Ummerman, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/20/18
DATE

NAME

4-4-18

A-2

STATE OF NEW JERSEY

In the Matter of William Able
Newark School District

CSC DKT. NO. 2016-1907
OAL DKT. NO. CSV 01850-16

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2018 BW

The appeal of William Able, Senior Custodian, Newark School District, removal effective September 16, 2015, on charges, was heard by Administrative Law Judge Leland S. McGee (ALJ), who rendered his initial decision on February 12, 2018. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision as well as his recommendation to modify the removal to a six-month suspension.

Since the removal has been modified, the appellant is entitled to back pay, benefits and seniority following his suspension until the date of his reinstatement. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this matter, while the penalty was modified, charges were sustained and major discipline was imposed. Therefore, the appellant has prevailed on all or substantially all of the primary issues of the appeal. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a six-month suspension. The Commission further orders that the appellant receive back pay, benefits and seniority from the conclusion of the suspension until the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01850-16
AGENCY DKT. NO. 2016-1907

IN THE MATTER OF WILLIAM ABLE,
NEWARK PUBLIC SCHOOL DISTRICT,

Lauren Bonaguro, Esq., for petitioner (Decotiis, FitzPatrick, Cole & Goblin, attorneys)

Bernard Mercado, Esq., for respondent (Charlotte Hitchcock, General Counsel, attorneys)

Record Closed: November 13, 2017 Decided: February 12, 2018

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of an employment termination proceeding against William Able (Petitioner or Able) by the City of Newark Public School District (Respondent). Able worked for Respondent for approximately twenty years. His last position was as Head Custodian for Barringer High School. His employment was terminated effective September 16, 2015, for conduct unbecoming a public employee, misuse of public property, and other sufficient causes, occurring on or about September 7, 2015.

Specifically, Respondent alleged that Petitioner allowed, caused and/or supervised the disposal of "construction debris" into garbage bins at Barringer, and the use of a blower belonging to Barringer to be used to remove dust from the van that delivered the debris. Later that same day, the van returned and Petitioner is alleged to have allowed, caused and/or supervised the removal of twenty to twenty-five student lockers. Among the occupants of the van were Petitioner's children.

On September 18, 2015, Respondent issued a Preliminary Notice Disciplinary Action (PNDA) against Petitioner alleging three (3) charges. On November 19, 2015, Respondent issued a Final Notice of Disciplinary Action (FNDA) removing Able from public employment. The following charges were sustained:

- N.J.A.C. 4A:2-2.3(a)(6) – conduct unbecoming a public employee
- N.J.A.C. 4A:2-2.3(a)(8) – misuse of public property
- N.J.A.C. 4A:2-2.3(a)(11) – other sufficient cause

Petitioner then appealed the FNDA, and the New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL), for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on January 29, 2016.

This matter was assigned to the Honorable Imre Karaszegi, ALJ. It was scheduled for hearing on September 27, 2016, which was adjourned and rescheduled for November 15, 2016. On October 14, 2016, this matter was reassigned to the undersigned. Hearings were rescheduled for, and held on February 16, and May 5, 2017. Post-hearing submissions were filed on November 13, 2017, and the record closed.

DISCUSSION OF THE FACTS

One substantive fact in this case is not in dispute and I **FIND** that Petitioner allowed his family to remove student lockers from Barringer High School. The issue in this case is whether Petitioner had the authority to remove the lockers.

Summary of Testimony

Respondent's witness, Keith Scott Barton (Barton), is the Executive Managing Director of Operations for Respondent. Barton was responsible for facilities operations. This includes custodial services, trade services, and fixed assets. He also serves as Respondent's Affirmative Action Officer.

Barton testified that employees must have authorization to dispose of the District property from the fixed assets division and his office to manage inventory. The procedure for disposing of fixed assets includes an inspection by Wilfred Young (Young), who maintains the inventory records. He visits sites to review inventory numbers, tag equipment, and to determine if items are operational. Respondent offered into evidence a Bulletin regarding "Removal of Obsolete Assets" (R-1), dated September 15, 2011. This document indicates that the procedure is that the school principal (or designee) makes recommendations on the "validity of the fixed assets" and causes a Fixed Assets Removal Form to be completed and signed as to the equipment to be removed. The form is submitted to the fixed assets department, specifically to Wilfred Young. If Young "determines that those desks, in this example, can no longer be used, then at that point, a dumpster is ordered, or we figure out the best way to dispose of the – that furniture. In most cases we order a dumpster." (T1-115:9-13.) Barton stated that if fixed assets are removed without following this procedure it is theft. Respondent entered into evidence a copy of a Newark Police Incident Report dated September 15, 2015, naming Tariq Mclamb as the "suspect." (R-2.)

Barton also testified that the District pays for trash removal services. Under the contract the vendor, only trash generated by the District should be disposed of in Barringer's dumpsters.

Barton was doing a building walk-through in preparation for a news conference just before the beginning of the school year. He was also following up on an email from Carrieann Zielinski (Zielinski) who advised the facilities department that the lockers had been removed. Several student lockers were removed from hallways and stored in the boiler room. Barton had a conversation with Petitioner about replacing the lockers in spaces where tiles had fallen from the hallway walls. He stated that the lockers were not replaced and the spaces were covered with poster board. Barton testified that there was no policy about storing the lockers in the boiler room but it would be governed by safety and fire hazard regulations.

The parties entered a copy of pages 1 of 24, 2 of 24, and 18 of 24, of Respondent's Fixed Assets Manual updated by Wilford Young on July 18, 2011. (J-7.) Barton did not know whether Petitioner actually received a copy of the Manual. There is a procedure that requires each employee to sign for receipt of the Manual. He testified that the school administrator is primarily involved in the fixed assets process and custodians, per se were not be a part of the process outlined in the Manual. In the Barringer High School building, there are two separate schools. At the time, the principal in the lower level of the building was Mincy, with Zelinski responsible for operations. At the upper level, the principal was Breidlove, with Owens responsible for operations.

Barton testified that the custodians should know the procedures regarding removal of fixed assets through their administrators. There should have been training for all staff when they returned after the summer break and before the students arrived. He stated that there should have been a sign-in sheet for all staff in attendance at the training but he is not aware of whether Barringer had any such training program. He was also not aware if Petitioner specifically received instructions about the disposal of fixed assets. The District stopped issuing Bulletins in 2014.

Petitioner Stipulated that he stored some lockers in the boiler room and removed others. Although Barton testified that there were "a large number" of lockers missing from the hallways, he did not check the boiler room and did not know whether any lockers were stored there.

Esther Williams (Williams), Senior Head Custodian at night (3:00 p.m. to 11:00 p.m.) at Barringer High School, has been employed by Respondent for twenty-seven years; twenty-one years as a custodian. In 2015, she was a custodial worker on the 7 a.m. to 3 p.m. shift. She became Senior Head Custodian in July 2016.

Williams testified that she is not aware of any policies regarding the disposal of items in schools. She testified that she has never seen the September 15, 2011, bulletin regarding removal of obsolete assets. (R-1.) She has never seen the Newark Public Schools Fixed Asset Manual. (J-7.) As far as she knew, it was not necessary to have specific authorization to remove items that are to be thrown away. She stated, "[w]e always threw things out. We put them in the roll-off. We put them against the fence. We put them besides the roll-off. In Barringer we have a driveway." (T1 167:4-7.) Williams further stated,

> But no, we never call anybody. In none of the schools that I worked, did we call anybody. So, I never – and I was always – I was always close to the head man. Because I had, you know, intentions of becoming a head person. So anything that I could learn throughout the years, I would pick up to - - when I became this - - in the position. But never did I see that they ever called anybody.
>
> [T1:167, 15-23.]

The exceptions are computers and items that have a bar code or District ID number. In that case Young had to be called for direction. If the item was broken it could be discarded in the "roll-off"—dumpster. The dumpsters were not permanently placed at the school so they had to wait for one to be placed in the driveway. "Every school does the same thing." (T1 177:17-18.) None of the lockers had a bar code on them.

Williams testified that as the hearing was conducted, there were student lockers stored in the boiler room. Approximately twenty sets of lockers with six to eight lockers per set. No administrators have advised her that they could not remain in the boiler room.

Williams described problems with the lockers in the hallway. The computer teachers and staff at Babyland (daycare) complained that the locks were broken and stayed open. On the first floor between stairway nos. 3 and 4, the students walked by and slammed the doors, which disturbed the teachers and babies. There was a meeting with Principal Zielinski to discuss moving the broken lockers. As a result of that meeting, Williams assisted in moving the lockers; the "good ones" went into the boiler room for possible use at other schools. Those that were corroded were placed outside by the fence over a two- or three-day period.

Williams stated that there was no training in regard to the removal of items; she stated, "I only know what they told me." Much what they learned was "on-the-job," as you go along. She did not know what occurred on the date of the within incident. She was not aware of Petitioner's children being present when she helped him remove the lockers. During the time that the lockers were removed from the premises, she was "upstairs . . . sealing . . . taking care of the floors at that moment." (T1, 187:18-20.)

Williams has worked at Barringer between four and six years. She has a close relationship with Petitioner in that he's "like a son" to her. They also are colleagues in the same union. They had acknowledged that stealing from school grounds is not acceptable. Williams also testified that she has a Black Seal license and is aware that it is not proper to store the lockers in the boiler room. The original intention was for them to be moved to other locations but when this case started, she was advised by Mr. Barton to leave everything just as Petitioner left things.

Petitioner testified that he started working for Respondent nineteen or twenty years ago as a temporary custodial worker. One year later he became a full-time employee. Ten years later he became Senior Head Custodian.

Able acknowledged that he removed the lockers. He stated that the school had a rodent problem that required shutting the entire building down for a weekend. The infestation was concentrated on the first floor where students left food in open lockers. He moved lockers to clean behind them and many of them were broken. He had a meeting with Ms. Zelinski in the middle of August 2015 and explained that there was trash

behind the lockers and that the students regularly slammed the doors as they walked passed them. He suggested that they be removed and Zelinski consented.

Petitioner testified that when Barton inspected the building prior to the press conference, he asked Petitioner about damage to the walls where the lockers had been removed. Petitioner stated that if the walls were not repaired, he would put the lockers back in place. The next day a teacher put up a bulletin board with students' work, which covered the damaged walls. The lockers shown in the video of September 7 had not been used in the fifteen years that he has worked there.

Petitioner testified that his first supervisor was Clement Collins and that is who "trained" him. Collins told him to use his discretion in disposing of old items. If there is a bar code on it, contact Wilford Young. Everything else was discretionary; determine if items could be repaired.

Petitioner has twelve children, eight boys and four girls, and they often went to school with him. The administrators know his children and they have always been welcome in the school and at school events. He stated that the assistant superintendent has invited his children to the staff cookouts. Petitioner acknowledges that he should not have had his children helping him on the day that the lockers were removed. However, he denies stealing or otherwise improperly removing the lockers from the school. It was his understanding that "garbage" could be discarded and he had the discretion to determine what was garbage. He denies receiving or seeing the Fixed Assets Manual (J-7) or the September 15, 2011, Bulletin (R-1).

Petitioner testified that he put the lockers in the school driveway by the fence and that it was his uncle who removed them from the premises. Petitioner does not know what his uncle did with the lockers after they were removed.

Petitioner testified that nobody asked him where the lockers were and he never mentioned to Burton that there were lockers stored in the boiler room. He has a Black Seal license and the training directive was to ensure that there were no combustibles in the boiler room. He described two tiers in the boiler room; the top tier is where he placed

the lockers in the area where the incinerators used to be. It was summer time and the boilers were not in operation—they run from October through April. In May, they clean and shut down the boilers.

Carrieann Zielinski is the school operation manager at Barringer High School. She is responsible for the daily operations of the school which includes everything that is not instructional: the cafeteria, the custodians, procurement, helping the principal develop the budget, and scheduling. She is the direct report of the Head Custodian, who is responsible for supervising the individual custodians.

Zielinski testified that the Head Custodian is responsible for preparing work orders for repairs such as door knobs and other equipment that is repairable. She is not aware of any policy for equipment that is damaged beyond repair, "they would probably have to reach out to Facilities." (T2 7:24-25.) Zielinski stated that there is no formal process for how policies are communicated to her.

Zielinski stated that in the past, Petitioner has submitted work orders for items that are in disrepair. In this specific instance, she did not authorize him to take the lockers himself; however, she never talked with him about what he was going to do with the lockers.

On September 1, 2015, Zielinski forwarded an email to Burton and William Polk, her second in command. (J-13.) Attached to the email were pictures of the walls and the floor from which the lockers were removed. In the email she acknowledged that Petitioner moved the lockers to clean garbage underneath it. It further stated,

> Upon further examination, it was discovered there were major holes in the wall, rat nests, and piles of garbage. The pictures attached show the damage done to the wall and the piles of garbage. I spoke with BAAH and we would prefer if the lockers were removed permanently. I saw the masons working on the wall yesterday. If we could just fix the wall and remove the lockers that would be ideal. With the lockers gone on the first floor it opens the hallways for the flow of traffic between the two schools. Since no one uses those lockers

> they become filled with trash and whatever else the students hide in there.
>
> [J-13.]

Zielinski testified that after requesting that the lockers be removed, she was not concerned about where they went from there. She assumed that there was a protocol for what would be done with the lockers once they were removed. Her purpose in sending the e-mail was to have the wall repaired and not have the lockers put back. As far as she knew, the lockers that were removed were still in the boiler room.

David Rawles (Rawles) is a project manager in Office of Project Control, which is in the Office of Facilities. He testified that he is familiar with the duties and responsibilities of custodial workers. He confirmed that student lockers, among other items, are considered "school property" and there is a process for addressing broken lockers. In his previous position as the special assistant for the High School Network, they provided support to the schools in the district. That support included preparing schools for the upcoming year. At the end of a school year Rawles (and/or staff in his office) emptied out student lockers and through a District contracted; a vendor would come in and repair lockers. For example, if a door is broken, "typically" lockers are cleaned out and either custodial staff or a designee in the school identifies the lockers that are in disrepair and the vender is contacted. "At some time throughout the summer the locker door is repaired or the lock."

Rawles testified that the process for disposing of items in disrepair varies depending upon how the item was acquired. Federally funded (grants) property cannot be disposed of in the "normal" way. Once the grant funding has ended "typically" there's an inventory of what was purchased through a grant, and they cannot be disposed of in the "normal" way. As such, there are different procedures for different items and circumstances. In this case, he is not aware of whether the lockers were purchased through a grant. He stated that there was a "general understanding" that school proper could not be taken for personal use.

Rawles stated that when preparing the building for the first press conference with Commissioner Serf, he personally inspected it. There were tiles in disrepair from where the lockers had been removed. Barton wanted the lockers placed back on the walls after the tiles were repaired. Petitioner was with them for the inspection. Rawles does not know why they were not put back on the walls and would be surprised if they were still in the building. They were not being used and some were in disrepair. Petitioner did not tell Rawles that the lockers were disposed of and Petitioner did not have permission to dispose of them.

Clement Collins (Collins) has been a supervisor of custodians for Respondent for approximately twelve years and was a custodian for fifteen years. His "training" as a supervisor "came from being a custodian." (T2 71:6.) He never received any specific training on the policies, but occasionally there were email circulars to the custodians and they would meet to discuss or sometimes develop the circulars. He never received any training regarding what items should be "tagged" or why; nor any training regarding which items were purchased by way of a grant, or otherwise.

He manages the custodial staff and grounds crews for eighteen high schools and three stadiums. He testified that it is not proper for custodians to take school property. The "normal" practice for addressing "broken" property is to try to repair it or to throw it out. When asked whether a custodian has to get permission prior to throwing property out, Collins stated that "it depends." In clarifying he stated,

> Well, it depends on if the custodian – because, you know, the custodian has the ability to determine, you know, what's trash depending on who assesses it.
>
> If there is – if there's items that were thrown out in the past then obviously they wouldn't have to get authorization for it, they would just probably – the normal procedure is just to throw it out.
>
> [T2 63:11-17.]

When asked whether Petitioner told him that there were several lockers that were broken at Barringer that had to be disposed of, Collins stated,

> I know they were going through a project, he never – I don't recall him calling me directly but I know there was lockers that – there was a project there that they were removing lockers, but I never got a call from him directly, no.
>
> . . .
>
> Well, as custodian in the building, you know, he would be directly involved with the removal or, you know, the transport and the discarding, you know.
>
> [T2 64:19 – 65:9.]

Collins stated that the custodians made the determination about what should be fixed or thrown out. Once the custodian makes that determination an item can just be discarded. When asked whether a custodian can take discarded property without authorization, Collins stated, "[w]ell, it's not in the policy to say that you can't but, I mean, I've never experienced that" (T2 67:18-19) and "it's possible" to take discarded property. Although he never gave Petitioner authority to take property, the proper person to give such authority was the administrator in the building.

Collins stated that he has not seen a policy for how to determine what items should be discarded and what shouldn't. He stated that some property/items are "tagged" with a "BO" number. That process started when the district started getting computers, laptops, new lawnmowers, and equipment that "they wanted to make sure that we had a count on or an inventory . . . ." It was associated with computerization of the inventory. For those items that are not tagged, "[t]here's to my knowledge no process."

CREDIBILITY

When the testimony of witnesses is in disagreement, the trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such

as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514, 521-22 (1950).

I **FIND** that the testimony of Petitioner, Collins, Zielinski, Rawles, and Williams to be credible and consistent with respect to whether or not there was a clear policy for disposal of school property and whether or not that policy was clearly articulated to Petitioner or any other custodian within the Respondent school district.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 580-81 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act states that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline and termination of public employees.

N.J.A.C. 4A:2-2.3(a) provides that a public employee may be subject to major discipline for various offenses. The New Jersey Department of Human Services has a Disciplinary Action Program that sets forth the standards that all employees must meet. (R-12.) "Unbecoming conduct" is broadly defined as conduct that adversely affects the morale or efficiency of the government unit or has the tendency to destroy public respect and confidence in the delivery of government services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6), I **FIND** that petitioner did not engage in conduct unbecoming a public employee with respect to discarding the lockers. There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis. King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), http://njlaw.rutgers.edu/collections/oal/.

In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit Sys. Bd. (June 26, 2001), http://njlaw.rutgers.edu/collections/oal/, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. Unbecoming conduct is not precisely defined in N.J.S.A. 11A or N.J.A.C. 4A; see, e.g., In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an "elastic one that includes any conduct that adversely affects morale or efficiency by destroying public respect for municipal employees and confidence in the operation of municipal services." Id. at 554.

In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), that court stated that a finding of misconduct need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye as an upholder of that, which is morally and legally correct."

In the present case, I **CONCLUDE** that there were no clearly established protocols for how to dispose of school property that was in disrepair. Further, there was no formal training for the custodians with respect to disposal of school property, and custodians had a great deal of latitude in determining what items should be disposed of and how. Custodians were left to rely on "past practices" for guidance as to the disposal of property

in disrepair. Finally, Petitioner's removal of the lockers was not clandestine and was consistent with what he believed to be the proper process. Therefore, I **CONCLUDE** that this charge should not be upheld with respect to the removal of the lockers.

I further **FIND** that Petitioner did engage in conduct unbecoming a public employee with respect to allowing his children to enter the school building to assist in the removal of the lockers. Therefore, I **CONCLUDE** that this charge should be upheld with respect to allowing the children on school property.

N.J.A.C. 4A:2-2.3(a)(8) (misuse of public property, including motor vehicles)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(8) and the charge of misuse of public property, while Petitioner reasonably believed that he had the authority to discard school property that was in disrepair, I **CONCLUDE** that it was not proper for him to allow anyone to remove the lockers from school grounds. There is no definition in the New Jersey Administrative Code for misuse of public property, but the charge is understood to mean that an employee has used public property, in a manner that is inconsistent with agency policy or reasonable safety standards. In In re Pressley, Nos. A-0699-13T4, A-0700-13T4 (consolidated) (App. Div. June 21, 2016), http://njlaw.rutgers.edu/collections/courts/, recurring incidents of unpermitted and erratic driving were sufficient to sustain a charge under N.J.A.C. 4A:2-2.3(a)(8).

I **CONCLUDE** that did misuse public property when he allowed the lockers to be removed from the premises as opposed to being disposed in the dumpster. Therefore, I **CONCLUDE** that this charge should be sustained.

N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(12), **FIND** that Respondent did not provide a factual basis for "other sufficient cause." There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons

v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/.

The FNDA does not specify what conduct should be considered to be "other sufficient cause." Therefore, I **CONCLUDE** that this charge should not be sustained.

ORDER

Based upon the foregoing, Respondent has not met its burden of proving all of the charges by a preponderance of the competent and credible evidence. There is no allegation and no evidence that Petitioner profited from the removal of the property. Further, although a criminal complaint was filed, no charges were brought against Petitioner for removing the lockers. It is therefore, **ORDERED** that the action of Respondent State-Operated School District of the City of Newark, in removing Petitioner was not justified and the penalty imposed is hereby **MODIFIED**.

It is **ORDERED** that for allowing school property to be removed from school grounds, a penalty of six months suspensions is hereby imposed.

It is further **ORDERED** that Respondent is paid back pay and benefits from six months following the date of termination. Consistent with Petitioner's duty to mitigate his damages, I **ORDER** Petitioner to submit to Respondent a certified statement detailing any employment and income for the period following his termination, with copies of relevant tax and other records and names of addresses of employers. N.J.A.C. 4A:2-2.10.

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

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

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

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

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

February 12, 2018
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: February 12, 2018

LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: February 13, 2018

lr

APPENDIX

LIST OF WITNESSES

For Petitioner:

William Able

Esther Williams

For Respondent:

Keith Scott Barton

Benjamin Mauriello

Carrieann Zelinski

Maurice Rawles

Clement Collins

LIST OF EXHIBITS IN EVIDENCE

Joint

J-1 Final Notice of Disciplinary Action dated December 18, 2001

J-2 Final Notice of Disciplinary Action dated May 8, 2002

J-3 Final Notice of Disciplinary Action dated January 5, 2004

J-4 Final Notice of Disciplinary Action dated February 12, 2005

J-5 Final Notice of Disciplinary Action dated November 17, 2008

J-6 Final Notice of Disciplinary Action dated November 19, 2015

J-7 Newark Public Schools Fixed Asset Manual cover dated July 18, 2011

J-8 New Jersey Civil Service Commission Job Specification for Senior Custodian

J-9 Security Surveillance Video dated September 6, 2015, 6:37 p.m.

J-10 Security Surveillance Video dated September 7, 2015, 10:24 a.m.

J-11 Security Surveillance Video dated September 7, 2015, 4:06 p.m.

J-12 Security Surveillance Video dated September 7, 2015, 3:43 p.m.

J-13 Email from Zelinski dated September 1, 2015

For Petitioner:

None

For Respondent:

R-1 Newark Public Schools Bulletin dated September 15, 2011

R-2 Newark Police Incident Report dated September 15, 2015

R-3 Email correspondent from Barton dated September 16, 2015

R-4 Email correspondence from Barton dated September 1, 2015

4-4-18

A-1

STATE OF NEW JERSEY

In the Matter of Bria S. Baisden
Edna Mahan Correctional Facility,
Department of Corrections

CSC DKT. NO. 2018-1630
OAL DKT. NO. CSV 18824-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 4, 2018 BW

The Civil Service Commission, at its meeting of April 4, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18824-17

AGENCY DKT. NO. 2018-1630

IN THE MATTER OF BRIA S. BAISDEN, EDNA MAHAN CORRECTIONAL FACILITY DEPARTMENT OF CORRECTIONS,

---

Sean Sprich., Executive Vice President, for petitioner (PBA Local 105)

Shareef M. Omar, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey)

Record Closed: February 22, 2018 Decided: February 23, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on December 28, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on January 23, 2018 wherein the parties agreed on a hearing date of March 14, 2018. Prior to the hearing date, the parties resolved all issues in dispute. On February 22, 2018, respondent submitted a fully executed Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

February 23, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

3-1-18

Date Received at Agency:

Date Mailed to Parties: MAR 1 2018
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box
TRENTON, NJ 08625-0

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Acting Director

February 16, 2018

2018 FEB 22 P 2:53

VIA REGULAR MAIL
Hon. Joann LaSala Candido, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Bria S. Baidsen v. Department of Corrections,
Edna Mahan Correctional Facility
OAL Docket No.: CSV 18824-2017 N

Dear Judge Candido:

As you may recall, the undersigned represents respondent, the Department of Corrections, in the above-captioned matter.

The parties have executed the attached settlement agreement, resolving all issues in this matter. If the terms of the settlement agreement meet your approval, respondent respectfully requests that you forward same to the Civil Service Commission for its review and approval.

Thank you for your attention to this matter.

Sincerely yours,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Shareef M. Omar
Deputy Attorney General

cc: Sean Sprich, Executive Vice President (via regular mail)

OAL DKT. NO. CSC 2018-1630
AGENCY DKT.
SETTLEMENT AGREEMENT

IN THE MATTER OF
BRIA BAIDSEN
AND
EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN, DEPARTMENT OF CORRECTIONS

2018 FEB 2 P 3:55

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. **Report on Progress of Probationer** dated October 31, 2017 contained the following proposed discipline for the disciplinary charges listed below:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee;	Termination/Working Test Period Release (for all charges)	11/16/17 (for all charges)
2. HRB 84-17, as amended, (C11) Conduct unbecoming of an employee;		

B. The parties have agreed that the following amended charge is sustained:

HRB 84-17, as amended, (D-7)
Violation of administrative procedures and/or regulations involving safety and security.

02/08/2018 11:10 9735893073 NSP OPERATIONS PAGE 01/05

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: NONE.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: NONE.

3. Additional fees to be paid, if any: NONE.

4. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

5. Respondent Department of Corrections will accept Ms. Baidsen's return as a Senior Correction Officer effective upon the approval of this settlement agreement by the Civil Service Commission (CSC).

6. Upon return to the Department of Corrections Ms. Baidsen will be reassigned to a Facility in the Northern Region based on operational needs.

7. Ms. Baidsen will receive retraining as determined by the Corrections Staff Training Academy (CSTA).

C. The Appellant Bria Baidsen withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Corrections agrees that the following result will occur with regard to each charge: An amended sustained charge of

HRB 84-17, as amended, (D-7)
Violation of administrative procedures
and/or regulations
involving safety and security.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Corrections (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the

02/08/2018 11:10 9735893073 NSP OPERATIONS PAGE 02/05

underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Bria Baidsen's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past

02/08/2018 11:10 9735893073 NSP OPERATIONS PAGE 03/05

action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/7/18
DATE

Bria Baidsen, Appellant

2-8-18
DATE

ON BEHALF OF Appellant

2/12/18
DATE

ON BEHALF OF Respondent

02/08/2018 11:10 9735893073 NSP OPERATIONS PAGE 04/05

CERTIFICATION

I, Bria Baidsen, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/7/18
DATE

Bria Baidsen

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4-4-18

A-3

STATE OF NEW JERSEY

In the Matter of Jermaine Curry
New Jersey State Prison,
Department of Corrections

CSC DKT. NO. 2016-1430
OAL DKT. NO. CSV 17582-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2018 BW

The appeal of Jermaine Curry, Senior Correction Officer, New Jersey State Prison, Department of Corrections, 60 working day suspension, on charges, was heard by Administrative Law Judge Dorothy Incarvito-Garrabrant, who rendered her initial decision on February 9, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF APRIL, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 17582-15
AGENCY DKT. NO. 2016-1430

IN THE MATTER OF JERMAINE CURRY,
NEW JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.

Peter Valenzano, Esq., for appellant (Mashel Law, LLC, attorneys)

Tamara L. Rudow, Esq., Legal Specialist, Department of Corrections, Office of Employee Relations, appearing for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: November 9, 2017 Decided: February 9, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Appellant, Jermaine Curry, a Senior Corrections Officer at New Jersey State Prison, (NJSP), Department of Corrections (respondent, NJSP DOC, or DOC), appeals disciplinary action seeking a suspension for sixty working days for conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; C(24) threatening, intimidating, harassing, coercing or interfering with fellow employees on State property;

D(7) violation of administrative procedures and/or regulations involving safety and security; and E(2) intentional use or misuse of authority or position. (J-1.)

The appellant denies the allegations that he inappropriately restrained a civilian instructor, or that he verbally abused, harassed, intimidated and interfered with the instructor by locking him in a vegetable shop on March 26, 2015. He also contends that his actions were necessary for safety and security reasons.

PROCEDURAL HISTORY

On May 3, 2015, respondent issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications against appellant. Following a departmental hearing on September 11, 2015, the respondent issued a Final Notices of Disciplinary Action on September 17, 2015, sustaining the charges in the Preliminary Notice and suspending appellant from employment for sixty working days. (J-1.) Appellant filed a timely notice of appeal.

The matter was transmitted to the Office of Administrative Law on October 29, 2015 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter commenced on February 7, 2017, May 1, 2017, and June 27, 2017.[1] The parties filed post-hearing briefs and the record closed on November 9, 2017.[2]

[1] Appellant was represented by Todd McConnell, New Jersey State PBA, Local 105 Representative, on February 7, 2017. He subsequently retained counsel, and Peter Velenzano, Esq. represented him on the remaining dates.

[2] An extension of time was granted for the filing of this initial Decision.

FACTUAL DISCUSSION

Testimony

For Respondent

Glen Trahan (Trahan) is the Assistant Regional Food Service Director at Northern State Prison. On March 26, 2015, he was the Institutional Trade Instructor (ITI) and Assistant Food Service Supervisor at NJSP. He is a civilian worker. He and appellant have had conflicts in the past, and appellant has filed special complaints and Equal Employment Division (EED) complaints against him.[3] Trahan denied that those complaints had any bearing on what occurred in this incident. He stated that all of the EED complaints against him "turned out false."

Trahan testified that during lunch mess service on March 26, 2015, he and ITI Calvin Bryant (Bryant) went downstairs into the cookhouse basement to prepare additional foods for mess and for delivery to certain inmates. Trahan was in possession of a commercial can opener. Trahan and Bryant were accompanied by two inmates who were tasked with opening cans in the vegetable shop and dividing the food into portions for each inmate. Trahan approached appellant and twice requested that he unlock the vegetable shop. Appellant was on his phone in the office. He did not respond and remained on his call. Trahan noticed that the vegetable shop was already unlocked, so he and the inmates entered the room. Trahan secured the can opener into the slot on the work counter. He then began instructing the inmates about dividing the contents of the cans. Bryant entered the shop and then left to retrieve more cans from another storeroom down the hall. At this point, no cans had yet been opened as they were being placed and organized on the table.

While Trahan was still giving instructions to the inmates on the division of the contents, appellant entered the vegetable shop, and ordered Trahan and the two inmates

[3] Trahan and ITI Calvin Bryant had also filed EED complaints against Curry.

to leave the room. At this point, no cans had been opened. The two inmates left. However, before Trahan could exit the room, appellant slammed the door and locked it. Appellant said "[n]ow I got you, I'm going to lock you up like an inmate." Appellant locked the door. Appellant began rapping to Trahan telling him that he was locked up like an inmate. Trahan testified that he asked appellant to open the door. Appellant refused. Trahan yelled to Bryant to get assistance from Officer Joseph Buckley (Buckley). Bryant immediately went upstairs to get assistance.

Trahan testified that he was locked in the vegetable shop for about fifteen to twenty minutes, until Sergeant Michael Keaton (Keaton) released him. During the time he was restrained, Trahan sat at the back of the shed and ate an orange, while appellant taunted him, and attempted to agitate him. Trahan testified that he did not engage appellant because he did not want to get into a verbal altercation with him. When Trahan was released, he went to Administration.

Trahan completed a special report on March 26, 2015, (J-5) and participated in an investigative interview on April 14, 2015. (J-17c.)

Calvin Bryant (Bryant) is an ITI II assigned to the cookhouse at NJSP. He is a civilian worker whose duties include giving food preparation instructions to inmates.

Bryant testified that the vegetable shop door was unsecured when Trahan, the inmates and he went downstairs to open cans. When they entered the vegetable shop, Trahan instructed the inmates about how much food to take from the cans and place into the pans. No cans had been opened.

Bryant left the vegetable shop to go down the short hallway to a storeroom to retrieve additional cans. While he was doing this, he heard appellant say "[y]ou can't be in here. You all got to get out." Bryant observed the inmates and Trahan begin to leave. The inmates exited the vegetable shop and the basement immediately. However, before

Trahan even had a chance to exit, appellant kicked the vegetable shop door shut on Trahan, and locked him in the shop.

Bryant testified that appellant then started rapping at Trahan like "Run DMC" and said, "[y]ou're locked up like an inmate now." Bryant went upstairs to get Buckley, but Buckley said that he could not leave his post during mess. Buckley also advised that Keaton had been contacted about the situation by appellant and would be responding.

Bryant was present when Trahan was released. Keaton told appellant to open the door. However, Keaton then had to take appellant's keys from him to release Trahan. Trahan stormed out stating he was going to talk to his lawyer. Trahan had been locked in the vegetable shop for ten to twelve minutes. In his special report dated March 26, 2015, Bryant wrote that Trahan was locked in the shop for six minutes. (J-4.) He participated in an investigative interview on April 10, 2015. (J-17e.)

Bryant described appellant as a "ticking time bomb," who could blow at any minute. He stated that appellant wanted to make his own rules and regulations.

Joseph Buckley (Buckley), Senior Corrections Officer, testified that he has been employed by the DOC for fifteen years and is currently assigned to the Officer's Dining Room at NJSP. On March 26, 2015, he was assigned to the cookhouse.

On that date, Buckley was at his post in the cookhouse during mess. He was approached by Bryant who advised that appellant had locked Trahan in the vegetable shop. Buckley advised Bryant that he was unable to leave his post during mess. He told Bryant to speak with Keaton and that he had heard a radio call from appellant to Keaton.

In the past, Buckley had been assigned to the cookhouse area in the basement. Buckley stated that it was against policy for an ITI to be in the vegetable shop with inmates while they were opening cans. Buckley testified that he never locked a civilian worker in the vegetable shop and that there "was no reason to do so." Buckley added that even if the ITIs were present in the vegetable shop with the inmates while they were opening

cans, he would not lock the civilians in the vegetable shop because the policy does not provide for that procedure.

Buckley had reviewed and was aware of Cook House Update #1, dated January 24, 2014, which codified procedures for inmates working in the vegetable shop. (J-10.)

Buckley completed a special report on March 26, 2015, (J-6) and an investigative interview on April 17, 2015. (J-17a.)

Michael Keaton (Keaton) testified that he has been employed by the DOC for twenty-one years and has been a Sergeant for the last ten years. He was appellant's supervisor for one year and gave him a good evaluation. On the date of the alleged incident, he was assigned to run mess.

Keaton received a call from appellant who advised that the inmates were opening cans and that Trahan would not leave the vegetable shop. Keaton could not leave his post and go to the cookhouse basement until mess ended. Once mess ended, Keaton went to the vegetable shop which took approximately fifteen minutes. Appellant advised that he had locked Trahan in the shop because he was opening cans with inmates. Keaton took appellant's keys and unlocked the door releasing Trahan, who stated that he was going to see Administration.

Keaton did not recall seeing any opened cans. Although an ITI could be locked in the vegetable shop for safety reasons, based on his observations, there was no reason for appellant to have locked Trahan in the vegetable shop.

Keaton completed a special report on March 26, 2015, (J-7) and an investigative interview on April 10, 2015. (J-17b.)

Michael Kubik (Kubik), Senior Investigator, testified that he has been assigned to the Special Investigations Division (SID) for nine years, and received special training in conducting investigations.

Kubik conducted an investigation into this alleged incident. As part of his investigation he reviewed all of the special reports and conducted interviews of appellant, Bryant, Trahan, Buckley, and Keaton. (J-2, 3, 4, 5, 6, and 7.) Kubik summarized the witnesses' statements contained in his report. (J-2.)

Kubik reviewed the Handbook of Information and Rules for employees of NJDOC (J-8), the Law Enforcement Personnel Rules and Regulations (J-9), Cook House Update #1 (J-10), Major Wayne Sanderson's memo permitting two or three inmates to work in the vegetable shop (J-10), and the March 26, 2015 cookhouse log book. (J-11.)

Kubik noted that there was a discrepancy about the length of time Trahan was locked in the vegetable shop. The witness statements ranged from approximately five to fifteen minutes. Kubik explained that this was a common occurrence in stressful incidents when individuals are emotional. Based on his experience conducting similar investigations, he was not concerned about the discrepancies in the elapsed time because in such situations ten minutes may seem like fifteen and one minute may seem like four minutes to different individuals.

Kubik noted that appellant's statement to SID was inconsistent with the other witnesses' statements. Appellant stated that Trahan was only locked in the vegetable shop for less than one minute. Appellant stated that he, and not Keaton, let Trahan out of the vegetable shop.

Kubik's investigation concluded that appellant locked Trahan in the vegetable shop on March 26, 2015. Keaton had to be pulled away from his duties to attend to appellant's actions. There was a disparity between appellant's version of events and those of all the other witnesses. While there is no standard operating procedure for the vegetable shop, Kubik determined that "a civilian employee should not be involuntarily locked inside any

room within NJSP." (J-2.) Kubik forwarded his final report to Administration for appropriate action.

Davin Borg (Borg) has been employed by DOC since 1999, and is the Administrative Major at NJSP. His duties include being responsible for disciplinary matters, policies, and daily operations. Borg testified that he was familiar with the facts of the alleged incident on March 26, 2015, and had reviewed the special reports, investigation report, PDNA, FNDA, and the other NJDOC documents related to the alleged incident and investigation.

The policy required that the vegetable shop be secured other than when instruction was being done. Borg stated that appellant was responsible for securing the vegetable shop at the beginning of his shift when he performed his inspection. If he had discovered that the vegetable shop was unlocked, then he should have reported that it was unsecured. Borg testified that during mess operations, no inmates are permitted in the vegetable shop.

Borg concluded that appellant violated several NJDOC policies. First, Borg testified that it is against NJDOC policy to secure a civilian inside a room. Second, the appellant violated the NJSP Internal Management Policy (IMP) #14 West Compound Mess Hall/Kitchen policy by failing to secure the vegetable shop door at the beginning of his shift. This policy required that "[a]ll doors are to be closed at all times. All doors with locking devices will remain locked except when in use, including the pantry, cells, sally ports, and doors." (J-14.) Third, the appellant violated, IMP #402 Custody Staff policy, relative to staff conduct by failing to conduct himself in a profession manner by locking a civilian in a vegetable shop when it served no custodial interest.

Borg also testified that appellant's conduct violated the Law Enforcement Personnel Rules and Regulations as follows:

1. Article I, Section 2, No Officer shall knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public

that an officer may be engaged in conduct which violates the public trust as an officer.

2. Article I, Section 3, Officers shall be held responsible for the proper performance of duty and for strict adherence to these rules of conduct.

3. Article I, Section 5, Officers shall not willfully disobey any lawful verbal or written orders of any individual placed by competent authority in a position of supervisor over such officer.

4. Article II, Section 6, Officers must maintain a high degree of self-control at all times.

5. Article II, Section 7, No officer shall make, or cause to be made, any false or misleading statements. No officer shall intentionally omit or misrepresent facts or information known to the officer.

6. Article III, Section 3, No officer shall act or behave, either in an official or private capacity, to the officer's discredit, or the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty.

7. Article III, Section 4, An officer shall be civil, orderly, maintain decorum, control temper and be patient and use discretion in the performance of duty.
(J-9.)

During cross-examination, when asked if it was appropriate to release a civilian worker from confinement if they were directing racial slurs at the officer and were slamming a can opener against the door grating, Borg testified that involuntarily securing a civilian who is a DOC employee, who has not exhibited any signs of violence or threat, and who is not incarcerated by the State would be a violation of law and the IMPs. Borg stated that slamming a can opener on a door to get someone's attention or being called a racially derogatory name would not be sufficient to form a belief that that individual

would assault the officer. Inmates call officers similar names all the time and such situations do not result in an assault.

Finally, appellant had two prior C(11) charges for conduct unbecoming an employee. Based on the charges in the FDNA, Borg stated the appellant could have been removed. (J-15.)

Michael Ptaszenski (Ptaszenski) testified that he has been employed by the NJDOC for twenty-two years and is the Administrative Lieutenant at NJSP. His duties include being responsible for overseeing the policy, procedures, and discipline at NJSP. For four years during his employment, he was the cookhouse sergeant. Ptaszenski stated that the sergeant cannot leave the cage until mess is completed. Ptaszenski described the walk Keaton had to do from the sergeant's cage to the vegetable shop. He stated it would take three to five minutes to traverse the route.

Relative to the cookhouse officer's duties, there is no policy requiring that inmates be pat-frisked or wanded upon entering the cookhouse because inmates are subjected to those inspections in the rotunda before they head down the steps into the cookhouse.

No civilian should be locked in any room. The log book of events in the cookhouse is a document, which can be updated at any time during a shift by the officer assigned to the cookhouse. The entries are not made simultaneously with the corresponding event.

For Petitioner

Stephen Gass (Gass), Retired Senior Corrections Officer, testified relative to the policies and procedures in place at the time of the incident.[4] Gass retired from the NJDOC with twenty-eight years of service. He had worked in the cookhouse for more than six years. He was a contributor to the project to establish the vegetable shop as the only location in which canned goods were permitted to be opened in the cookhouse. Gass

[4] Appellant offered SCO (Ret.) Stephen Gass as an expert; however, Gass was not qualified or accepted as an expert. He was permitted to testify as a witness.

testified that appellant should not have been in the basement while mess was running because the officer was supposed to be observing the food trays going out of the ports.

Gass stated that entries in the log book are to be made contemporaneously with the events. However, he acknowledged that appellant was in exclusive control of the log book at all times material and relevant to this incident.

Gass stated that if an ITI had asked him to open the vegetable shop his first action would be to search the room for contraband. He would then secure the door and proceed to the utensil room, if required, to retrieve the can opener. Gass could not identify any written policy requiring that inmates be pat-frisked upon entering the vegetable shop. Gass would then reopen the vegetable shop, count the cans that needed to be opened, place the can opener in the worktable and secure the inmate in the vegetable room. The ITI could instruct the inmates from outside the secured shop door.

After the inmates opened the cans, the cans were rinsed, smashed, and counted. Prior to exiting the room, Gass would take the can opener and place it back in the utensil room. The cans and lids would be counted. The inmate would be patted down, taken out of the room and the cans and lids would be placed in a secure location.

When asked what action should be taken if an ITI refused to leave the vegetable shop while cans were being opened, Gass testified that the sergeant should be called pursuant to Section 5 of the NJDOC, Law Enforcement Personnel Rules and Regulations, which requires that any incident in progress be reported. If the ITI still did not leave the room, then he should be separated from the inmates so that the inmates could be frisked in a neutral area to make sure they had not concealed any contraband. Then the door could be secured, while the cans are opened.

Finally, Gass testified that it would be appropriate to call the sergeant to de-escalate a situation with an ITI who slammed a can opener on the door's grate.

Jermaine Curry, appellant, testified that on March 26, 2015, he was assigned as the Cookhouse Relief Officer II and was in the basement of the cookhouse during lunch mess service. Trahan and Bryant asked appellant to open the butcher and vegetable shops. Appellant admitted it was a violation of procedure for him to leave his post in the cookhouse and go into the basement. Appellant testified that he did a sweep of the butcher shop and proceeded to the vegetable shop. However, he was unable to sweep it because Trahan and the inmates had entered the vegetable shop with cans. Trahan had the can opener in his hand when they entered the vegetable shop.

According to appellant, this was contrary to procedure. The best practice is for inmates to be physically pat-frisked and wanded with a handheld metal detector to make sure they do not have any contraband before they enter the vegetable shop. The officer then takes a physical count of all the cans before the inmates enter the vegetable shop, to prevent any contraband from entering or leaving the cookhouse. Appellant stated that it is important for the inmates to remain outside the vegetable shop during this process so that the officer does not become distracted.

While appellant was pat-frisking one of the inmates, he heard the slamming of cans on the work station behind him in the vegetable shop. He then observed cans being opened by Trahan.

At this point, appellant radioed Keaton and directed Trahan to stop. Appellant explained that opening cans with the inmates was a violation of the safety and security procedures. Appellant told Trahan to exit the room. Instead, Trahan shouted expletives at him and ignored his directions. Trahan continued to open cans. As a result, appellant ordered the inmates to leave, called for the sergeant, and locked Trahan in the vegetable shop because he was acting in a hostile and insubordinate manner. Appellant further stated that he secured Trahan for safety and security reasons to separate him from the inmates, the canned goods, and any possible weapons. He secured the inmates in a separate maintenance room to pat-frisk them.

Appellant returned to the vegetable shop, and began to unlock the door, when Trahan called him a "f*****g mooley" and slammed the can opener against the door's metal grate. Believing that Trahan was a safety and security threat to him, appellant did not release him. Appellant contacted Keaton for a second time. This time he did not radio Keaton. Instead, he called Keaton by telephone. Keaton responded that he would be there in two to three minutes.

Keaton and Lieutenant Kennedy arrived at the vegetable shop two to three minutes later. Appellant maintained this was consistent with the log book, which shows an interval of four minutes between contacting Keaton and his arrival at the vegetable shop. (J-12.) Appellant admitted he made the entries in the log book after the incident and not simultaneously with the events. Keaton unlocked the vegetable shop releasing Trahan, who stated he was going to administration.

Appellant stated he returned to the vegetable shop and found several can lids, which he saved in a plastic bag pursuant to appropriate procedures. However, Lieutenant Kennedy told him not to worry about them. Kennedy told him to report to administration to file his special custody report.

Appellant noted that he and Trahan have had other conflicts. Appellant testified about Trahan and Bryant's history of insubordinate conduct toward him and undue familiarity with the inmates, which subverted appellant's authority over the inmates. Appellant stated that Trahan and Bryant told the inmates that the ITIs were their friends and appellant was not because appellant was an officer; that they disregard appellant's directions; and that they gave the inmates extra food to win their support against appellant. Appellant emphatically testified that Trahan had repeatedly "defied and undermined [appellant's] authority in the eyes of the inmates." Appellant believed these behaviors made his work environment unsafe. Appellant had previously filed an EED complaint against Trahan and special custody reports against Trahan and Bryant. Appellant believed Trahan and Bryant exaggerated the instant incident in retaliation for the prior complaints.

Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

The testimony presented by Trahan, Bryant, Buckley, and Keaton about their actions on March 26, 2015, their observations of Trahan's demeanor, the absence of opened cans in the shop, appellant's behavior, and their statements in their special reports were consistent. Collectively, their testimony of the events of the incident made sense and hung together to describe what occurred. It was undisputed that appellant involuntarily restrained Trahan in the vegetable shop.

Buckley and Keaton expressed no pre-existing issues with or animosity towards appellant, which made their testimony believable. Keaton even indicated that when he had been appellant's supervisor he had given appellant a good evaluation.

While appellant maintained that Trahan and Buckley exaggerated the incident in retaliation for special and EED complaints he had filed against them, there was no competent evidence presented to substantiate this allegation. The fact that Trahan and Bryant disliked appellant did not prove that they exaggerated appellant's actions during this incident. It also did not support appellant's position that he acted appropriately to protect Trahan's or his own safety and security. It further did not demonstrate that appellant's rendition of the facts was believable. To the contrary, the other witnesses' renditions of the disputed facts have a greater "ring of truth," than the scenario offered by appellant, who plainly had a greater interest in the outcome of this proceeding.

I **FIND** that there were no opened cans in the vegetable shop.

Additionally, I accept Kubik's testimony about his investigation and conclusions. His experience from past investigations about errors in estimations of time by different individuals involved in a stressful, emotional situation was credible. Ten minutes could appear to be fifteen minutes and one minute could be four minutes during this event. The discrepancies in time between forty-five seconds to four minutes, according to appellant, and fifteen minutes, according to the other witnesses, were not problematic in light of Kubik's and the other witnesses' testimonies about the events. I **FIND** that appellant involuntarily restrained Trahan in the vegetable shop for a period of time.

Appellant's demeanor during the hearing and rendition of the events lacked a ring of truth that undermined his credibility. During the hearing, appellant was agitated, defensive, and combative.[5] Also, appellant was overly emphatic, when stating that Trahan had repeatedly "defied and undermined [appellant's] authority in the eyes of the inmates." Appellant's perception that his authority over the inmates was subverted by

[5] Appellant exhibited the same demeanor during a telephone conference call held on March 10, 2017.

Trahan was misplaced, based on his own version of Trahan's past actions towards him. The significant personal offense taken by appellant to his rendition of Trahan's past conduct was a disproportionate and troubling reaction. In this regard, appellant's behavior and perceptions were more consistent with Bryant's opinion that appellant was a "ticking time bomb."

Similarly, appellant was insistent that it was the best practice and policy to pat-frisk and wand the inmates upon their entry into the vegetable shop. As Ptaszenski testified, inmates were searched in the rotunda when entering the cookhouse. There was no need for an additional search in the basement when entering the vegetable shop and no such policy requiring same existed. Even appellant's witness, Gass, was unable to identify any policy that required inmates be pat-frisked upon entering the vegetable shop. This behavior was consistent with Bryant's testimony that appellant wanted to make his own rules and regulations. It also undermined appellant's credibility because this baseless search was his justification for involuntarily securing Trahan in the shop.

Additionally, appellant's rendition of events did not hang together or support his alleged justification for his actions. Appellant maintained that he had to temporarily lock Trahan in the vegetable shop for safety, and that he secured the inmates in a maintenance room for purposes of searching them for contraband and weapons after releasing Trahan. However, appellant never testified whether he returned to the inmates to frisk them. He never stated whether he released them. In fact, he never included any statement in this regard in his Special Custody Report or his interview with Kubik. This lent credibility to Bryant's testimony that the inmates immediately vacated the vegetable shop and the basement pursuant to appellant's order. Appellant's omissions undermined his testimony and made his safety and security justifications untenable. The inmates were not secured or searched.

Similarly, the log book entries authored by appellant on March 26, 2015, appeared to be an attempt to bolster his version of the facts and to minimize the amount of time that Trahan was involuntarily and inappropriately restrained. The entries were made after the events and after no opened cans were found. This made the entries suspect. Additionally, appellant did not indicate in his Special Custody Report or during his

interview with Kubik that he had discovered or placed any opened cans in bags to secure them for disposal or that he gave them to Lieutenant Kennedy.

The discrepancies in appellant's testimony and changing rendition of facts made appellant's testimony unbelievable. On the contrary, the testimony presented by the other witnesses was consistent and credible.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to also be relevant and credible **FACTS** in this matter:

On March 26, 2015, appellant was assigned to NJSP as the Cookhouse Relief Officer II. He was required to do a sweep of the cookhouse areas including the vegetable shop at the beginning of his shift. Appellant did not report that the vegetable shop was unlocked or that he had to secure it. During the lunch mess movement, he was in the basement of the cookhouse contrary to NJSP policy.

Accompanied by two inmates, Trahan and Bryant descended into the basement to work in the vegetable shop where they would open cans and divide the food product into portions for inmates' meals. Trahan asked appellant to open the vegetable shop twice, then realized that the shop door was already unlocked and unsecured. Appellant, who was on his phone, ignored the requests. There had been multiple, past, special complaints and even EED complaints filed by Trahan and Bryant against appellant, and *vice versa*, which created an adversarial relationship among the parties.

After Trahan and the inmates entered the shop, Bryant went to another storeroom down the hall to retrieve additional cans. Trahan secured the can opener in the work-counter slot and began instructing the inmates about how to divide the product. No cans had been opened at this point.

Then, appellant ordered everyone out of the vegetable shop on the pretense that he had not been able to pat-frisk and wand the inmates before they entered the shop and that he had to secure Trahan's and his safety. Specifically, appellant said "[y]ou can't be in here. You all got to get out." This was heard by Bryant, who was down the hallway. Inmate instruction was occurring, and no cans had yet been opened. Additionally, no policy existed requiring that inmates be frisked and wanded as they entered the vegetable shop. The inmates had already been wanded in the rotunda upon their entry to the cookhouse. To the contrary, such limited searches were only required upon their departure of the shop by NJSP policy.

Pursuant to appellant's order, the inmates immediately exited the vegetable shop and the cookhouse basement. Appellant did not search them or secure them in any other room. Trahan attempted to comply with appellant's instructions to leave the shop. However, as soon as the inmates exited, appellant kicked the door shut and locked Trahan in the shop, which prevented him from complying with appellant's order. Appellant involuntarily restrained Trahan. Appellant began rapping "[y]ou're locked up like an inmate now" and otherwise taunting Trahan. All of this was heard or seen by Bryant.

Trahan asked Bryant to get Buckley to help with the situation and Bryant went upstairs to notify Buckley. Appellant radioed Keaton and advised that Trahan was opening cans in the vegetable shop with the inmates. Buckley advised Bryant that he could not leave his post during mess and that he had heard a radio call by appellant to Keaton. Buckley told Bryant he could contact Keaton, and that he believed Keaton would be down as soon as mess ended.

Throughout this time, Trahan sat in the back of the vegetable shop waiting for the door to be unlocked. After mess ended, Keaton walked across the mess and cookhouse areas to the basement of the cookhouse, a route which took at least four minutes to traverse. He was followed into the basement by Bryant. Keaton told appellant to open the door. Appellant did not follow this direction. Ultimately, Keaton took appellant's keys and opened the door. Trahan left and went to administration. No opened cans were discovered in the vegetable shop.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We

> can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

N.J.A.C. 4A:2-2.3(a)(6)

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge of conduct unbecoming was appellant's intentional restraint of Trahan's freedom and the verbally abusive and harassing manner in which appellant mocked and spoke to Trahan after he was locked in the vegetable shop. Appellant's conduct was such that it adversely affected the morale or efficiency of a governmental unit and would have a tendency to destroy public respect in the delivery of governmental services.

As a corrections officer, appellant had a duty to recognize and appreciate that individuals incarcerated in NJSP had lost their freedom, and that he was entrusted to protect the inmates' limited rights and their dignity in that environment. He also had a duty to treat his civilian co-workers with respect. His actions touting that he had the power

or authority to take Trahan's freedom and mocking him by comparing him to an inmate was disrespectful and egregious conduct which served no legitimate purpose. It was violative of his obligations in a position of public trust. It offends publicly accepted standards of respect and decency.

Whether appellant misused his authority and took Trahan's freedom for four minutes or fifteen minutes is of no moment. No circumstances existed warranting Trahan's restraint for any length of time. Appellant presented no competent evidence that Trahan was a safety risk to him or that the inmates posed a safety risk to Trahan. Assuming, *arguendo,* that Trahan had made racial slurs or expletives at appellant as he alleged, such actions still would not have justified appellant locking Trahan in the vegetable shop.

Appellant's justifications are without merit. If appellant's genuine motive and justification for restraining Trahan was safety and security concerns, then appellant could have directed Trahan out of the vegetable shop. He could have secured the inmates temporarily in the shop and then wanded them. This would have ensured Trahan and appellant's safety and security. Under the circumstances presented here, appellant displayed a significant lack of judgment which violated his obligations and duties. I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6).

Appellant has also been charged with violating HRB 84-17, as amended; C(11) conduct unbecoming an employee; C(24) threatening, intimidating, harassing, coercing or interfering with fellow employees on State property; D(7) violation of administrative procedures and/or regulations involving safety and security; and E(2) intentional misuse of authority or position.

Human Resource Bulletin (HRB) 84-17

HRB 84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

D(7) Violation of administrative procedures and/or regulations involving safety and security, and IMP #14, West Compound Mess Hall/Kitchen policy

First, pursuant to HRB 84-17, as amended, the appellant was required to follow the IMPs established for the NJSP. IMP #14 West Compound Mess Hall/Kitchen policy required that "[a]ll doors are to be closed at all times. All doors with locking devices will remain locked except when in use, including the pantry, cells, sally ports, and doors." Appellant violated this safety policy by failing to secure the vegetable shop door at the beginning of his shift to prevent any contraband items being taken by the inmates and used as a weapon. It is required policy that the vegetable shop be secured other than when instruction was being done.

I **CONCLUDE** that appellant violated HRB 84-17, as amended by failing to discharge his duties in accordance with D(7) administrative procedures and regulations involving safety and security and IMP #14.

Law Enforcement Personnel Rules and Regulations and IMP #402, Custody Staff policy

Second, appellant violated IMP #402 Custody Staff policy by failing to conduct himself in a professional manner by locking a Trahan in the vegetable shop, when it served no custodial or security interest. Appellant also violated IMP #402, by his inappropriate restraint of Trahan and mocking of Trahan's lack of power and freedom.

Third, appellant violated the Law Enforcement Personnel Rules and Regulations as follows. The following rules and regulations relate to the officer's conduct. Article I, Section 2, provides that no Officer shall knowingly act in any way that might reasonably be expected to create an impression of suspicion among the public that an officer may be engaged in conduct which violates the public trust as an officer.

Article I, Section 3, provides that an Officer shall be held responsible for the proper performance of duty and for strict adherence to these rules of conduct. Article II, Section 6, provides that Officers must maintain a high degree of self-control at all times.

Additionally, Article III, Section 3, provides that no officer shall act or behave, either in an official or private capacity, to the officer's discredit, or the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off-duty. Finally, Article III, Section 4, provides that an officer shall be civil, orderly, maintain decorum, control temper and be patient and use discretion in the performance of duty.

I **CONCLUDE** that appellant's conduct violated HRB 84-17, as amended, IMP #402, Law Enforcement Personnel Rules and Regulations, Article I, Sections 2 and 3, Article II, Section 6, and Article III, Sections 3 and 4 as he did not conduct himself in a professional manner while on duty and acted in a way that violated the public trust.

Article II, Section 7, provides that no officer shall make, or cause to be made, any false or misleading statements. No officer shall intentionally omit or misrepresent facts or information known to the officer. Appellant's statements that he secured and packaged all of the opened cans in a plastic bag after the incident, that Lieutenant Kennedy told him not to worry about them, and that Trahan was threatening him by banging the vegetable shop door with the can opener was contrary to the weight of the evidence presented by all of the other fact witnesses. Trahan, Bryant, Keaton, and Kubik testified consistently

that no cans had been opened before Trahan was locked in the vegetable shop, that there were no opened cans in the shop when Trahan was released, and that Trahan was calm. Appellant's self-serving statements and log book entries were misleading and only meant to justify his actions after the fact. I **CONCLUDE** that appellant's conduct violated Article II, Section 7.

C(24) Intimidating, Harassing, and Interfering with fellow employees on State Property and E(2) Intentional Misuse of Authority or Position

Appellant's conduct rose to the level of intimidating, harassing, and interfering with fellow employees on State property in violation of C(24), when he involuntarily restrained Trahan in the vegetable shop for no legitimate reason. Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated C(24) by intimidating, harassing and interfering with a fellow employee on State property and E(2) because he intentionally misused his authority and position.

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

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

For his actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, and NJDOC rules, regulations and policies. Appellant was charged with a sixty-working-day suspension. This suspension is consistent with the disciplinary process outlined in NJDOC's table of offenses. (J-15.)

In this matter, no mitigating factors were present.

To the contrary, the aggravating factors are significant: There was no justification for appellant's behavior; it involved involuntarily restraining and taking the freedom of a fellow employee; it involved a misuse of appellant's position and his authority as an officer; it involved being disrespectful, intimidating, verbally abusing, and harassing a fellow employee; it involved violating the direction of his superior officer to release his fellow employee; and it involved violating the public trust. Additionally, appellant had two prior C(11) charges for conduct unbecoming an employee. Such conduct is egregious and requires the appropriate penalty of major discipline of the appellant.

After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the egregious behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significantly sufficient to warrant a penalty, which, in part, is meant to impress upon him, as well as others, the seriousness of any further infractions by him in that regard.

Here, the respondent is not seeking removal, but rather, the imposition of a sixty day suspension. A sixty day penalty serves to impress the importance of the seriousness of these infractions and significance of the duties required of the appellant, and others, in

the position of Senior Corrections Officer. Given the conduct exhibited here, I **CONCLUDE** that the imposition of the sixty working day suspension was appropriate and consistent with the penalties specified in NJDOC's table of offenses.

ORDER

I ORDER that the respondent has sustained its burden of proof as to the charges of violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause; and HRB 84-17, as amended by failing to discharge his duties in accordance with D(7) administrative procedures and regulations involving safety and security, IMP #14, west compound mess hall/kitchen policy, IMP #402, custody staff policy, Law Enforcement Personnel Rules and Regulations, Article I, Sections 2 and 3, Article II, Sections 6 and 7, and Article III, Sections 3 and 4, and by C(24) intimidating, harassing, and interfering with fellow employees on state property and E(2) intentional misuse of authority or position.

I **ORDER** that the action of the appointing authority in imposing a sixty working day suspension on appellant is **AFFIRMED**.

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

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

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

February 9, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 2/9/18

Date Mailed to Parties: 2/9/18

tat/lam

APPENDIX
LIST OF WITNESSES

For Appellant:

Senior Corrections Officer Jermaine Curry, Appellant
Stephen Gass, Retired Senior Corrections Officer

For Respondent:

Institutional Trade Instructor Glen Trahan
Institutional Trade Instructor Calvin Bryant
Senior Corrections Officer Joseph Buckley
Sergeant Michael Keaton
Senior Investigator Michael Kubik
Major Davin Borg
Lieutenant Michael Ptaszenki

LIST OF EXHIBITS

Joint Exhibits:

J-1 Preliminary Notice of Disciplinary Action, dated May 3, 2015 and Final Notice of Disciplinary Action, dated September 17, 2015
J-2 Confidential SID Investigation by Michael Kubik
J-3 Special Report, SCO J. Curry, dated March 26, 2015
J-4 Special Report, ITI C. Bryant, dated March 26, 2015
J-5 Special Report, ITI Trahan, dated March 26, 2015
J-6 Special Report, SCO J. Buckley, dated March 26, 2015
J-7 Special Report, Sgt. M. Keaton, dated March 26, 2015
J-8 Handbook of Information and Rules
J-9 Law Enforcement Personnel Rules and Regulations
J-10 Cook House Update4 #1, dated January 24, 2014

J-11 Cook House Update #2, dated October 31, 2014

J-12 Log Book Unit B, dated March 26, 2015

J-13 Level III Custody Staff—General Information IMP.NJSP.402, Revised 8/11

J-14 Level III West Compound Mess Hall/Kitchen #314, Revised 5/08

J-15 HRB 84-17

J-16 Appellant's Work History

J-17a DVD SCO Buckley interview, dated April 17, 2015

J-17b DVD Sgt. Keaton interview, dated April 10, 2015

J-17c DVD ITI Trahan interview, dated April 14, 2015

J-17d DVD SCO Curry interview, dated May 7, 2015

J-17e DVD ITI Bryant interview, dated April 10, 2015

For Appellant:

P-25 Resume of Stephen Gass

4-4-18

A-4

STATE OF NEW JERSEY

In the Matter of Yamalis Diaz,
Camden County, Department of Corrections

CSC DKT. NO. 2017-2409
OAL DKT. NO. CSV 2000-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 4, 2018 BW

The appeal of Yamalis Diaz, County Correction Officer, Camden County, Department of Corrections, 30 working day suspension, on charges, was heard by Administrative Law Judge Mary Ann Bogan, who rendered her initial decision on January 16, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority. A reply to reply was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 30 working day suspension to a 15 working day suspension.

Since the penalty has been modified, the appellant is entitled to 15 working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino*

(MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority. Per *N.J.A.C.* 4A:2-2.10, the amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 2000-17
AGENCY DKT. NO. 2017-2409

IN THE MATTER OF YAMALIS DIAZ, CAMDEN COUNTY DEPARTMENT OF CORRECTIONS.

William B. Hildebrand, Esq., for appellant (Law Offices of William B. Hildebrand, LLC)

Antonieta Paiva Rinaldi, Esq., Assistant County Counsel, for respondent (Christopher A. Orlando, County Counsel)

Record Closed: November 30, 2017 Decided: January 16, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Respondent, the Camden County Department of Corrections, (CCDC) suspended appellant Yamalis Diaz for thirty-working days pursuant to N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct unbecoming; 4.1 Courtesy: General Orders #73, #74. CCDC alleges that appellant, a County correction officer, was involved in a domestic dispute with Anthony Bowen

(Bowen) at her residence, she was criminally charged by the Pennsauken Police Department, and a suspension for a period of thirty working days was appropriate. Appellant maintains that she was victimized by Bowen during an incident at her home, and because the Pennsauken Municipal Court dismissed all of the criminal charges against her, she should not be guilty of all the charges.

PROCEDURAL HISTORY

On February 4, 2016, the CCDC issued a Preliminary Notice of Disciplinary Action charging the appellant. (R-5. R-10 amended.) After a departmental hearing on November 21, 2016, CCDC issued a Final Notice of Disciplinary Action on January 20, 2017, (amended January 26, 2017) sustaining the charges in the Preliminary Notice, and the appellant was suspended from employment for thirty working days. (R-11.) Appellant appealed, and on February 8, 2017, the matter was filed at the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13. The matter was heard on November 30, 2017, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Testimony

John Jones (Jones) is a Sergeant at CCDC and works in the Internal Affairs Unit. Jones investigated and prepared an internal affairs report involving a domestic dispute at the home of appellant. (R-1.) Jones reviewed the Pennsauken Police Department Supplementary Incident Report wherein Bowen, the appellant's boyfriend, reported to the responding police officer that appellant assaulted him with a bowl, and a broom stick, then she exited the home, and struck his vehicle twenty times with a metal pole. Appellant reported to the Officer that Bowen held her against the wall, chocked her, and then showed the officer a scratch on her chest, several inches below her neck. The report also indicated that appellant "deflected police questioning into complaints about her back."

Jones found Bowen's report of the incident consistent and credible and he found the appellant was not forthcoming when she deflected police questioning during the investigation. Appellant also admitted following Bowen to his vehicle, in an attempt to retrieve her cell phone, and hitting Bowen's vehicle with a bar. The bar that she used was later found in a recycling bin. Jones reviewed the general incident report prepared by the appellant, and her statements to the police, and found inconsistency. The incident report contained information that she was hit by Bowen several times while he was choking her, she fell backwards and broke the bowl. (R-4.)

Appellant is a sworn officer and must be accountable for her conduct while on and off duty. The appellant was arrested and held on $26,000 bail. (R-2.) On February 1, 2016, the Office of the Camden County Prosecutor directed that appellant be prohibited from carrying a duty weapon and any personal weapons pending the investigation. (R-3.)

On September 16, 2016, the criminal charges were dismissed for lack of prosecution when Bowen failed to appear for the municipal court hearing. (R-6.) The Office of the Camden County Prosecutor remanded the action to the agency for administrative action. (R-7.)

Jones continued his investigation after the dismissal of the criminal charges. He reviewed the photographs of Bowen's damaged vehicle, the broken bowl, the two red grips and bar in the trash can, and the cleaned-up house, and determined that the photographs were consistent with Bowen's statement. (R-8.)

Jones did not interview appellant because her attorney did not permit her to be interviewed, and Bowen did not respond to his request for an interview.

Karen Taylor (Taylor) is a Captain at CCDC. She ensures compliance with departmental polices and issues employee discipline. Appellant was charged with violating policies and procedures pertaining to the rules of conduct. As a public employee, appellant is held to a higher standard of conduct both on and off the job. While off-duty, appellant conducted herself in a manner that was unbecoming when she

failed to adhere to the code of conduct while on and off duty. Instead of removing herself from the incident, she escalated the incident. She caused disrepute to the department by engaging in unbecoming conduct. Moreover, she violated the policies when she failed to control herself, left the safety of her home, and continued engaging in unbecoming conduct when she went outside and damaged the vehicle. Taylor drafted the charges and recommended suspension days on the information in the report prepared by the Office of Internal Affairs, and the Pennsauken Police Report.

The departmental policies set forth:

Department of Corrections, General Rules of Conduct sets forth that an employee, whether on or off duty, is expected to conduct themselves in a respectful manner and use good judgment. Appellant violated the policy and procedures when she failed to conduct herself in a respectful manner and use good judgment while off duty. (R-12.)

Department of Corrections, Personal Conduct of Employees sets forth that an employee, whether on or off duty, is expected to treat the public with respect and courtesy at all times. Appellant violated the policy and procedures when she failed to treat a member of the public with respect while off duty. (R-13.)

Department of Corrections, Professional Code of Conduct, sets forth that employees are expected to conduct themselves in a manner that is professional and ethical. The appellant failed to do so when she failed to treat Bowen with respect and courtesy at all times. (R-14.)

Taylor found a thirty-day suspension appropriate, because appellant, discredited the department, acknowledged that she damaged the vehicle, and was found not to be credible in her statements to the police. Taylor also took this action because appellant has been issued two reprimands, one involving a domestic dispute resulting in a report to the Pennsauken Police Department. Taylor acknowledged that she did not interview Bowen or the appellant.

Appellant administratively entered letters of commendation saying that Appellant was chosen as officer of the month in February 2009 and May 2014. (P-1 and P-2.)

Discussion

Appellant primarily contends that respondent relied entirely on hearsay and failed to produce a residuum of legally competent evidence, particularly as to Bowen's version of the incident. However, respondent's witnesses gave detailed, concise and informative testimony regarding the internal affairs investigation, and the policies and procedures applicable to corrections officers. The testimony as to the facts surrounding the incident came from statements set forth in documentary evidence. Moreover, appellant was the only witness with firsthand knowledge of the incident who attended the hearing, and although she was available, she did not testify. None of the other witnesses were present. Such out-of-court statements, if offered to prove the truth of the matters stated, are hearsay.

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

This does not mean that each factual detail must be supported by legally competent evidence. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (1013). Legally competent means that the evidence would be admissible under the New Jersey Rules of Evidence. Evidence that falls within an exception to the hearsay rule, N.J.R.E. 802-803, is legally competent.

The evidence submitted on behalf of the respondent was mostly in the form of written documents. Jones prepared an incident report after reviewing the police report,

the warrant, and the appellant's general incident report. He testified to written statements made by the appellant, Bowen, and the responding police officer without any oral testimony from these witnesses, which constitutes hearsay. (See, also, State v. Lungsford, 167 N.J. Super. 296, 310, 400 A.2d 843 (App. Div. 1979), states that witness' statements embedded in police reports are not admissible under business record exception to the hearsay rule even though the report itself may be admissible). While Jones' testimony was credible and appeared accurate there was no proof that the version of the incident he relied upon was accurate.

A further review of the evidence indicates that the record includes competent evidence. Appellant admitted, in the general incident report that she prepared two days after the incident, "I hit him in the face and arms with an open hand, several times so he would stop choking me, but he did not. I grabbed a brush that was next to me at the time and used it to push him away from me. In an attempt to retrieve my cell phone and other items, I followed him to his vehicle. As I exited, my residence I grabbed a [ ] exercise bar that was near my front door just in case he attempted to assault me again. I knocked on the driver side window and door with the bar a few times . . ." Appellant also admits that she was placed under arrest and taken to the Pennsauken Police Department where she was charged with 2C:17-3A(1) criminal mischief, 2C:39-4D possession of weapons for unlawful purposes and 2C12-1B(7) aggravated assault. "I was cleared for incarceration then transported to the Camden County Correctional facility where I was booked and later bailed out on $26,000 (10%) bail."

In a general incident report prepared by the appellant on September 15, 2016, she acknowledges that she appeared at Pennsauken Municipal Court for trial, and was found not guilty of the charges.

N.J.R.E. 803(b)(1) establishes an exception to the hearsay rule for admissions. Hearsay exception by party-opponent is a statement offered a party which is:

> **(1)** the party's own statement, made either in an individual or in a representative capacity . . .

Appellant's unchallenged admissions, memorialized in a general incident report she prepared, falls within an exception to the rule against hearsay, and I **FIND** this admission provides a residuum of legal and competent evidence. Accordingly, I **FIND** the following **FACTS** appellant engaged in an altercation with Bowen inside her home on January 31, 2016, requiring a response by the Pennsauken Police Department. Appellant also left the home with a bar in her hand, followed Bowen to his vehicle, and hit the vehicle with the bar. Appellant was placed under arrest, incarcerated and held on $26,000 bail.

Furthermore, viewing the record as a whole, this finding is supported by multiple reports and statements contained in official written reports, including records submitted by the police department, the internal affairs division, and an official incident report, prepared by a public employee. Therefore, given the nature of these documents, while some are hearsay, they are reliable, credible and competent, and the appellant did not contradict the statement by live testimony.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris Cnty. Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

As a corrections officer, appellant is held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

The respondent has sustained the charges of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), and appellant was charged with violation of C.C.C.F. Rules of Conduct: V1.1 Violations in General; 1.2 Conduct unbecoming; 4.1 Courtesy: General Orders #73, #74.

N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee is often described as an elastic phrase that includes any conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in public entities. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation, and may be based upon the violation of the implicit standard of good behavior governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419,429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

I **CONCLUDE** that appellant's conduct did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was because she engaged in an altercation with Bowen at her home which required a response by the local police department. She hit his car with an object, she was arrested and taken into

custody until bail was posted. Appellant's conduct was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services. Such behavior does not reflect the implicit standard of good behavior governing public employees consistent with public policy. Therefore, as to this charge, respondent has met its burden of proof that appellant did commit an act of unbecoming conduct.

Appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As to the charge of other sufficient cause, appellant conducted herself in a manner that violated standards of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Department of Corrections, General Rules of Conduct sets forth that an employee, whether on or off duty, is expected to conduct themselves in a respectful manner and use good judgment. As to this charge, respondent has met its burden of proof that appellant violated this policy when she failed to conduct herself in a respectful manner, and she failed to use good judgment when she escalated the incident. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Department of Corrections, Personal Conduct of Employees, sets forth that employees are expected to treat members of the public with respect and courtesy at all times. As to this charge, respondent has met its burden of proof that appellant violated this policy when she failed to treat Bowen with respect and courtesy at all times. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Department of Corrections, Professional Code of Conduct, sets forth that employees are expected to conduct themselves in manner that is professional and ethical. As to this charge, respondent has met its burden of proof that appellant violated

this policy when she failed to conduct herself in a professional manner. Accordingly, I **CONCLUDE** that respondent has met its burden of proof on this issue.

PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). As previously set forth, this is a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R. 2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

Appellant has been previously issued two written reprimands, one for domestic violence that required a police response. She has no minor or major suspensions.

For her actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(6), "Conduct unbecoming a public employee" and N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause." In addition, appellant has been found guilty of violations of the policies and procedures of the department specifically as to rules of conduct, personal conduct of employees, and the professional code of conduct. Appellant was given a thirty-day suspension.

This suspension is not consistent with the disciplinary process. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that a reasonable calculation of progressive discipline in the presence of

the prior disciplinary actions, the conduct of the appellant, and the current violation is a fifteen-day suspension.

I **CONCLUDE** that a fifteen-day suspension is appropriate and consistent with progressive discipline.

ORDER

It is **ORDERED** that the charges against the appellant for violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct unbecoming; 4.1 Courtesy; General Order #73, #74 are **AFFIRMED**. Accordingly, I **ORDER** that the action of the Appointing Authority is **MODIFIED**. Appellant will receive a fifteen-day suspension.

Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated for that period of time when back pay was waived. However, the appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See Johnny Walcott v. City of Plainfield, 282 N.J. Super, 121, 128 (App. Div. 1995); James L. Smith v. Department of Personnel, Docket No. A-1489-02T2 (App. Div. March 18, 2004); In the Matter of Robert Dean (MSB, September 21, 1989). In the case at hand, while the penalty was modified, the Commission has sustained all of the charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, Bazyt Bergus v. City of Newark, Docket No. A-3382-00T5 (App. Div. June 3, 2002); In the Matter of Mario Simmons (MSB, decided October 26, 1999). See also, In the Matter of Mario Simmons (MSB, October 26, 1999). See also, In the Matter of Kathleen Rhoads (MSB, decided September 10, 2002) (Counsel fees

denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

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

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

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

January 16, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: January 16, 2018

Date Mailed to Parties: January 16, 2018

MAB/cb

APPENDIX

WITNESSES

For Appellant:

Yamalis Diaz, Appellant

For Respondent:

Sergeant John Jones

Captain Karen Taylor

EXHIBITS

For Appellant:

P-1 Camden County memo re: April Officer of the Month, dated May 16, 2014

P-2 Camden County memo re: Employee of the Month for December 2008; dated February 4, 2009

For Respondent:

R-1 Internal Affairs Report authored by Sgt. John Jones

R-2 Pennsauken Police Report with charges, dated January 31, 2016

R-3 Letter from Prosecutor's office, dated February 1, 2016

R-4 General Incident Report by C/O Yamalis Diaz, dated February 2, 2016

R-5 Preliminary Notice of Disciplinary Action (31A), dated February 4, 2016

R-6 General Incident Report by C/O Yamalis Diaz, dated September 17, 2016 with Pennsauken Twp. charge disposition inquiry

R-7 Letter from Prosecutor's office, dated September 26, 2016

R-8 Photos of car and house with evidence reports and documents

R-9 Not Admitted

R-10 Preliminary Notice of Disciplinary Action (31A) Amended, dated October 3, 2016

R-11 Final Notice of Disciplinary Action (31B), dated January 20, 2017; Final Notice of Disciplinary Action (31B) Amended, dated January 26, 2017

R-12 Camden County Department of Corrections Rules of Conduct

R-13 Camden County Department of Corrections General Order #073 Personal Conduct of Employees

R-14 Camden County Department of Corrections General Order #074 Professional Code of Conduct

R-15 C/O Yamalis Diaz Chronology of Discipline

4-4-18

A-5

STATE OF NEW JERSEY

In the Matter of Carol Fox
Borough of Keyport, Police Department

CSC DKT. NO. 2018-1033
OAL DKT. NO. CSV 15787-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2018 BW

The appeal of Carol Fox, Public Safety Telecommunicator, Borough of Keyport, Police Department, removal effective September 20, 2017, on charges, was heard by Administrative Law Judge Sarah G. Crowley, who rendered her initial decision on February 27, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Carol Fox.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 15787-17
AGENCY DKT. NO. 2018-1033

IN THE MATTER OF CAROL FOX, BOROUGH OF KEYPORT, POLICE DEPARTMENT.

Lesley Sotolongo, Esq., for appellant (DeCotis, Fitzpatrick, Coles, and Giblin, LLP, attorneys)

Leslie G. London, Esq., for respondent (McManimon, Scotland and Baumann, LLC, attorneys)

Record Closed: February 5, 2018 Decided: February 27, 2018

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Appellant, Carol Fox is a Communications Officer / Dispatcher (Dispatcher) for the Borough of Keyport, Police Department (Keyport). She had been employed there for thirteen years, prior to her removal. A Preliminary Notice of Discipline was served after an incident which occurred on July 26, 2017. After a full hearing before town council, a Final Notice of Disciplinary Action was issue on September 20, 2017. The appellant filed

a notice of appeal which was transmitted the Office of Administrative Law (OAL) as a contested case on October 24, 2017. N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. The matter was heard on February 5, 2018, and the record closed at that time.

SUMMARY

Appellant has been charged with incompetency, inefficiency or failure to perform duties; as well as neglect of duties and other sufficient cause. Appellant was employed as a dispatcher for Keyport for thirteen years. On July 26, 2016, she left her dispatcher post at Keyport prior to her relief arriving, in violation of specific rules and department policies and practices. The appellant was working the 7:00 p.m. to 7:00 a.m. shift. The rules require the dispatcher to wait for their relief and to update them on any developments during their twelve hours shift prior to leaving. The appellant does not dispute that she left her post and that there was a prisoner in the cell.

TESTIMONY

For respondent:

Chief Mark Hafner, has been with the Keyport Police Department for thirty years. He was promoted to Captain last year. There are twenty employees in the police department at Keyport. They have two full-time dispatchers and several part-time dispatchers. A junior officer will be assigned to the dispatch desk if one of the dispatchers is not available. The duties of the dispatcher are to answer the telephone and dispatch police and fire departments to emergencies. They are to log every fifteen minutes what a prisoner is doing if there is a prisoner in the cell. It is a very important position and there are specific rules and regulations governing their responsibilities, and they are never to leave their post unattended.

He identified the Keyport Police Department Manual of Rules and Regulations which govern the Department and the positions. You are required to fill your relief in on

what happened on your shift and never leave before your relief arrives. If someone does not come to relieve you, you need to call your supervisor and find out who is replacing you. The chief decides who will work the shift if your relief did not come in.

On July 26, 2017, he heard about what happened with Dispatcher Fox leaving before her relief arrived. He was put in charge of the investigation because there had been some issues between Chief Casaletto and Fox. He asked Ms. Fox for her statement and at first, she did not give it to him and said she was talking to an attorney. She eventually sent him an email about a week later. In her email she acknowledges that she left her post before her replacement arrived. She claimed that she told the Sargent she was leaving to go home. However, she acknowledged there was no discussion about who her relief was or that they had not arrived. She characterized the incident of leaving her post as a "one-time oversight."

Chief Hafner testified that he obtained statements from everyone involved. It was standard procedure to request written statements from everyone involved. He requested statements from DeGroat, Salvatore, Dixon and several others. Casaletto provided a statement as well since he was there when it happened. He concluded that Fox had left before her relief arrived. When she said good-bye to everyone, they all assumed that she was properly relieved before she left. After she was gone, someone looked in the desk area, and saw that there was no one there and that she left prior to being relieved. The Chief pointed out the sections of the SOP's which require monitoring of the prisoners if you are the dispatcher on duty, and the rule which requires individuals to stay in their post until properly relieved. He concluded that Fox violated both of these provisions.

Christopher DeGroat is a patrolman with the Keyport Police Department and has been employed there for approximately four years. As a junior officer, he is assigned to the dispatch desk several times a month. This occurs when someone is out and due to budget cuts they don't always call in the part-timers. On the day in question, he saw Carol Fox leaving when he was in the parking lot. He did not know yet that I was going to have to handle the desk. Dixon advised him when he came in that he had to cover the dispatch

desk. It is up to the Sargent to decide who will cover when someone is out. Sometimes he would get a text message about it before he arrived, and other times he would just find out after he arrived. When you are working dispatch, you cannot leave the desk unless you have someone to cover for you. You must watch any prisoners in the jail and answer the phones. You may not leave until your relief arrives and you need to tell your relief about anything that happened during your shift before your leave.

Robert Hassmiller has been a patrolman in Keyport for four years. He has had to cover the dispatch desk dozens of times. As a junior officer, you often have to fill in on the dispatch desk. You don't know until you are coming in if you are going to have to work dispatch. There are rules and regulations governing the job of dispatch. You must answer the phone and watch the security camera on the prisoners. You also have to respond to anyone coming in the door. The desk must be manned around the clock and you cannot leave until you get someone to relieve you. The supervisor will usually find someone to cover the desk for you or you can call someone to cover for you if you need a break. When your shift is over, you cannot leave until your relief arrives, and you need to fill your relief in on what happened in the past twelve hours. He has never arrived at the dispatch desk and not had someone there. Likewise, he has never left the desk prior to his relief arriving. He testified that when he saw Carol Fox leaving that day, he assumed that her relief had arrived. However, he did not know who was scheduled to cover the dispatch desk. When someone calls out or there is a vacation, it is up to the Sargent on duty to figure out who is going to cover the desk.

Robert McCartin is detective for the Borough of Keyport. He was a patrolman for twenty years prior to that and occasionally worked dispatch. He was familiar with the rules and testified that you must remain in your post until you are relieved. He never left his post at dispatch before he was physically relieved by someone. You must request relief if you want to leave the post for any period of time. If someone is not there at the end of your shift, you call your supervisor and ask him to relieve you or find someone to relieve you. He was working the day that Fox left her post before her relief arrived. Chief Hafner asked him to give a statement about the event of the morning of July 26, 2017.

He was with Salvatore and Casaletto in the office, when he observed Fox leave the building. He later noticed that that no one was in dispatch and asked Dixon who the dispatcher was because Fox left and no one was there. That is when they realized that Fox had left before her relief had arrived.

Steven Gallow is the township administrator for the Borough of Keyport. He is responsible for personnel matters such as discipline. He was familiar with this matter and was advised that Fox had left her post before relief arrived on the morning of July 26, 2017. He asked Mark Hafner do the investigation because there were issues between Chief Casaletto and Fox. During an investigation it is normal to request that all the employees give a written statement when an investigation is conducted. He is familiar with the policies which govern disciplinary actions. He is also familiar with the rules regarding remaining at your post until relief arrives and the need to monitor a prisoner in the cell at all times from the camera at dispatch.

After the investigation was completed, he determined that Carol Fox had left her post prior to her relief arriving. He determined that the offense was egregious enough to merit removal. It was a violation which jeopardized the public safety of the prisoner as well as the public. It was also a clear violation of the rules and regulations governing the department and the post of dispatch. He noted that she had several prior disciplinary actions for incompetency and neglect of duty, and had no excuse for just leaving her post. Accordingly, he felt that removal was the appropriate level of discipline.

For appellant

Matthew Salvatore was an officer at the Keyport Police Department until September 2017, when he retired. He testified that Ms. Fox was a good worker and she was helpful when you asked her to do anything. He never had any issues with her. He was on duty on July 26, 2017. He recalled that Gallagher was not coming in but he did not recall who the replacement was. When he saw Fox leaving he said goodbye and did not think anything of it. In his opinion, it was just a misunderstanding. He does not think

that she would just abandoned her post. However, he did not dismiss her and would not have dismissed her until her replacement arrived. He did not ask her to stay because he didn't think he needed to because you can leave your post until replacement arrives. He testified that the rules are clear that you are not allowed to leave your post until your replacement arrives.

Carol Fox has been a dispatcher for Keyport Borough Police Department for thirteen years. She is familiar with the rules and regulations governing the department with respect to the job duties. Her duties include answering emergency calls for police and fire and watching any prisoners in the cell. You are required to fill in the log sheet with anything that happens. She was working from 6:30 p.m. to 6:30 a.m. on July 26, 2017. Her shift ended at 6:30 a.m. and Dixon, Salvatore, McCartin, and Hassmiller were in the office. She stopped and said goodbye to them and left. She never asked who was relieving her, and did not seek permission to leave her post before her replacement arrived. She knew that the usual relief, Gallagher was on vacation, but she did not know who was supposed to reliever her and she did not ask. She testified that she just assumed they knew someone needed to relieve the dispatch.

The next day, Salvatore came to her and told her there was a problem because she left her post before her relief arrived. Salvatore said an email came from the Chief. She had problems with Chief Casaletto and filed several complaints against him. She testified that she believes that this discipline is retaliatory because of her complaints against the Chief. She testified that they should have known no one was at dispatch because she had said goodbye and Gallagher was off. She also said it was a onetime oversight.

FINDINGS OF FACT

The resolution of the charges against appellant requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J.

Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that all of the witnesses were honest and sincere in their testimony. The facts surrounding the charges are undisputed. The appellant does not dispute that she left her post at dispatch prior to being relieved on July 26, 2017. She has been in this position for thirteen years and is familiar with the rules and regulations governing job duties and the requirement for relief prior to leaving your post. Even assuming there was some confusion about who the relief was to be that day, it did not relieve appellant of the responsibility of waiting for relief or contacting a supervisor if relief did not arrive. The fact that she stopped and said good bye to everyone, including her supervisor does not reliever her of the obligation of waiting for relief before leaving her post.

Accordingly, I **FIND** the following as **FACT**

1. On July 26, 2018, the appellant was working the 6:30 p.m. to 6:30 a.m. dispatch shift at the Keyport Borough Police Department.

2. At the end of her shift, the appellant left at approximately 6:35 a.m. before her relief arrived.

3. The appellant left the dispatch desk and a prisoner unattended.

4. The appellant never requested any relief or provided any reason why she had to leave before her relief arrived.

5. The rules and regulations prohibits leaving the desk unattended

6. The rules and regulations require you to wait for your relief before you leave at the end of your shift.

7. The rules and regulations require log notes every fifteen minutes of your observation of any prisoners.

8. On the morning in questions, there was a prisoner in the cell.

9. The appellant had not been relieved by anyone.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provision of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses

connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4a:2-2.3.

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking her removal. Specifically, appellant was charged with violation of N.J.S.A. 4A:2-2.3 (a) General Causes: 1. Incompetence, inefficiency or failure to perform duties; Neglect of Duty and Other Sufficient cause. Appellant is also charged with violating Keyport Borough Police Department Rules and Regulations as well as the Borough of Keyport Code section pertaining to the duties of the Communications Operator. It is undisputed that appellant left her post on July 26, 2017, prior to being relieved, leaving a prisoner and the emergency phone desk unattended.

Based upon the testimony and findings, I **CONCLUDE** that the respondent has satisfied its burden of proving that appellant left her post at dispatch without being relieved in violation of rules and regulations and engaged in incompetency, inefficiency, neglect of duty and other sufficient cause.

The issue then becomes, not whether the charges have been sustained, but rather, the level of discipline to be imposed. Keyport urges removal and the appellant urges that some level of discipline less than removal is appropriate.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Merit System Board (i.e. now the Civil Service Commission) is required to evaluate the proofs and penalty on appeal, based on the charges. N.J.S.A. 11A:2-19; West New York v. Bock, 38 N.J. 500 (1962). With respect to the discipline, under the precedent established by Town of West New York v.

Bock, supra, courts have stated, "[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, Id. at 523, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

"[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (February 25, 2005), adopted as modified, Merit Sys. Bd. (May 23, 2005), <http://njlaw.rutgers.edu/collections/oal/>; see Henry, supra, 81 N.J. 571. Counseling, warnings, meetings, etc., do not constitute discipline under Civil Service rules. See N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-3.1. The appellant has seven prior charges of incompetency, inefficiency and neglect of duty. Although none of them resulted in a significant suspension, the respondent urges removal due to egregious nature of the current charges. The appellant seeks something less than removal.

I **CONCLUDE** that the penalty of removal is appropriate given the egregious nature of the offense of just leaving an important post without securing relief, which could have resulted in life threatening consequence for the public trying to call in an emergency and the prisoner who was left without supervision. I further **CONCLUDE** that there are some aggravating factors as well. One factor is that appellant continued to try to justify leaving her post by claiming she said good bye first and that it was a "one time" oversight." The prior offenses of neglect of duty and/or incompetency are further aggravator factors.

ORDER

The charges of incompetency, inefficiency, insubordination, neglect of duty and violations of the Keyport rules and regulations has been sustained. I therefore, **ORDER**

the action taken by the Keyport in removing appellant from her position as a Communications Operator is **AFFIRMED**.

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

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

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

February 27, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: February 27, 2018 (emailed)

Date Mailed to Parties: February 27, 2018 (emailed)

/mel

APPENDIX

WITNESSES

For Appellant:

Matthew Salvatore
Carol Fox

For Respondent:

Robert McCartin
Robert Hassmiller
Christopher DeGroat
Mark Hafner
Steven Gallow

EXHIBITS

Joint:

J-1 Keyport Police Department Manual of Rules and Regulations Adopted February 17, 2015
J-2 July 28, 2017 Carol Fox Statement
J-3 August 7, 2017 Carol Fox Statement
J-4 July 28, 2017 Sargent Salvatore Statement
J-5 DeGroat Statement
J-6 McCartin Statement
J-7 August 9, 2017 Dixon Statement
J-8 August 11, 2017 Hassmiller Statement
J-9 August 17, 2017 Casaletto Statement

J-10 Section 3-5-8 of Municipal Code of Keyport

J-11 Borough of Keyport Employee Handbook August 3, 2016

J-12 August 29, 2017 Preliminary Notice of Disciplinary Action; September 5, 2017 Preliminary Notice of Disciplinary Action (Revised)

J-13 September 20, 2017 Final Notice of Disciplinary Action

For Appellant:

None

For Respondent:

R-1 Keyport Police Department SOP – Reference 2004-01

R-2 Other Fox Disciplinary Actions (Documents – 10 pages)

a. January 1, 2008
b. May 28, 2008
c. April 16, 2013 (5 pages)
d. January 9, 2014
e. January 10, 2014
f. September 22, 2014

4-4-18

B-25

STATE OF NEW JERSEY

In the Matter of Tonya Howard,
City of Newark

CSC Docket No. 2017-2286
OAL Docket No. CSV 01510-17

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2018 (DASV)

The appeal of Tonya Howard, a Police Communications Clerk with the City of Newark, of her removal, effective September 22, 2016, on charges, was before Administrative Law Judge Jude-Anthony Tiscornia (ALJ), who rendered his initial decision on January 17, 2018. Exceptions were filed on behalf of the appellant, and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 4, 2018, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a 45 working day suspension and ordered that the appellant undergo a pre-reinstatement drug test.

DISCUSSION

The appellant was charged with violations of the Newark Police Department Rules and Regulations concerning disobedience of orders and intoxication or illegal use of drugs. Specifically, the appointing authority asserted that on August 30, 2016, the appellant tested positive for marijuana (cannabis). Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ set forth that the appellant tested positive for marijuana, a controlled dangerous substance. Additionally, the ALJ indicated that

the appellant did not dispute the test result, but she argued that her removal was unjust. The appointing authority moved for summary decision, asserting that no material facts were in dispute and a decision could be rendered without further hearing. The appellant also agreed that there were no material facts in dispute. Upon a review of the parties' submissions, the ALJ found that on June 6, 2016, the appointing authority received an anonymous tip that the appellant had been engaged in the illegal use of marijuana. An investigation commenced, and on August 30, 2016, the appellant submitted a urine sample, which tested positive for marijuana. Subsequent to the drug test, the appellant voluntarily entered into a drug rehabilitation facility. Considering the positive drug test and the appellant's admission of using an illegal substance, the ALJ granted the appointing authority's motion for summary decision and upheld the charges against the appellant. Regarding the penalty, the ALJ indicated that the appellant is employed in a public safety department and is in charge of receiving emergency communications from the public. As such, the ALJ determined that the appellant's position "directly and explicitly involve[s] public safety." Thus, the ALJ found that the appellant's misconduct causes risk of harm to persons or property. Accordingly, the ALJ concluded that progressive discipline principles need not be followed in this instance, and removal of the appellant was warranted. The ALJ noted that the appointing authority was under no obligation to consider the appellant's subsequent rehabilitation efforts.

In her exceptions, the appellant argues that the ALJ failed to analyze whether the appointing authority had a sufficient basis to subject her to a "reasonable suspicion" drug test. She contends that the appointing authority "acted off' an anonymous tip and did not visit her home during the investigation. Further, the appellant indicates that the appointing authority was suspicious of her weight, but she attributes her thin frame to a documented medical treatment that she underwent. Moreover, the appellant maintains that the ALJ incorrectly concluded that the appointing authority was not obligated to apply progressive discipline principles. She states that "[j]umping immediately to termination should be reserved for only the most severe misconduct." In addition, the appellant takes exception with the ALJ's disregard of her rehabilitation efforts when determining the appropriate penalty. She maintains that treatment and rehabilitation are mitigating factors and the Commission has afforded employees who seek such drug rehabilitation treatment a "second chance." The appellant indicates that the ALJ could have recommended that she undergo a drug test as a condition of her return to work.

In its reply, the appointing authority maintains that it has a "legal and contractual right" to remove the appellant. It indicates that despite the appellant's arguments regarding a "reasonable suspicion" drug test, the parties agreed that the arguments did not raise factual issues. In other words, the appellant did not dispute any of the underlying facts. Nonetheless, in response to these arguments,

the appointing authority sets forth that its Drug Screening Policy lists objective factors in making a determination as to what constitutes "reasonable suspicion" to test an employee for drugs. For instance, the appellant was under investigation, had "exorbitant absenteeism," and "bizarre behavior patterns." With regard to the latter, the appointing authority indicates that the appellant had "lied about reasons for being booked off" and had been absent from work with no reason. Additionally, the Police Lieutenant who conducted the appellant's investigation observed the appellant in an interview of an unrelated investigation and she "had an extremely thin frame and her mannerisms suggested potential drug use." Thus, the appointing authority maintains that there was a reasonable basis to subject the appellant to a drug test. Furthermore, it contends that, as determined by the ALJ, it had no obligation to consider the appellant's alleged rehabilitation. Therefore, the appointing authority submits that her removal was warranted for the safety and well-being of its citizens.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's assessment of the charges but does not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modifies the removal to a 45 working day suspension. Initially, it is clear from the record that the matter was ripe for summary decision. It was undisputed that the appellant tested positive for marijuana and admitted to having used an illegal substance. In reviewing these facts, the ALJ properly determined that the charges against the appellant were sustained. Moreover, regardless of the ALJ's lack of analysis on the propriety of subjecting the appellant to a drug test, as noted, the appellant admits to illegal drug use. She voluntarily admitted herself to a drug rehabilitation facility. Thus, there is no question that the charges against her have been sustained.

However, in determining the proper penalty, in addition to its consideration of the seriousness of the underlying incident, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Upon an independent review of the record and in consideration of the appellant's prior record of service, the Commission concludes that removal is too harsh a penalty. The Commission is guided by the principles of progressive discipline in this case. The appellant's disciplinary history does not evidence any discipline related to drug use in her approximately eight years of

employment prior to her removal.[1] Further, while the Commission is mindful of the seriousness of the appellant's conduct, the Commission notes that for non-law enforcement employees, who are not held to the stricter standard of conduct expected of law enforcement officers, a "second chance" is generally provided by appointing authorities for drug-related infractions. *See e.g., In the Matter of Brian Huntley* (CSC, decided February 12, 2014) (Removal modified to a six-month suspension and the appellant, a Heavy Equipment Operator, was ordered to undergo a return to work drug and alcohol test prior to reinstatement and random monthly testing for a period of 24 months upon reinstatement); *In the Matter of John Daraklis* (MSB, decided June 11, 2008) and *In the Matter of John Simpson* (MSB, decided March 26, 2008) (Removals modified to four-month suspensions and the appellants, a Laborer Heavy and Truck Driver, respectively, were ordered to undergo a return to work drug test prior to reinstatement, referral to the Township's Employee Assistance Program, and monthly random drug testing for a period of one year upon reinstatement); *In the Matter of Glenn Steiger* (MSB, decided July 11, 2007) (Removal modified to a four-month suspension and required testing before reinstatement and random drug testing thereafter, where Truck Driver failed random alcohol test); *In the Matter of Richard Wilkins, Jr.* (MSB, decided September 21, 2005) (Removal modified to a six-month suspension and required referral to Township's Employee Assistance Program and random testing after reinstatement, where Police Aide tested positive for marijuana and PCP). While the appellant is employed as a Police Communications Clerk in the City of Newark's Department of Public Safety, she is **not** in a law enforcement position. Further, the appellant sought treatment and voluntarily entered into a drug rehabilitation facility. Such efforts are certainly considerations to afford her a "second chance."

Accordingly, contrary to the arguments of the appointing authority, the Commission does not find the appellant's conduct so egregious as to warrant removal without following the tenets of progressive discipline. Therefore, the Commission determines that the appropriate penalty is a 45 working day suspension. This significant major discipline should serve as a warning to the appellant that any future infraction may result in her removal. The Commission further notes that its decision reducing the penalty in this case is not meant to minimize the seriousness of the appellant's infraction. In addition to the 45 working day suspension, the Commission orders that the appellant undergo a pre-reinstatement drug test to be administered by the appointing authority. Should the appellant pass this drug test, the appellant is to be immediately reinstated to her position. If the appellant fails this drug test, the Commission orders that the appointing authority issue a new Final Notice of Disciplinary Action (FNDA) removing the appellant with a current date of removal. Upon receipt of the FNDA, the appellant may appeal that matter to the Commission in accordance with

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[1] Agency records indicate that the appellant was appointed as a Police Communications Clerk effective June 17, 2008.

N.J.A.C. 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current drug test only. In either case, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant would be entitled to mitigated back pay, benefits, and seniority from the end of the 45 working day suspension until the time she is either reinstated or removed.

However, regarding counsel fees, *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super,* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the decision of the Superior Court of New Jersey, Appellate Division, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips*, *supra*, should the appellant pass the pre-reinstatement drug test ordered herein, the appointing authority shall immediately reinstate the appellant to her permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 45 working day suspension. The Commission also orders, prior to reinstatement, that the appellant undergo a drug test to be administered by the appointing authority. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. In either case, the appellant is entitled to back pay, benefits and seniority for the period after the imposition of the 45 working day suspension through the date of her actual reinstatement or removal. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement, if applicable, be delayed pending the resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of the appellant's reinstatement or removal. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). Any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 01510-17
AGENCY DKT. NO. 2017-2286

TONYA HOWARD,
Petitioner,
v.
CITY OF NEWARK, DEPARTMENT OF PUBLIC SAFETY,
Respondent.

John Branigan IV, Esq., (Oxfeld Cohen, attorneys) for petitioner

France Casseus, Assistant Corporation Counsel, for respondent

Record Closed: December 11, 2017 Decided: January 17, 2018

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Tonya Howard (petitioner) appeals removal from her position as a communications clerk for the City of Newark, Division of Public Safety, because she tested positive for marijuana, a Controlled Dangerous Substance (CDS). Petitioner does not dispute the test results or her past use of CDS but asserts that removal is unjust and unwarranted under the circumstances.

ISSUE

May respondent City of Newark remove petitioner based on her testing positive for CDS?

PROCEDURAL HISTORY

On January 9, 2017, petitioner was served with a Final Notice of Disciplinary Action (FNDA), removal effective September 22, 2016. (R-1.) Petitioner was charged with violating the following Department Rules and Regulations, in addition to the New Jersey Administrative Code:

1. Obedience to Orders – Civilian
   (Newark Police Dept. Rules and Regulations, Ch. 5:4-1)

2. Drug Screening Policy
   (Newark Police Dept. Rules and Regulations, General Order 89-2)

3. Intoxication or Illegal Use of Drugs
   (Newark Police Dept. Rules and Regulations, Ch. 18:9.6)

4. Drug and Alcohol Use/Testing
   (N.J.A.C. 4A:2-2.3(a)(10))

Petitioner filed the instant appeal at the Office of Administrative Law on February 1, 2017 (N.J.S.A. 40A:14-202d).

A hearing was scheduled for October 25, 2017, at which time it was determined by counsel that there were no material facts in dispute and a motion was made on the record by respondent for summary decision. Respondent filed a supporting brief with attachments which were received on November 20, 2017. Opposition to the motion was filed and received on December 11, 2017, at which time the record was closed.

The parties had not requested oral argument and I determine that the written submissions are sufficient to dispose of the matter.

FINDINGS OF FACT

The following facts are undisputed and I therefore **FIND** them to be the **FACTS** of the case.

Tonya Howard had been employed as a police communications clerk by respondent City of Newark, Department of Public Safety. Her job duties included receiving and responding to emergency 911 calls from the general public.

On June 6, 2016, respondent received an anonymous tip aleging that petitioner had been engaged in the illigal use of CDS marijuana. An internal investigation ensued as a result of the tip and on August 30, 2016, petitioner submitted a urin sample which ultimatly tested positive for CDS marajuana.

As a result of the positive drug test, petitioner was issued a Priliminary Notice of Diciplinary Action on December 1, 2016, and a Final Notice of Diciplinary Action on December 27, 2016, with termination effective September 22, 2016. (See R-1.)

Subsequent to the positive drug test, petitioner entered a drug rehabiitation facility of her own volition.

LEGAL ANALYSIS AND CONCLUSION

1. Summary Decision Standard

A "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. A court should grant

summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995).

Here, both parties agree that there is no material fact in dispute. Petitioner merely argues that 1) the tenants of progressive discipline would preclude removal of petitioner and 2) respondent should consider other mitigating circumstances, such as her voluntary rehabilitation, in making a final determination.

2. The law does not require strict application of progressive discipline.

Petitioner argues that since she has never been disciplined for illicit drug use in the past, her removal is precluded by the principle of progressive discipline, which allows for an employee's past disciplinary record to be used as "guidance in determining the appropriate penalty for the current specific offense. See W. New York v. Bock, 38 N.J. 500 (1962).

The concept of progressive discipline is often used as a guiding principle when determining the degree of severity and overall fairness of an agency's disciplinary action against its own employee. However, a state agency is not bound by progressive discipline, especially in instances regarding a risk to public safety: "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." In re Hermann, 192 N.J. 19 (2007)

In the case at bar the petitioner tested positive for CDS marijuana and admitted to using the illegal narcotic. I **FIND** an employee's use of illegal narcotics constitutes severe misconduct. Petitioner is employed by the public safety department for the City of Newark and she is charged with receiving emergency communications from the general public. I **FIND** that the petitioner's position does directly and explicitly involve public safety and I therefore **FIND** that petitioner's misconduct causes risk of harm to persons or property. Under the standard set forth in Hermann as sited above I **FIND**

respondent rightfully bypassed progressive discipline in this instance and I **CONCLUDE** petitioner's removal was warranted under Hermann.

3. Respondent is not obliged to consider petitioner's subsequent rehabilitation.

Petitioner voluntarily entered into a drug rehabilitation facility subsequent to her positive drug test. Petitioner argues that her openness to rehabilitation coupled with her assertion that marijuana is not "the most serious of narcotics" should afford her the "opportunity to rehabilitate and return to work." (See Pet'r's Response Br. at p. 5.) While her pursuit of rehabilitation is commendable, petitioner fails to demonstrate how this attempt at self-amelioration precludes respondent from removing petitioner due to her admitted drug use while employed as a communications clerk for the department of public safety.

ORDER

Based upon the foregoing, it is **ORDERED** that respondent's motion for summary decision is **GRANTED** as there are no issues of material fact in dispute and the moving party is entitled to prevail as a matter of law.

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

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

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

1/17/18
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 1/17/18

JAN 18 2018

Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

4-4-18

A-7

STATE OF NEW JERSEY

In the Matter of Andrea Kinion
City of Paterson, Division of Business Administration

CSC DKT. NO. 2017-1280
OAL DKT. NO. CSV 03717-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2018 BW

The appeal of Andrea Kinion, Affirmative Action Officer, City of Paterson, Division of Business Administration, resignation not in good standing, on charges, was heard by Administrative Law Judge Michael Antoniewicz, who rendered his initial decision on January 9, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was justified. The Commission therefore affirms that action and dismisses the appeal of Andrea Kinion.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03717-17
AGENCY DKT. NO. 2017-1280

IN THE MATTER OF ANDREA KINION, CITY OF PATERSON, DIVISION OF BUSINESS ADMINISTRATION.

Seth Gollin, Organizer/Field Representative, AFSCME Local 3724, for appellant Andrea Kinion pursuant to N.J.A.C. 1:1-5.4(a)(6)

Steven S. Glickman, Esq., for respondent City of Paterson

Record Closed: November 29, 2017 Decided: January 9, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Appellant Andrea Kinion (Kinion) appeals the determination of the respondent City of Paterson (City), Division of Business Administration, that found appellant was absent from duty for five or more consecutive days without the approval of a supervisor. Based on this action, respondent charged appellant with resignation not in good

standing, and other sufficient cause. Respondent contends that the appellant's violations warrant a penalty of resignation not in good standing, effective May 12, 2016.

Appellant contends that the facts of the case will prove that the charges are unfounded and a resignation not in good standing is not warranted. Appellant seeks reinstatement to her prior position as Affirmative Action Director for the City of Paterson.

PROCEDURAL HISTORY

On June 8, 2016, respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA) that notes resignation not in good standing effective May 12, 2016, from her position as Affirmative Action Director. Appellant requested an internal disciplinary hearing, which commenced on July 12, 2016. On September 9, 2016, a Final Notice of Disciplinary Action (FNDA), dated August 22, 2016, was served on appellant. The FNDA sustained all charges set forth on the PNDA. The disciplinary action against appellant based on the sustained charges is a resignation not in good standing effective on May 12, 2016.

On March 17, 2017, the New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL), for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. This matter was assigned to the undersigned and a hearing date was held on September 14, 2017. After the hearing was held, the appellant submitted post-hearing submissions on November 8, 2017. Respondent filed its post-hearing submission on November 29, 2017, and then the record closed.

ISSUES

N.J.A.C. 4A:2-2.2 identifies major discipline types to include removal, disciplinary demotion, and suspension or fine for more-than five working days at any one time. The

issues in this proceeding are whether a preponderance of the credible evidence establishes that the charges set forth in the FNDA because of appellant's absence from work for medical reasons and her failure to provide a complete Leave of Absence Packet warrant a disciplinary action and the penalty of resignation not in good standing? If so, is resignation not in good standing the appropriate disciplinary action warranted under the circumstances? Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Disciplinary Charges

The charges in the Final Notice of Disciplinary Action (31-B), dated April 10, 2013, are as follows:

> Violation of Civil Service Rule N.J.A.C. 4A:2-6.2(b) – Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing;
>
> Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)(12) – An employee may be subject to discipline for other sufficient cause.

Specification of the Charges

The specification for charges sustained in the Final Notice of Disciplinary Action (31-B), dated August 22, 2013, reads as follows:

> You have been absent from duty for five or more consecutive days without the approval of your supervisor N.J.A.C. 4A:2-6(c)—February 12, 2013 to the present. You were given leave of absence **paperwork** that needed to be filled out and returned to your supervisor by March 6, 2013 to cover you for this time since you had no more sick days remaining and you failed to do so. You have used all your sick time in the 2013 calendar year as of February 11, 2013.

SUMMARY OF TESTIMONY

(Appellant's Witnesses)

Eugenia Byfield (Byfield) was a Personnel Department employee. She was responsible for accepting and date-stamping the documents submitted on behalf of employees concerning extended leaves of absence. Byfield usually stamped all pages submitted, retained the originals for the Personnel Department, and returned copies of the stamped documents to the person who submitted them. Byfield stated that she did not know as to whether other employees stamped all pages or just the top page but that she normally time-stamped every page of a document that was submitted. Byfield also testified that the note from the Hackensack University Medical Group was submitted to her but was not attached to the Application for an Extended Leave of Absence. (P-2; P-3.) It was Byfield's recollection that she received P-2 as a part of the documentation for the appellant's request for disability-related benefits.

During the timeframe at issue herein, all requests for extended leaves of absence that Byfield received on behalf of Kinion were submitted by Niecha McPherson (McPherson). Byfield did not directly inform Kinion that any of her requests for extended leaves of absence were approved or denied because she understood that Kinion was responsible for ensuring that her requests for extended leaves of absence were approved.

Migdalia Salcedo (Salcedo) was also an employee in the Personnel Department and was also responsible for accepting and date-stamping the documents. Salcedo was unsure as to whether on April 13, 2016, she stamped both pages submitted or just the top page. Salcedo stated that she retained the originals for the Personnel Department and returned copies of the documents to the person who submitted them. During the period at issue, any requests for extended leaves of absence that Salcedo received on behalf of Kinion were submitted by Niecha McPherson. Salcedo received an Extended Leave of Absence form, dated April 12, 2016, along with a Hackensack

University Medical Group letter, dated April 12, 2016, about Kinion, when McPherson submitted them together on behalf of Kinion. (P-2.)

Salcedo's testimony was inconsistent, as for example, she stated that she would time-stamp every document and then testified that when McPherson submitted an application for Kinion, the application was on the front and doctor's notes were attached. Salcedo also testified that not only was P-2 submitted with P-3, it was attached in front of P-3. As such I find that Salcedo lacked credibility and as such should be given little weight.

Niecha McPherson (McPherson) was a City of Paterson employee and was a friend of Kinion. McPherson submitted to the Personnel Department several Extended Leave of Absence forms and other related documents on behalf of Kinion.

This witness testified on March 14, 2016, that she submitted to Byfield an Extended Leave of Absence form and a doctor's note at the Personnel Department on behalf of Kinion. Byfield then returned copies to McPherson. McPherson did not recall exactly which pages were stamped and which pages were not stamped. McPherson stated that she was unable to return to Kinion the copies of the Extended Leave of Absence form and the doctor's note she had received back from Byfield on March 14, 2016.

On April 13, 2016, McPherson submitted to Salcedo at the Personnel Department a doctor's note and another form on behalf of Kinion. Salcedo returned copies (P-2 and P-3) to McPherson. McPherson gave the copies (P-2 and P-3) that she received from the Personnel Department to Kinion within a few days of April 13, 2016.

On May 25, 2016, McPherson submitted to the Personnel Department an Extended Leave of Absence form and a doctor's note on behalf of Kinion. McPherson gave the copies that she had received from the Personnel Department to Kinion within

a few days of May 25, 2016. McPherson's testimony was also inconsistent and contrary to the more credible testimony of Abby Levenson and Byfield.

Andrea Kinion (Kinion) is the appellant in this case and has filed this appeal. Kinion returned from workers' compensation on October 5, 2015, and was directed to work three days per week and have therapy two days per week during each work week. On October 25, 2015, Kinion went back out of work on workers' compensation.

On December 15, 2015, Personnel Director Levenson directed Kinion to complete Family Medical Leave Act (FMLA) paperwork. Kinion questioned why because she was already out on workers' compensation, but completed the form anyway in January 2016. Kinion applied for disability because Levenson told her that workers' compensation was ending at the end of February 2016 and that she was running out of time. Kinion believed that FMLA leave commenced when workers' compensation ended around the end of February 2016.

In March 2016, McPherson submitted an Extended Leave of Absence form and a doctor's note to the Personnel Department on behalf of Kinion. Kinion was unable to testify that McPherson gave the application to respondent as she did not submit same herself. Kinion did not receive back from McPherson copies of what was submitted to the Personnel Department because McPherson was unable to get it to Kinion. Kinion received the stamped and signed versions of the Extended Leave of Absence form, dated March 11, 2016, and the Hackensack University Medical Group letter concerning Kinion dated March 11, 2016, (P-1) from Byfield because McPherson was unable to give Kinion the copies she received back from the Personnel Department when she submitted them.

On April 13, 2016, McPherson submitted an Extended Leave of Absence form and a doctor's note to the Personnel Department on behalf of appellant. Within a few days, McPherson returned to Kinion the documents the Personnel Department returned to McPherson on April 13, 2016, (P-3); the Extended Leave of Absence form, dated

April 12, 2016, and the Hackensack University Medical Group letter in regarding Kinion, dated April 12, 2016. (P-2.)

Kinon did not ask for signed copies of the documents submitted on April 13, 2016, because she received the copies back from McPherson with the date-stamp on P-2. Kinion believed that she had been granted an extended leave of absence through May 23, 2016, as was indicated on P-3. The Personnel Department did not inform Kinion that she was not granted an extended leave of absence through May 23, 2016.

On May 25, 2016, McPherson submitted an Extended Leave of Absence form and a doctor's note to the Personnel Department on behalf of Kinion. Within a few days, McPherson returned to Kinion the documents the Personnel Department retuned to McPherson on May 25, 2016. (P-4.)

Kinion had not received the PNDA, dated May 12, 2016, when she had McPherson submit an Extended Leave of Absence form and a doctor's note to the Personnel Department on her behalf on May 25, 2016. Kinion did not learn of the City's disciplinary action against her concerning her absence until she received the PNDA, dated June 8, 2016. (P-5.)

Absent from Kinion's testimony is the fact that her application for leave was approved by the respondent. It was Kinion's position that she had no duty to verify that her application for leave was approved.

(Respondent's Witness)

Abby Levenson (Levenson) has been employed with the City of Paterson as a unit chief for the Personnel Director since July 2015. As the Personnel Director, Levenson's duties included overseeing payments, providing health benefits, handling disciplinary matters, handling State benefits including unemployment, and applications for leaves of absence.

Levenson testified that Kinion was an employee hired by Paterson since 1995. Kinion went out on medical leave in 2009, which led to a separation from employment. Thereafter, Kinion was rehired on a part-time basis in August 2012. Kinion then resumed full-time employment in April 2013. In August 2013, Kinion went out on workers' compensation. Kinion then returned from workers' compensation in October 2015 working only three of the five work days per week, working on a part-time basis. From the time of October 5, 2015, and November 2, 2015, Kinion was at work for five and one-half days.

Kinion was then out pursuant to the FMLA beginning on November 2, 2015. Kinion was not eligible for this leave because she had not worked the necessary number of hours in the previous twelve months. Kinion then submitted a doctor's note (P-1) when she submitted the Extended Leave of Absence form, dated March 11, 2016. (R-5.) Kinion's FMLA was then extended to March 14, 2016, and approved by the respondent on March 28, 2016. The documents contained in P-1 (Leave of Absence and the doctor's note) were date-stamped by the City's Personnel Department. Levenson wrote to Kinion on March 7, 2016, advising her that Kinion's leave was about to expire and thus Kinion could be brought up on charges of job abandonment. (R-4.)

During time frame at issue herein, Eugenia Byfield and Migdalia Salcedo were employees in the Personnel Department and were responsible for accepting and date-stamping the documents submitted on behalf of employees concerning extended leaves of absence. The Personnel Department did not notify employees that requests for extended leave of absence were granted because it was the employee's responsibility, in accordance with the City's Personnel Policy Manual, to check to ensure that the employee's request had been granted. Kinion's leave was approved until April 15, 2016. (R-5 and/or P-1.)

The letter from the Hackensack University Medical Group concerning Kinion, dated April 12, 2016, was received by the Personnel Department, but was unrelated to a request for extended sick leave. The Extended Leave of Absence form, dated April 12, 2016, was not received by the Personnel Department. (P-3.)

The April 15, 2016, date passed without Kinion communicating with the respondent. The Personnel Department received the Extended Leave of Absence form dated May 20, 2016, on May 25, 2016, but took no action on this form because the Personnel Department was already in the process of serving Kinion with a PNDA (R-2) taking the action of a resignation not in good standing.

No denials of Kinion's requests for extended leave of absence were sent because it was the employee's responsibility, pursuant to the City's Personnel Policy Manual, to check to ensure that the employee's request had been granted. The timeframe had passed without such approval. The Unemployment Benefit Form B187Q for the quarter ending September 30, 2016, reflects the weeks to which Kinion's benefit payments were applicable, but does not necessarily reflect the date(s) on which Kinion actually received the benefit payments. (R-10.)

Levenson never saw Kinion's application for an extended leave of absence, which sought an extension of her leave of absence from April 15, 2016, through May 23, 2016. (P-3.) I **FIND** Levenson's testimony in general—and specifically on this topic—to be credible.

FINDINGS OF FACT

Based on the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following **FINDINGS of FACT**:

1. Appellant was employed by respondent as an Affirmative Action/EEO Director in 1996.

2. Kinion went out on medical leave in 2009, which resulted in a separation from employment.

3. Kinion was then rehired on a part-time basis in August 2012.

4. Kinion then resumed full-time employment in April 2013 but then went out on workers' compensation in August 2013.

5. Kinion returned from workers' compensation in October 2015 and was working only three of five days per work week.

6. Kinion began a medical leave on November 2, 2015, which was due to expire on March 15, 2016.

7. On March 11, 2016, Kinion submitted a request for an extension of her leave of absence, which the respondent approved through April 15, 2016.

8. During the above process Byfield and Salcedo were working for the City in the Personnel Department and were responsible for accepting and processing documents submitted on behalf of employees concerning requests for extended leaves of absence.

9. Respondent's Personnel Department does not notify employees of action taken on applications for leaves of absence and the employees check to ensure the action taken on their application.

10. Kinion was advised by Levenson on March 7, 2016, that Kinion's failure to return to work after the expiration of her leave of absence could result in job abandonment charges.

11. Kinion's approved extension of her leave of absence was granted by the respondent until April 15, 2016.

12. Kinion did not obtain an extension of her leave of absence after April 15, 2016, from the Personnel Department.

13. Byfield and Levenson understood that it was Kinion's responsibility to ensure that her requests for an extension of her leaves of absence were approved by the City.

14. The submission of paperwork from Hackensack University Medical Group was filed with the City on April 12, 2016, but no application for an extension was filed with it.

15. Kinion failed to return to work after April 15, 2016, without obtaining a further extension of her leave.

16. Respondent's Personnel Department received an Extended Leave of Absence form dated May 20, 2016, on May 25, 2016, but the respondent did not take any action on this application because it was already in the process of serving Kinion with a PNDA for being absence from duty without the approval of her supervisor for more than five days, thus a resignation not in good standing.

LEGAL ANALYSIS

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, supra, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended or removed, the employer must show just cause for its proposed action. The Merit System Board is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program."

Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty. In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in Bock, supra, 38 N.J. at 519. In Bock, the officer had received a thirty-day suspension and seventeen minor-disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522-24.

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), http://njlaw.rutgers.edu/collections/oal/ (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a) (2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief

that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't., CSV 7553-02, Initial Decision (October 27, 2003), http://njlaw.rutgers.edu/collections/oal/ (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

Resignation Not In Good Standing

The rule governing resignation not in good standing is found at N.J.A.C. 4A:2-6.2(b). It provides:

> Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

The Civil Service Code also provides "the appointing authority or the Board may modify the resignation not in good standing to an appropriate penalty or to a resignation in good standing," Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (1963). Although the record may clearly establish that an appellant was absent without authorization in excess of five consecutive business days, if the appellant was unable to work due to medical reasons (no evidence was presented on this issue), a resignation not in good standing should be modified to a resignation in good standing. Sykes v. New Jersey Judiciary, Middlesex Vicinage, CSV 4461-04, Initial Decision (July 12, 2005), adopted, Comm'r (September 23, 2005), <http://njlaw.rutgers.edu/collections/oal/final/csv4461-04.pdf>; Taylor v. New Lisbon Medical Center, CSV 2842-05, Initial Decision (December 9, 2005), adopted, Comm'r (January 18, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv2842-05.pdf>; Salley v. Hudson County Dep't of Roads and Public Property, CSV 11813-09, Initial Decision (January 4, 2011), adopted, Comm'r (February 18, 2011), <http://njlaw.rutgers.edu/collections/oal/final/csv11813-09.pdf>. The validity of modifying a resignation be in good standing has been settled law in this New Jersey for some time. See Weil v. Atl. County Dep't of Public Safety, 97 N.J.A.R.2d (CSV) 413,

418; McLaughlin v. N.J. Civil Serv. Comm'n, 137 N.J. Law 338 (Sup. Ct. 1948), aff'd, 1 N.J. 284 (1949); Griffin v. City of Jersey City, 4 N.J. Super. 81 (App. Div. 1949).

Kinion argues and the respondent does not dispute, and I agree, that it is the duty of the respondent to approve or not approve an employee's application for a leave of absence. I find it credible, as set forth in Levenson's testimony, that Kinion's first application for FMLA application was approved and had Levenson's signature on it. Thereafter, Kinion's request for an Extended Leave of Absence application for the first time was also approved and had the signatures of Levenson and the Business Administrator, Nellie Pou. There is no doubt that the alleged next request for an extended leave of absence has neither the signature of Levenson nor Pou and thus was never approved.

Respondent's Personnel Policy Manual (R-3), which Kinion testified she drafted, states:

> I understand that if my family or medical leave (total of paid and unpaid time) does not exceed 12 weeks I will be returned to my same or equivalent position. I understand that if my family or medical leave exceeds 12 weeks, the City may terminate my employment in accordance with applicable law. **If my request for a leave is approved, it is my understanding that unless the City has authorized an extension of my leave in writing, I must report to duty on the first workday following the date my leave is scheduled to end. I understand that failure to do so will constitute unequivocal notice of my intent not to return to work and the City may terminate my employment.**
>
> **[Emphasis added.]**

The application for an Extended Leave of Absence states: "We are requesting signatures for approval of the above request." There is no doubt that the respondent has the duty to approve or not approve such an application. In the case when the employee does not receive a written approval, as required above, it is incumbent upon the employee to determine if the application was approved, and if this is not obtained, the employee must report for duty, or risk being terminated by being found to have

resigned not in good standing. In this case, it is clear that the employee received no written or verbal approval of an extension of her request for leave.

Kinion is charged with resigning from her position, not in good standing, pursuant to N.J.A.C. 4A:2-6.2(b). Based upon the above findings, I **CONCLUDE** that Kinion has resigned from her position not in good standing as of May 12, 2016.

Under N.J.A.C. 4A:2-6.2(b), five or more consecutive days absence without approval of an employee's supervisor is regarded as abandonment of the position and deemed a resignation not in good standing. In the current instance, Kinion did not return to work after submitting an application for an Extended Leave of Absence and was not on an authorized leave of absence. Kinion was on a leave of absence that began on November 2, 2015, and was due to expire on March 15, 2016. Kinion extended the leave until April 15, 2016. Thereafter, there was no approved extension and Kinion did not return to work. Kinion made an application for another extension of her leave on a form dated May 20, 2016, and received May 25, 2016. (See R-6.)

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Perth Amboy v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at this de novo hearing are whether Kinion is guilty of the charge brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry, supra, 81 N.J. 571; Bock, supra, 38 N.J. 500. In this matter, the City bears the burden of proving the charges against Kinion by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Suero, CSV 5039-04, Final Decision (June 22, 2005), <http://njlaw.rutgers.edu/collections/oal/>.

There is no debate that Kinion failed to report to work following the expiration of her leave of absence on April 15, 2016, or that she failed to contact her supervisors to

determine if her request for extension was granted. McPherson was acting on behalf of Kinion, and did so by requesting an extension of the leave of absence. However, McPherson, as well as Kinion herself, failed to contact the City to determine if the extension had been granted. There is no dispute that no approval of an extension of the leave was granted by the respondent based on the fact that the respondent was taking disciplinary action against Kinion for resignation not in good standing.

Kinion attempts to cloud the issue by arguing that the City had the burden to notify the appellant of the action taken on her application, i.e., approval or denial. The argument is not persuasive. In the first instance, the City has demonstrated adequately that there was no action taken on the appellant's application for an extension and that Kinion filed an application for an extension beyond five days after the expiration of her leave.

Kinion contends that the withholding of approval for the leave extension was unreasonable. The record establishes that Kinion had the duty to appear for work in the event that she did not receive an approval from the respondent. I **CONCLUDE** that the City has been reasonable in authorizing leaves of absence in the past and in this case. Based upon the foregoing, I **CONCLUDE** that the City has met its burden of proving by a preponderance of the credible evidence, that Kinion was absent from duty for five or more consecutive business days without approval of her supervisor. It is within the discretion of an appointing authority as to whether a request for a leave of absence should or should not be granted. See Smith v. College of New Jersey, CSV 977-98, Final Decision (October 14, 1998), <http://njlaw.rutgers.edu/collections/oal/>. I, therefore, **CONCLUDE** that the City did not unreasonably fail to grant Kinion a further leave of absence. Accordingly, I **CONCLUDE** that Kinion's unapproved absence effectuated a resignation not in good standing.

CREDIBILITY

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth.

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

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

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). The evidence presented and the credibility of the witnesses will assist in resolving whether the charges and discipline imposed should be sustained; or whether there are

mitigating circumstances, which should impact the charges and the penalty. Mitigating circumstances must be taken into consideration when determining whether there is just cause for the penalty imposed.

In the instant case, there is sufficient evidence that appellant has been disciplined for similar conduct or actions in the past. In regard to testimony on ancillary facts offered to support or negate a charge, the weight of the evidence indicates the City did not provide Kinion with an extension of her leave of absence and that Kinion's application, dated May 20, 2016, was well beyond the expiration of her leave of absence which ended on April 15, 2016.

CONCLUSION

In an appeal, from a major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.A.C. 11A:2-21, N.J.A.C. 4A:2-1.4(a). This burden requires the appointing authority to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty of the stated offenses. Atkinson, supra, 37 N.J. 143; Polk, supra, 90 N.J. 550. Here, the respondent charges the appellant with resignation not in good standing.

Based on testimonial and documentary evidence presented, in regard to charges creating violations of N.J.A.C. 4A:2-2.3(a), I **CONCLUDE** that the Civil Service Rule N.J.A.C. 4A:2-6.2(b), resignation not in good standing, if an employee is absent from duty for five or more consecutive business days, or has not returned to work for five or more business days following an approved leave of absence, without the approval of her superior, she shall be considered to have abandoned her position and shall be recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b)(c). In the instant matter, appellant was absent for more than five consecutive days without a supervisor's approval. Respondent has proven that Kinion abandoned her employment by failing to obtain an extension of her leave signed by her supervisor prior to failing to return to duty less than five days later. I, therefore, **CONCLUDE** that the penalty of a resignation

not in good standing on the charges as set forth herein, is reasonable and warranted and the charge should be upheld.

ORDER

It is **ORDERED** that Andrea Kinion is hereby deemed to have **RESIGNED** from her position not in good standing, effective May 12, 2016.

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

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

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

January 9, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

January 9, 2018

Date Mailed to Parties:

JAN 11 2018

jb

~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

Appellant:

Eugenia Byfield

Migdalia Salcedo

Niecha McPherson

Andrea Kinion

Respondent:

Abby Levenson

EXHIBITS

For Appellant:

P-1 Extended Leave of Absence dated March 28, 2016 (approved)

P-2 Letter from Hackensack University Medical Group, dated April 12, 2016

P-3 Extended Leave of Absence (May 23, 2016, return date; not approved)

P-4 Extended Leave of Absence (July 1, 2016, return date; not approved)

P-5 Preliminary Notice of Disciplinary Action dated June 8, 2016

For Respondent:

R-1 Final Notice of Disciplinary Action (31-A) dated August 22, 2016

R-2 Preliminary Notice of Disciplinary Action dated May 12, 2016

R-3 Leave of Absence, Family and/or Medical Leave Application dated December 16, 2015

R-4 Letter from Abby Levenson to Andrea Kinion dated March 7, 2016

R-5 Extended Leave of Absence form dated March 11, 2016

R-6 Extended Leave of absence form dated May 20, 2016

R-7 Extended Leave of Absence form dated June 30, 2016

R-8 Civil Service Commission decision (Hearing Denied) dated October 28, 2016

R-9 Civil Service Commission decision (Request for Reconsideration) dated March 13, 2017

R-10 Unemployment Benefits Form B187Q for the quarter ending September 30, 2016

R-11 Personnel Action Form (3.75) dated June 20, 2011

4-4-18

A-1

STATE OF NEW JERSEY

In the Matter of Joy Olojede
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2545
OAL DKT. NO. CSV 02554-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 4, 2018 BW

The Civil Service Commission, at its meeting of April 4, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 02554-17
AGENCY DKT. NO. 2017-2545

IN THE MATTER OF JOY OLOJEDE,
NEW JERSEY DEPARTMENT OF HUMAN
SERVICES, HUNTERDON DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Daniel Pierre, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 9, 2018 Decided: March 14, 2018

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter concerns the appeal of Joy Olojede from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on February 22, 2018 pursuant to N.J.S.A. 40A:14-202(d).

As a result on March 9, 2018, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

DATE 3/14/18

SARAH G. CROWLEY, ALJ

Date Received at Agency: 3/14/18

Date Mailed to Parties: 3/15/18

Attachment

OAL DKT. NO. CSV 02554-2017 S
AGENCY DKT. NO. 2017-2545

SETTLEMENT AGREEMENT

IN THE MATTER OF
JOY OLOJEDE
Appellant,
AND
HUNTERDON DEV. CTR.,
DEPT. OF HUMAN SERVS.
Respondent.

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The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **January 26, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Administrative Order 4:08, *A3 Job Abandonment*	Removal	9/27/16
2. N.J.A.C. 4A:2-6.2(c), *Resignation not in good standing*	Removal	9/27/16
3. N.J.A.C. 4A:2-2.3(a)6, *Conduct unbecoming a public employee*	Removal	9/27/16
4. N.J.A.C. 4A:2-2.3(a)12, *Other sufficient cause*	Removal	9/27/16

B. The Appellant **JOY OLOJEDE** withdraws her appeal and request for a hearing, and the Respondent Appointing Authority agrees to reinstatement and that the following result will occur with regard to each charge:

Charge	Disposition
1. Administrative Order 4:08, A3 Job Abandonment	Withdrawn
2. N.J.A.C. 4A:2-6.2(c) Resignation not in good standing	Withdrawn
3. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	Withdrawn
4. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause	Withdrawn

C. The parties have agreed to the following:

1. To date, appellant has served a total of __N/A__ days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: **ZERO (0) .**
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Appellant **JOY OLOJEDE** is advised that if there should be the need for a leave in the future she shall ensure any documentation, faxed by her doctor to Human Resources (H.R.) at Hunterdon Developmental Center is received by contacting H.R. promptly upon transmission. It is the responsibility of all employees to follow up on medical documentation being received by their employer, and not that of the physician's office. This settlement agreement shall form as a formal warning.

The Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of **JOY OLOJEDE** will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/9/18
DATE

Appellant

3/9/18
DATE

ON BEHALF OF Appellant
William P. Nash

3/9/18
DATE

ON BEHALF OF Respondent
Daniel Pierre

2/22/18
DATE

Respondent

OAL DKT. NO.

CERTIFICATION

I, Jay Olojede, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/9/18
DATE

Jay Olojede

4-4-18

A-8

STATE OF NEW JERSEY

In the Matters of Eugene Royster and
Kate Blaszkowski
Burlington County

CSC DKT. NOS. 2018-1003 & 2018-1000
OAL DKT. NOS. CSR 15059-17 & 15060-17
(Consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2018 **BW**

The appeals of Eugene Royster and Kate Blaszkowski, County Correction Officers, Burlington County, removals effective September 4, 2017 and August 30, 2017, respectively, on charges, were heard by Administrative Law Judge Jeff S. Masin, who rendered his consolidated initial decision on February 6, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, as well as having carefully considered the exceptions and reply to exceptions filed by the parties and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellants was justified. The Commission therefore affirms those actions and dismisses the appeals of Eugene Royster and Kate Blaszkowski.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF EUGENE R. ROYSTER AND KATE E. BLASZKOWSKI, BURLINGTON COUNTY.

INITIAL DECISION
OAL DKT. NOS. CSR 15059-17
AND CSR 15060-17
(CONSOLIDATED)
Agency DKT NO. 2018-1003
Agency DKT NO 2018-1000

Mark W. Catanzaro, Esq., for appellants Eugene R. Royster and Kate E. Blaszkowski (Law Offices of Mark W. Catanzaro, attorney)

Andrew C. Rimol, Esq., for respondent Burlington County (Capehart and Scatchard, attorneys)

Record Closed: January 22, 2018 Decided: February 6, 2018

BEFORE **JEFF S. MASIN,** ALJ t/a:

Burlington County employed two corrections officers, Eugene R. Royster and Kate E. Blaszkowski. On two dates in 2017, June 3 and July 1, each of these officers admittedly did not perform required periodic tours of I Wing, the section of the Burlington County Detention Center ("jail") to which they were each assigned. Despite their not having performed these inspections, each officer documented that they had performed the inspections in the jail log. As a result of an examination of video recordings made of I Wing, which resulted from a request made by the attorney for another officer facing disciplinary action in an unrelated matter, the fact that Officers Royster and Blaszkowski had failed to perform these inspections came to light. Each officer was then charged in

two separate Preliminary Notices of Disciplinary Action (PNDA) with violations of the New Jersey Administrative Code, as well as violation of various internal policies, one notice apiece for each officer for June 3 and July 1. Following departmental hearings each officer was dismissed from service, as documented in Final Notices of Disciplinary Action (FNDA). Each filed a separate appeal with both the Civil Service Commission and the New Jersey Office of Administrative Law (OAL). These separate appeals were each assigned to this judge. Following a conference with counsel it was determined the cases would be tried sequentially. Although at first it was not clear that they should be consolidated, following completion of the hearings on both cases, which were held on January 17, 2018, it became clear that the facts and legal issues were essentially the same. As a result, an order consolidating the matters is issued in conjunction with this initial decision.

The specific violations each officer was charged with were the same. The County asserts that each officer violated N.J.A.C. 4A:2-2.3(1), incompetency, inefficiency or failure to perform duties; (3), inability to perform duties; (6) conduct unbecoming a public employee; (7) neglect of duty; and (12) other sufficient cause. This latter charge alleges violations of Policy and Procedures Manual sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, 1192 and 1250. The specific provisions in each of these sections will be examined later in this opinion. It should be noted here that during this hearing, the County advised that it was not pursuing the charge of any violation of Policy 1192 against either officer.

As noted, neither officer denies the charge that they did not perform the specific inspections set forth in the specifications contained in each of their PNDAs. Each received two such documents, one for the violations on June 3, 2017, the other for the violations on July 1, 2017. More specifically, the review of recordings conducted by Captain McDonnell showed that Officer Royster failed to conduct required security tours on the 0600-1800 shift on June 3, 2017, at 0730, 1000 and 1030. He entered "false or misleading entries into the official logbook by documenting these security tours" when in fact he had not performed them. Additionally, on July 1, 2017, Royster failed to perform

the required security tours at 0700, 0730, 0830, 1100 and 1130. However, in each instance he again entered "false or misleading entries into the official logbook by documenting" the security tours, even though he had not physically conducted them. Officer Blaszkowski was charged with exactly the same violations. In her case, on June 3, 2017, on the same 0600-1800 shift, she failed to conduct required security tours and falsified entries into the official logbook by documenting such tours as if they had occurred at 1233 and 1305, when she did not actually conduct physical inspections. On July 1, 2017, on the same tour, she again did not conduct required security tours, but she documented that she had done so at 1233 and 1305. According to Blaszkowski's testimony at the hearing, on each of these days she relieved an officer who was taking a meal break and it was during the time that she performed such relief duty that she failed to conduct the tours and yet documented that she had done so. In his testimony, Officer Royster explained that his failure to conduct the required inspections on each of the two dates arose from his becoming "comfortable" and he offered that he had "no excuse" for his failure to perform his duties. Officer Blaszkowski testified that, although she was aware of her obligation to physically walk her post on each of the days, she failed to do so because she had become "too relaxed."

Neither of these officers denies that they are guilty of failing to perform their required duties on the two days in question. However, they have appealed the appointing authority's decision to remove them from their positions, claiming that they have been subject to disparate treatment and have not been treated fairly with respect to the penalty imposed, or perhaps even in being charged with these violations. There are two bases for this claim. The first is that when Burlington County began its review of video recordings of the various wings of the institution, it first focused upon I Wing, where they were assigned, and where the unrelated incident from which the demand for the video review arose. However, shortly after Captain McDonnell reviewed the I Wing recordings and made note of the two officers' failure to perform their tours, the attorney for the officer in the unrelated matter withdrew his demand for the recordings and the County stopped reviewing the video recordings. As a result, other officers assigned to other wings of the jail, who may have similarly failed to perform the required tours such

as these two failed to perform, were not identified, as the video recordings of the other wings of the institution were not reviewed. Additionally, the recordings showed that Sergeant Hernandez, also assigned to I Wing, and a lieutenant, also assigned to that wing, failed to perform their required inspection tours, and yet they were not disciplined. Further, the appellants point to a decision of the Civil Service Commission involving a Mercer County corrections officer found guilty of the same offenses, who was only given a forty-five-day suspension by the appointing authority, a suspension which was upheld by the Civil Service Commission and then affirmed by the Appellate Division, In the Matter of Nolan Cox, Mercer County Department of Public Safety. Thus, these long-term officers, whose prior disciplinary records include no sanctions for performance but only attendance issues, see their removal as constituting excessive punishment for these violations.

Matthew S. Leith, a Corrections Administrative Captain at the Burlington County Jail, testified as to the importance of the periodic tours that officers such as Royster and Blaszkowski are required to undertake during their time assigned to a wing, such as I Wing in the case of the two dates on which they failed to do so. I Wing consisted of five cells containing a total of fourteen bunks. The Wing is used for persons newly admitted to the Detention Center. An officer assigned to the Wing sits at a desk, but is unable to see into each of the cells and observe all of the bunks unless the officer physically moves along the Wing to make such observations. The control booth officer who opens the doors to the Wing from that officer's booth cannot see inside all of the cells either. The walking inspection of the cells and the inmates in them allows the officers to assure that the inmates are safe and secure, that they are not overdosing, that no suicide attempts are being made, and that the facility, and its inmates and corrections officers, are safe and secure. Captain Leith identified several policies and procedures of the Burlington County Detention Center that are applicable and which spell out the responsibilities of corrections officers, policies and procedures that the County charges these officers violated.

Policy and Procedure Section 1007 provides that officers are to listen for unusual sounds in cell blocks, observe for changes in noise levels, calls for help, detect unusual odors, prevent escapes and suicides, patrol cell block areas to check for safety and security hazards such as fires, smoke, broken pipes, windows, etc. This is all done in order to "protect the security and safety of the inmates and the institution."

Policy and Procedure Section 1012-1074 provides that officers are subject to discipline, including dismissal, for any violation of the policies and procedures. Policy 1023 specifically requires such compliance with the policies. Policy 1030 holds officers responsible for "the efficient performance of duties assigned and for the proper supervision of any inmate in his/her custody." Policy 1031 requires that officers "promptly obey any lawful order." Policy 1038 prohibits officers from acting in any manner that is to the officer's, or the Department's, discredit. Policy 1065 prohibits any officer from making "any false or misleading statements or written reports by intentional omission or misrepresentation of facts or information known to the officer." And Policy 1066 provides that "no officer shall . . . enter, in any official book or record, any false or misleading statements."

Policy 1172 specifically provides for the maintenance of logbooks, recording inmate movements, events and situations of special circumstances. Officers are trained in the use and maintenance of these logs. Section C. of this Policy provides that the logbook contain "Officer security/touring wing (30 min general security check)." In addition, officers providing relief, such as Blaszkowski did on June 3 and July 1, are "responsible for that post during such time as she is relieving and is responsible to make the appropriate entries into the logbooks . . . in her own handwriting." Section A.4. of this Policy provides: ". . . falsification of these documents will not be tolerated; offender(s) are subject to disciplinary action and/or criminal charges (Official Misconduct)."

Captain Leith noted that the jail's logbooks are legal documents. They are used for official purposes and can become evidence in legal proceedings (such as is the case in this matter).

Policy 1190 C. provides that "Security tours will be made approximately every thirty (30) minutes at irregular intervals. An accounting of inmates is also done during security tours, which enables the shift to accomplish the dual requirements of security and count procedures." Policy 1250, at page 4, paragraph 15, requires "routine tours of the entire tier or post" to be made "approximately every thirty (30) minutes. This duty requires the officer to physically walk around to make an inspection. The officer will document in the logbook when such duty was performed and note findings of each tour."

Receipts signed by each officer were entered as evidence confirming that they had received copies of the policies and procedures.

Discussion

In a Civil Service disciplinary action, the appointing authority bears the burden of establishing alleged violations of administrative code provisions that subject the employee to disciplinary sanction. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). The proof must be by a preponderance of the credible evidence. Matter of Polk, 90 N.J. 550 (1982).

In the current matter, each of the charged civil servants has readily acknowledged that on June 3 and July 1, each did not conduct required walking tour inspections of their assigned post on I Wing. Each did not do so and each admitted that he or she had falsified the logbook to make it appear that he or she had in fact performed the required tours. As such, neither Royster nor Blaszkowski denies their guilt. Each admits to neglecting their required assignment, on more than one occasion, each admits to failing to perform their duties, and each admits to falsifying the logbooks

with entries that made it appear that they had accomplished their mandated tours when they full well knew that they had not. It short, they lied when they entered these false representations in the logbooks for June 3 and July 1, 2017. By their own admission, both officers violated the several policies and procedures discussed above.

I **FIND** that Officer Eugene Royster did not perform the required walking inspection of I Wing on June 3, 2017. He made false entries in the log book to indicate that he had performed these inspections. On July 1, 2017, he failed to perform these required walking inspections at 0700, 0730, 0830, 1100 and 1130. Again, he made false entries in the logbook to show that he had performed the tours. I **CONCLUDE** that he violated N.J.A.C. 4A:2-2.3(a)(1), failure to perform duties; (3), inability to perform duties, in that he had an attitude of complacency that rendered him unable to motivate himself to perform as his duty required; (6) conduct unbecoming a public employee, in that he entered false information and neglected his vital duties in a correctional setting, acts that have the ability to undermine the public's trust in government and its employees and bring discredit to the institution, Karins v. Atlantic City, 152 N.J. 532, 557 (1998); (7) neglect of duty; and (12) other sufficient cause, in that he violated Policy and Procedures Manual Sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1190 and 1250.

I **FIND** that on June 3, 2017, Officer Blaszkowski did not perform the required walking inspection of I Wing at 0931. She made a false entry to show that she had performed the tour. On July 1, 2017, she failed to perform the required walking tours at 1233 and 1305. Again, she made false entries in the logbook. I **CONCLUDE** that she violated N.J.A.C. 4A:2-2.3(a)(1), failure to perform duties; (3), inability to perform duties, in that she had an attitude of complacency that rendered her unable to motivate herself to perform as her duty as required; (6) conduct unbecoming a public employee, in that she entered false information and neglected her vital duties in a correctional setting, acts that have the ability to undermine the public's trust in government and its employees and bring discredit to the institution, Karins v. Atlantic City, 152 N.J. 532, 557 (1998); (7) neglect of duty; and (12) other sufficient cause, in that she violated

Policy and Procedures Manual Sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1190 and 1250.

Sanction

The appointing authority determined that the appellants should be terminated. Appellants argue that such a penalty is inappropriate. Each notes that they have no prior disciplinary history for performance-related issues. Additionally, each has served for a considerable time, Royster since March 2004, and Blaszkowski since March 2006.

As noted earlier, each officer points to In the Matter of Nolan Cox. Cox was a Mercer County corrections officer who was charged with misconduct for failing to perform the majority of the routine security checks in his assigned location during an overnight shift. Cox had been an officer for about twenty years. On February 27, 2012, he was assigned to a Pod during the overnight shift. Like the appellants, his responsibility was to patrol his unit at least once every thirty minutes and make a visual check to assure the safety and security of the inmates in this maximum security area. The required checks involved walking the unit. A review of the security footage showed that Cox had only performed three of his required security checks during his shift. Additionally, the logbook contained an entry next to each half-hour entry which read "all secure." This indicated that Cox had made the security checks, but the recordings showed that he had not. He was charged with violating procedures and falsifying the entries in the logbook. Cox had one prior major discipline, resulting in a ten-day suspension, and two subsequent reprimands. Cox explained that since it was a quiet night on the tier, he wrote "all secure" in the log book. He acknowledged that he had not made his rounds that night.

The appointing authority imposed a forty-five-day suspension for misconduct. On appeal, the ALJ dismissed the falsification charge as unproven and reduced the suspension to a five-day suspension, but the Civil Service Commission reinstated the falsification charge and imposed the forty-five-day suspension. The Appellate Division

affirmed the Board's final decision, noting the "substantial deference" it grants to agencies unless their decision is "arbitrary, capricious or unreasonable."

The appellants point to the Commission's decision in Cox to impose only a forty-five-day suspension as proof that Burlington County's decision to remove them cannot be justified. Indeed, counsel for the appellants note that the Commission could have imposed up to a six-month suspension on Cox had it deemed Mercer County to have been too lenient.

The proper penalty to be imposed when a corrections officer fails to perform required security checks, thereby neglecting his/her duty, has been the subject of consideration by the appellate courts on a number of occasions. The situation becomes more complicated when the neglectful officer also falsifies records. In Henry v. Rahway State Prison, 81 N.J. 571 (1980), the Commission reduced a penalty imposed on Henry from removal to a ninety-day suspension. He had falsified a report. On appeal, the Supreme Court reinstated the removal, determining that the Board had acted arbitrarily when it "failed to consider a relevant factor, namely, the seriousness of a single instance of a State corrections officer's falsification of a report," particularly in the context of a prison setting, "where order and discipline are necessary for safety and security." As the Court said, "The falsification of a report can disrupt and destroy order and discipline in a prison." Henry, at 580. In Matter of Warren and Sowa, 117 N.J. 295 (1989) ("Warren"), the Court considered an appeal of Warren's thirty-day suspension. The appointing authority had removed him, but the ALJ imposed only a thirty-day suspension. On appeal, the Appellate Division split over whether the Merit System Board (then the name of the current Civil Service Commission) had properly chosen to suspend, and not remove, him from his position as a corrections officer. As that court explained, there was some uncertainty as to the exact charges against Warren, for the Board had expressed concern as to whether the case was limited to neglect of duty or also involved falsification. In upholding the Appellate Division's majority opinion affirming the suspension, as opposed to the dissent which argued that removal should have been

imposed, the Supreme Court stated that in the context of the case, the penalty imposed by the Board was not arbitrary, capricious or unreasonable. However,

> In the clearer context of a corrections officer's trial for intentional falsification of a report, there can be no doubt that the Board must consider this as an offense striking at the heart of discipline within the corrections system. Failure to accord due consideration to that factor in the prison setting would violate implied legislative policies regarding prison security.
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> [Warren, at 299].

In 2007, the Commission ruled in In the Matter of Jose Castillo, 2007 N.J. Agen Lexis 1027. Castillo had been charged with neglect of duty and falsification. The appointing authority removed him from service. On de novo review, the ALJ determined that he had performed the required security tours, although not at the times that he had entered in the logbook. While the ALJ dismissed the neglect charge, the Board concluded that he had neglected his duty when he failed to perform these tours at the required times, and also concurred that he had falsified the records. The ALJ had reduced the removal to a thirty-day suspension. However, the Board imposed a six-month suspension, the maximum suspension allowable. As the Board noted,

> In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. George v. North Princeton Developmental Center, 96 N.J.A.R. 2d 463, 465 (CSV) 1996. Although the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. Henry v. Rahway, 81 N.J. 571, 580 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to

> undermine the public trust. In this regard, the Board emphasizes that a law enforcement officer is held to a higher standard than a civilian public employee. See Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). See also In re Phillips, 117 N.J. 567 (1990). In the instant matter, the Board emphasizes that the appellant is employed in a paramilitary setting and is charged with maintaining security, discipline and order in a correctional facility. The precise requirements of such a position are not mere technicalities but are established and must be adhered to in order to ensure the utmost security of the facility. The appellant's admitted failure to perform his duties in a timely manner and his falsification of official records are, indeed, egregious infractions, whether or not it has been established that grave consequences resulted.

Each disciplinary action must be assessed on its own facts, both as to issues of guilt and of penalty. As the cases surveyed show, and as no doubt others would also indicate, there is no fixed penalty that is always imposed when the charges involve corrections officers who neglect their assigned duty and falsify records in order to make it appear that they have performed the duty. In the present matter, two long-term employees with unblemished performance records (disregarding here attendance violations) both neglected their respective duties and compounded their wrongdoing when they falsified the logbooks. Thus each chose to ignore the need to walk the inspections, and faced with the fact that they not only had to physically do so, but also had to document the experience, they chose to lie in the written record. In the face of recordings that demonstrated their failures, each acknowledged their guilt. Unlike Mercer County, here Burlington County imposed the maximum penalty of removal. Unlike Officer Castillo, who performed at least some of his mandated tours but did not do so when he was required to and then falsified the record, on two separate dates each of these officers did not even conduct the tours. They were "comfortable," "relaxed." As the decisions have noted time and again, in a correctional setting, such attitudes fly in the face of the need to insure to the utmost the safety and security of inmates, officers and the public in general. And the falsification of records is especially "egregious," Castillo, and "strik[es] at the heart of discipline within the corrections system. Warren, at 299. While Cox may suggest some doubt as to how the Commission may view the seriousness of these charges, that decision provides no

reliable guide for the current case. In Cox, the appointing authority chose, for reasons that the record does not reveal, to suspend a neglectful and untruthful corrections officer for forty-five days. While acknowledging the seriousness of Cox's violations, the Board seems to have felt that given the appointing authority's stance on penalty, they would not upgrade the penalty, and it must be noted, given that the original penalty was a suspension, they could not have removed Cox on the de novo appeal. Had Mercer County removed Cox, or imposed a stiffer suspension, it seems clear enough the Commission would have affirmed that sanction.

The teachings of cases that understand the egregious nature of falsification, as well as the serious potential involved when corrections officer fail to perform their required inspections, are far more persuasive than the Cox decision. Here, the appellants each failed to perform several tours on two different dates, chalking their dereliction up to a "comfortable" and a "relaxed" attitude that in a prison setting is simply asking for trouble, and compounded their mischief by falsifying records that are important legal documents the need for reliability of which is obvious enough. Under these circumstances, despite the officers' good records, removal is fully warranted. Carter v. Bordentown, 191 N.J. 474 (2007).

As for the contention that these officers have been the victims of disparate treatment, there is no allegation that they were charged as a result of some invidious discrimination due to their race, sex, age, or other such classification. "Disparate treatment," which involves enforcement of the law "applied and administered by public authority with an evil eye and an unequal hand," State of New Jersey, Township of Pennsauken v. James Schad, 160 N.J. 156, 183 (1999), raises concerns of a "Constitutional" nature. However, both the United States Supreme Court and the New Jersey Supreme Court have limited claims of "disparate treatment" to situations involving differing treatment arising due to such distinctions. Oyler v. Boles, 368 U.S. 448 (1962); State of New Jersey, Township of Pennsauken v. James Schad, 160 N.J. 156, 183 (1999)("The conscious exercise of some selectivity in enforcement is not a constitutional violation unless the decision to prosecute is based upon an unjustifiable

standard such as race, religion, or other arbitrary classification." Schad, at 183.) As for the fact that other officers stationed on other wings may have escaped detection because the original reason for the video review that caught these appellants disappeared when the attorney who requested the review in respect to an unrelated case withdrew his request, these officers cannot expect to avoid the consequences of their misconduct on such a flimsy basis, characterized as "unfairness." They are no different than the speeder caught by a radar device while others speed in the vicinity. Had the device been turned in a different direction, some other speeder might have been caught. That does not justify ignoring the inappropriate conduct of those detected in violation of the law. Finally, it is unclear exactly what the appointing authority understood about Sergeant Hernandez's or a lieutenant-on-duty's conduct vis-a-vis their own inspection requirements at the time in question. The appointing authority must assure that it treats the conduct of these personnel with the same concern as it has shown here for that of these appellants. The Commission may wish to inquire as to the matter. However, the guilt of Royster and Blaszkowski is clear and admitted, and they cannot use the uncertainty about others as an excuse to avoid their removal for the multiple violations of which they are surely guilty.[1]

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[1] As this decision was about to be issued, counsel for the appellants sent me a letter and documents concerning a 2014 disciplinary action by Burlington County against an Officer Cesaretti, who was charged with similar offenses as these appellants. The County entered into a Settlement Agreement in that case, under which the officer received a thirty-day suspension, fifteen days of which were to be held in abeyance. No information as to the factual circumstances involved in that case, or the reasons for the settlement, were provided. According to counsel's letter, this 2014 proceeding was disclosed as a part of discovery in a pending civil service appeal now before Administrative Law Judge Ascione, In the Matter of Eric Warren, Burlington County, OAL Dkt. No. CSR 16796-17. The County terminated Warren for offenses which counsel for these appellants states involved "identical conduct" as that alleged against his clients. Counsel contends that the resolution of the Cesaretti matter highlights the "disparate treatment and fundamental[ly] unfair[ness]" involved in the County's attempt to remove Royster and Blaszkowski. The Stipulation of Settlement entered into in Cesaretti states that it is not precedential for any other matter or any other employee matter that may proceed to the disciplinary process. There is no way to determine from what is before me what the reasons were for the County to settle as it did, such as whether there were evidence problems or other considerations that may have be in play. Be that as it may, that episode occurred at least four years ago. In responding to the late submission, counsel for Burlington County notes that a different administration was in place in 2014. He also notes that there are now pending additional such cases before other administrative law judges, involving the same type of violations.

By itself the information regarding the Cesaretti case says nothing about what should happen to miscreants doing the same things today. As noted, there is no legal basis alleged here for "disparate treatment" as that term is defined. As for the fairness argument, the comments set out above apply.

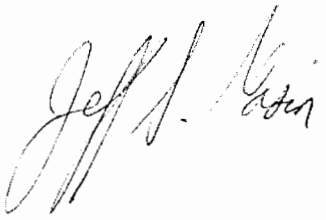
IT IS HEREBY ORDERED that the appeals filed by Officers Eugene R. Royster and Kate E. Blaszkowski be **DENIED** and they **BE REMOVED** from their positions as corrections officers. Officer Royster's removal is effective as of September 4, 2017. Officer Blaszkowski's removal is effective as of August 30, 2017.

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

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

Finally, in deciding a case before a judge or the Commission, the facts of the instant matter and the appropriate response to the violations proven must, in the first instance, govern the penalty to be imposed. If certain counties, at certain times, under differing administrations, have perhaps taken possibly lax account of the seriousness of the failure of corrections officers to perform their responsibilities, and perhaps more importantly to then lie about having done so, neither the ALJs hearing the appeals nor the Commission need approve such attitudes. The Supreme Court noted the very serious impact of these sort of violations, especially of the fabrications involved, in Henry. Nothing contained in the recent submission suggests a lesser penalty than that imposed in this decision. That said, it may be that the Commission, which has a broader view of the scope of disciplinary cases that come before it on appeal and presumably also an interest in how counties deal with disciplinary charges that do not reach the Commission, may see a need to consider whether there is a need for some additional guidance or directive regarding how matters involving these sort of charges need to be treated in order to assure a reasonable degree of certainty as to the way in which such discipline is imposed.

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



February 6, 2018
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 2/6/18

Date Mailed to Parties: 2/6/18

mph

WITNESSES:

For appellants:

Eugene R. Royster
Kate E. Blaszkowski

For respondent:

Matthew S. Leith

EXHIBITS:

For appellants:

P-1 Not in evidence
P-2 DVD
P-3 Disciplinary History Key for Eugene Royster
P-4 Disciplinary Key for Kate Blaszkowski

For respondent:

R-1 E-mail dated July 14, 2017, McDonnell to Scholtz
R-2 Logbook July 1, 2017
R-3 incident Report
R-4 Preliminary Notice of Disciplinary Action, Royster, 7/27/17 for July 1, 2017
R-5 E-mail dated July 27, 2017, McDonnell to Scholtz
R-6 Logbook for June 3, 2017

R-7 Preliminary Notice of Disciplinary Action, Royster, July 3, 2017 for June 3, 2017

R-8 Incident Report

R-9 Preliminary Notice of Disciplinary Action, Blaszkowski, July 27, 2017, for July 1, 2017

R-10 E-mail dated July 27, 2017, McDonnell to Scholtz

R-11 Preliminary Notice of Disciplinary Action, Blaszkowski, August 24, 2017 for June 3, 2017

R-12 Preliminary Notice of Disciplinary Action, Blaszkowski, July 31, 2017 for June 3, 2017

R-13 Policy 1007

R-14 Policy 1012-1074

R-15 Policy 1172

R-16 Policy 1190

R-17 Policy 1250

R-18 Receipt for Policy Manual, Royster, dated September 27, 2012

R-19 Receipt for Policy Manual, Blaszkowski, dated September 27, 2012

R-20 Disciplinary History, Royster

R-21 Disciplinary History, Blaszkowski

4-4-18

A-1

STATE OF NEW JERSEY

In the Matter of Dario Salas
City of Newark,
Department of Public Works

CSC DKT. NO. 2018-1403
OAL DKT. NO. CSV 17734-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 4, 2018 BW

The Civil Service Commission, at its meeting of April 4, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 17734-17
AGENCY REF. NO. 2018-1403

IN THE MATTER OF DARIO SALAS, CITY OF NEWARK, DEPARTMENT OF PUBLIC WORKS.

William P. Hannan, Esq., appearing for appellant Dario Salas (Oxfeld Cohen, attorneys)

France H. Casseus, Esq., appearing for respondent City of Newark (Kenyatta K. Stewart, Acting Corporation Counsel, attorneys)

Record Closed: March 16, 2018 Decided: March 19, 2018

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

By Final Notice of Disciplinary Action dated October 30, 2017, and made effective July 28, 2017, the City of Newark, Department of Public Works (City), removed appellant Dario Salas (appellant) from his civil service position as a Truck Driver (CDL) for conduct unbecoming a public employee, misuse of public property, and other sufficient cause, namely that he allegedly engaged in a private debris collection while on his assigned garbage route. Appellant filed a request for a hearing appealing his

removal, which appeal was filed with the Office of Administrative Law by the Civil Service Commission for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 on December 1, 2017.

The matter was assigned to me on December 6, 2017. On December 18, 2017, I convened a telephonic case management conference. Among other issues discussed, a hearing date for February 21, 2018, was scheduled.

Prior to the scheduled plenary hearing, the parties communicated that they were in the process of negotiating a resolution of the matter and, accordingly, the hearing was adjourned. The parties were given the opportunity to reduce the settlement to writing. Under cover of March 16, 2018, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the applicable law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

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

March 19, 2018
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

Mailed to Parties:
id

RECEIVED
2018 MAR 16 A 10:
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Dario Salas, Appellant, v. CITY OF NEWARK, Respondent.	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 17734-2017 N** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

IT IS HEREBY AGREED by and between the City of Newark ("City"), Service Employees International Union, Local 617 ("Union"), and Employee, Dario Salas ("Salas"), to resolve the disciplinary matter as it relates to the Final Notice of Disciplinary Action ("FNDA") dated October 30, 2017. Rather than continuing further with Salas' termination on the charges of conduct unbecoming of a public employee; misuse of public property including motor vehicle; and other sufficient causes, as codified at N.J.A.C. 4A:2-2.3(a), the City, the Union and Salas (collectively referred to hereinafter as the "Parties") have determined to resolve this matter by this Agreement, and agree as follows:

1. The Parties hereby agree that all charges associated with the FNDA issued on October 30, 2017 will be upheld.
2. The City will amend the disciplinary action in the FNDA dated October 30, 2017 from removal/termination to suspension based on the charges.
3. The Parties agree Salas will serve a suspension period of Five (5) months commencing July 28, 2017, based on the charges reflected in the FNDA.
4. The Parties agree the period following the Five (5) months suspension until the date Salas returns to work will be deemed an unpaid leave of absence.

5. Salas shall waive and will not be entitled to any back pay from the date of his initial removal until the date of his return to work.
6. The Parties acknowledge under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
7. Salas further waives any and all rights or claims which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
8. Salas and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
9. Salas and the Union each further agree that there is no consideration due Salas, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.
10. Except for the assessment of Salas' disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.
11. Salas and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

12. Salas is bound by this Agreement. Anyone who succeeds to Salas' rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.
13. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.
14. Salas and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
15. This Agreement contains the sole and entire agreement between Salas, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Salas specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
16. Salas agrees and acknowledges that he has been fully and fairly represented by his Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.
17. Salas agrees and acknowledges that he has had full opportunity to review this Agreement with his counsel and/or union representation and he enters into same knowingly and voluntarily.
18. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
19. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE**

COMMISSION shall not interfere with the rights of either party to pursue the matter further.

20. By signing this Settlement Agreement, Salas states that:
    a. He has read it;
    b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;
    c. He agrees with everything in it;
    d. His representative negotiated this Agreement with his knowledge and consent;
    e. He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so; and
    f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

3/16/18
Date

BY: _____
City of Newark Department of Public Works

3/2/2018
Date

BY: _____
Union Attorney/Representative

March 2, 2018
Date

Dario Salas
Dario Salas

Approved as to Form and Legality:

3/2/18
Date

Law Department

CERTIFICATION

I, Dario Salas, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

March 2, 2018
DATE

Dario Salas
NAME

4-4-18

A-1

STATE OF NEW JERSEY

In the Matter of Joseph Sanger
City of Newark,
Police Department

CSC DKT. NO. 2017-943
OAL DKT. NO. CSV 16885-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 4, 2018 BW

The Civil Service Commission, at its meeting of April 4, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16885-16

AGENCY DKT. NO.: CSC 2017-943

IN THE MATTER OF JOSEPH SANGER,
CITY OF NEWARK POLICE DEPARTMENT.

Bette R. Grayson, Esq., for Appellant Joseph Sanger(Grayson & Associates, attorneys)

Kimberly Holmes, Assistant Corporate Counsel, for Respondent City of Newark Police Department

Record Closed: February 23, 2018 Decided: February 23, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals a Final Notice of Disciplinary Action, dated September 27, 2016, providing for a penalty of twelve days suspension.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on November 4, 2016.

A settlement agreement was submitted to the undersigned on February 23, 2018, signed by the parties.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Appellant's appeal is withdrawn with prejudice.

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

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

February 23, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 3-1-18

Date Mailed to Parties: MAR 1 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JOSEPH SANGER,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
	:	
v.	:	**OAL DOCKET NO.: CSV 16885-2016N**
	:	
CITY OF NEWARK,	:	
	:	**SETTLEMENT AGREEMENT AND**
Respondent.	:	**GENERAL RELEASE**

RECEIVED
LAW DEPARTMENT
CITY OF NEWARK, N.J.
2018 FEB 13 A 9:32
KH

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Officer Joseph Sanger ("Sanger" or "Appellant"), Bette R. Grayson, Esq., of Grayson and Associates, LLC, counsel for Sanger and the City of Newark ("City" or "Respondent") (Sanger, Grayson and Associates and the City, are collectively referred to hereinafter as the "Parties"). This agreement is made and entered into by the parties in full settlement of Sanger's appeal regarding the above matter.

Departmental disciplinary charges were brought against Sanger by the Newark Police Department. The Final Notice of Disciplinary Action and Specifications dated September 27, 2016 (hereafter "FNDA"), contained the following charge: Care of Property, in violation of Newark Police Department Rules and Regulations Chapter 15:1.4 for which Sanger was suspended twelve (12) days beginning November 7, 2016 and ending November 22, 2016.

It is agreed as follows:

1. The charges listed in the FNDA are upheld.
2. Sanger agrees to accept eleven (11) suspension days. The City will amend Sanger's disciplinary record to reflect the 11-day suspension.
3. The total number of days of back pay to be paid by the Appointing Authority to the appellant is one (1) day.

4. The parties acknowledge Sanger will be credited with pension and seniority time for the one day in which he had been suspended.

5. Sanger further waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.

6. Sanger agrees not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

7. Sanger further agrees that there is no consideration due Sanger, and/or his counsel, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

8. Except for the assessment of Sanger's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

9. Sanger further acknowledges that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration,

that is in any manner grounded, based upon, or related to the FNDA.

10. Sanger is bound by this Agreement. Anyone who succeeds to Sanger's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.

11. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

12. Sanger agrees this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

13. This Agreement contains the sole and entire agreement between Sanger, and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Sanger specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

14. Sanger agrees and acknowledges that he has been fully and fairly represented by Bette R. Grayson, Esq., of Grayson and Associates, LLC, and he is satisfied with that representation and with the terms and conditions of this Agreement.

15. Sanger agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and he enters into same knowingly and voluntarily.

16. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

17. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

18. By signing this Settlement Agreement, Sanger states that:

a) He has read it;

b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c) He agrees with everything in it;

d) His representative negotiated this Agreement with his knowledge and consent;

e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f) He has been given at least 10 days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) He understands that for a period of 7 days following the execution of this Agreement he may revoke this Agreement and

the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

2-22-18
Date

BY: _____
Anthony F. Ambrose III, Director
City of Newark, Police Department

2-8-2018
Date

BY: _____
Joseph Sanger

2-13-18
Date

_____
Bette R. Grayson, Esq.,
Grayson and Associates, LLC
Counsel for Joseph Sanger

Approved as to Form and Legality:

2/13/18
Date

_____
Kimberly K. Holmes, Esq., A.C.C.
Law Department, City of Newark

CL NO. 16-00386

CERTIFICATION

I, Joseph Sanger, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2-8-2018
DATE

Joseph Sanger
Joseph Sanger

4-4-15

B-37

STATE OF NEW JERSEY

In the Matter of April Scott, Police Officer (S9999R), City of East Orange and Police Officer (S9999R), Township of Bloomfield	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2017-1134 and 2017-3109	:	List Removal Appeals

ISSUED: APRIL 10, 2018 (ABR)

April Scott appeals her removal from the eligible list for Police Officer (S9999R), City of East Orange (East Orange), on the basis of an unsatisfactory criminal background. The appellant also appeals her removal from the eligible list for Police Officer (S9999R), Bloomfield Township (Bloomfield), on the basis of an unsatisfactory criminal background. These appeals have been consolidated herein, as they address common issues.

The appellant, a non-veteran, applied for and passed the open competitive examination for Police Officer (S9999R), which had a closing date of September 4, 2013. The subject eligible list promulgated on May 2, 2014 and expired on March 22, 2017.

The appellant's name was certified to East Orange on February 2, 2016 (OL160095) and to Bloomfield on April 27, 2016 (OL160513). In disposing of the February 2, 2016 certification (OL160095), East Orange requested the removal of the appellant's name due to an unsatisfactory criminal background, unsatisfactory driving record, and a negative credit history. In support, East Orange submitted a background report detailing November 19, 2003 and May 8, 2006 arrests; three Temporary Restraining Orders (TROs) filed against the appellant in 2011; responses to calls at the appellant's residence by the Bloomfield Police Department; her financial history; and her involvement in seven motor vehicle accidents. In disposing of the April 27, 2016 certification (OL160513), Bloomfield requested the appellant's removal on the basis of an unsatisfactory criminal record. In support, Bloomfield submitted a New Jersey State Police (State Police) Fingerprint

Identification System Automated Applicant Record dated August 19, 2015, which only detailed the appellant's November 19, 2003 arrest.

With regard to the appellant's criminal background, both East Orange and Bloomfield asserted that the appellant was arrested at age 22 on November 19, 2003 and charged with two offenses under the New Jersey Code of Criminal Justice, which were diverted through the Pre-Trial Intervention (PTI) Program in July 2004. The charges from that incident were ultimately dismissed on August 12, 2005 and the records from that arrest were expunged in March 2009.[1] East Orange also indicated that in May 2006, the appellant, then aged 25, was charged with simple assault, in violation of *N.J.S.A.* 2C:12-1A and endangering the welfare of children, in violation of *N.J.S.A.* 2C:24-4A. East Orange submitted that on July 9, 2007, the appellant pled guilty to the simple assault charge and was sentenced to time served and assessed a $45.00 fine.

On appeal to the Civil Service Commission (Commission), the appellant acknowledges that she was criminally charged following a November 2003 incident, but she contends that she should be restored to the subject eligible list, as the only conviction in her record is the January 2006 simple assault charge, a disorderly persons offense, and because she has significantly rehabilitated herself since the time of her 2007 conviction for that offense. The appellant argues that a proper review of the circumstances surrounding the underlying May 2006 offense "could have changed the outcome." In the instant matter, the appellant does not describe the nature of the November 2003 or May 2006 incidents because of a stated desire to avoid making details about her children's involvement in those incidents public. However, she maintains that she pled guilty to simple assault in 2007 in order to get her children back from the Department of Children and Families (DCF) after it informed her that in March 2007 there had been an incident in the resource home where one of her children was residing. The appellant submits a letter from DCF, dated April 25, 2007, regarding the investigation of that incident. Moreover, the appellant argues that there is significant evidence of her rehabilitation since the May 2006 incident. Specifically, she cites her attainment of a Bachelor's degree from New Jersey City University in 2009 and completion of a number of programs, including anger management, individual therapy, and parenting courses, as evidence of her rehabilitation. Furthermore, she contends that her employment as a Juvenile Detention Officer at the Essex County Juvenile Detention Center from June 2010 to May 2011[2] demonstrates her suitability for the subject title, given that the "facility employed [her] knowing [her] full background history." Moreover, she

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[1] On appeal, the appellant submits a copy of an Order of Expungement issued by the Monmouth County Superior Court dated March 20, 2009, which ordered the expungement of the records connected to her November 19, 2003 arrest.

[2] In *In the Matter of April Scott* (CSC, decided April 18, 2012), the Commission approved a settlement wherein the appellant resigned in good standing from her position of Juvenile Detention Officer, effective May 12, 2011, in lieu of removal.

submits that she has served as a Family Service Worker with the Essex County Department of Citizen Services since November 2012 without any disciplinary issues.

In response, East Orange, represented by Michael D'Aquanni, Esq., and Bloomfield contend that the appellant's criminal background supports the removal of the appellant's name from the subject eligible list. Specifically, East Orange notes that the appellant acknowledged in her preemployment application that she had been arrested, convicted of a crime, placed on probation, fined, had to post bail, had been the subject of a criminal complaint, and was investigated for child abuse or neglect. It stresses that municipal Police Officers are held to a higher standard of conduct than ordinary employees and it maintains that the appellant does not meet those standards. East Orange and Bloomfield argue that the appellant's criminal history includes a 2003 arrest which culminated in "convictions" for two criminal offenses and a 2006 arrest that resulted in "convictions" for endangering the welfare of a child and simple assault. Bloomfield maintains that it considered the expungement of her 2003 arrest when considering her for appointment, but nevertheless determined that she was not a good candidate for the Police Officer position she sought. In support, East Orange submits copies of a State Police Fingerprint Identification System Automated Applicant Record detailing the appellant's arrest history; a Computerized Criminal History (CCH) record from the State Police dated August 11, 2008 which details the appellant's arrest history; a July 9, 2007 Judgment of Conviction from the Monmouth County Superior Court for the May 2006 simple assault charge; and a July 9, 2007 Order of Dismissal for the May 2006 charge of endangering the welfare of children.

In reply, the appellant argues that East Orange and Bloomfield mischaracterize her criminal record. In this regard, she maintains that her only conviction was for simple assault based upon the above-noted May 2006 incident. She asserts that the November 2003 charges were dismissed following her completion of PTI and were subsequently expunged. She also argues that East Orange and Bloomfield failed to adequately consider the circumstances of the underlying arrest behind the 2003 charges. Moreover, she contends that East Orange's and Bloomfield's factual errors regarding her criminal history supports her restoration to the subject eligible list. She contends that an appropriate consideration of her criminal history pursuant to *N.J.A.C.* 4A:4-4.7 would not support her removal on that basis, as the nature of the underlying incidents were isolated events that were not serious, her age of 22 at the time of the 2003 incident and 25 at the time of the 2003 incident, the 11 years that have elapsed since the most recent charges and the evidence of her rehabilitation since the last incident all support her restoration to the subject eligible list. The appellant submits that the significant evidence of her rehabilitation includes her completion of a Bachelor's degree, trade school program, parenting programs, domestic violence victim counseling, and anger management program, as well as her employment in the

titles of Juvenile Detention Officer and Family Service Worker with Essex County. As to her removal by Bloomfield, the appellant argues that Bloomfield's submissions in this matter demonstrate the flaws in its background report, particularly its statement that she was "convicted" of the charges stemming from the November 2003 incident. In that regard, she notes that she was not convicted following that incident. Rather, her participation in PTI led to the dismissal of the underlying charges in July 2004.

In response to the instant appeal, both East Orange and Bloomfield argue that the appellant's removal from the subject eligible list is also warranted based upon her driving record. In that regard, both East Orange and Bloomfield cite her Driver's Abstract, which shows that she was involved in seven motor vehicle accidents between 2004 and 2014. They contend that such a history falls short of the conduct expected of a municipal Police Officer. Bloomfield also argues that the appellant's pattern of summonses for driving violations supports her removal from the subject eligible lists. Specifically, it notes that the appellant was issued summonses for unsafe operation of a motor vehicle in 2000, 2002 and 2007; careless driving in 2006 and 2007; speeding in 2004; driving while on her cell phone in 2009; and failing to obey traffic control devices in 2009 and 2014.

East Orange also argues that the appellant has an unsatisfactory background which supports her removal from the subject eligible list. In that regard, East Orange presents that the appellant was the defendant in requests for TROs issued against her by the Superior Court, Chancery Division, Family Part, Essex County in February 2011, March 2011 and April 2011. Additionally, it notes that the Bloomfield Police Department responded to multiple landlord-tenant disputes involving the appellant, as well as disputes with her children's babysitter. It submits copies of various incident reports from nine police calls to the appellant's residence between April 2011 and March 2016. Finally, East Orange argues that the appellant's 2006 bankruptcy and her outstanding debt as of June 2016 support its request to remove her from the subject eligible list. It submits an October 13, 2006 Order from the United States Bankruptcy Court, District of New Jersey, which discharged a portion of the appellant's debts pursuant to Chapter 7 of the United States Bankruptcy Code.

Concerning her driving record, the appellant emphasizes that she was not cited following any of the accidents noted in her Driver's Abstract. In support, she submits copies of accident reports dated March 21, 2005, July 27, 2010 and February 14, 2014. The March 2005 accident report states that she was in the process of making a right turn when she was involved in a collision with another vehicle. The July 2010 accident report indicates that she hit a bicyclist who failed to stop at a stop sign at an intersection. The accident report states that the bicyclist fled the scene after being hit. The February 2014 accident report indicates that the appellant was sideswiped by another vehicle and the other driver fled the accident

scene. She argues that Bloomfield has not provided adequate documentation to support her removal from the subject eligible list based upon her driving record, particularly since it did not remove her on that basis when disposing of the July 12, 2015 certification (OL150912).[3]

The appellant contends that East Orange's observation that she was a defendant on three TROs is misleading, as all three TROs were dismissed and had come from the same accuser, a woman that she had previously employed to babysit her children. Moreover, she maintains that East Orange failed to acknowledge that she was a victim of domestic violence and had secured a Final Restraining Order against the father of her children on January 19, 2006. She also contends that there is documented evidence of individuals systematically using the courts to file false restraining orders. In support, she submits an article from that describes a former Newark police officer's alleged use of restraining orders against former girlfriends as a means of retaliating against them. The appellant argues that East Orange cannot rely on the police calls to her residence as evidence of her unsatisfactory background, as the Investigation Reports of these incidents demonstrate that she was only involved as a complainant or a witness, and not as a suspect accused of wrongdoing.

The appellant counters that her credit history does not support her removal from the subject eligible list. She argues that her 2006 bankruptcy is too remote in time to be considered relevant, as 10 years elapsed between that event and the subject certification to East Orange and that bankruptcy no longer appears in her credit report. Moreover, the appellant submits that the majority of her debt amount is attributable to her student loans. As such, it should not preclude her employment. The appellant submits a copy of TransUnion credit report dated September 5, 2017 in support of her contentions regarding her financial history.

CONCLUSION

N.J.S.A. 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4 provide that an eligible's name may be removed from an eligible list when an eligible has a criminal record which includes a conviction for a crime which adversely relates to the employment sought. The following factors may be considered in such determination:

a. Nature and seriousness of the crime;
b. Circumstances under which the crime occurred;
c. Date of the crime and age of the eligible when the crime was committed;
d. Whether the crime was an isolated event; and
e. Evidence of rehabilitation.

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[3] In disposing of the July 12, 2015 certification, Bloomfield bypassed the appellant, who was listed in the 33rd position. The appellant did not appeal her bypass on that certification.

The presentation to an appointing authority of a pardon or expungement prohibits an appointing authority from rejecting an eligible based on such criminal conviction, except for law enforcement, correction officer, juvenile detention officer, firefighter or judiciary titles and other titles as the Chairperson of the Commission or designee may determine. It is noted that the Appellate Division of the Superior Court remanded the matter of a candidate's removal from a Police Officer eligible list to consider whether the candidate's arrest adversely related to the employment sought based on the criteria enumerated in *N.J.S.A.* 11A:4-11. *See Tharpe v. City of Newark Police Department*, 261 *N.J. Super.* 401 (App. Div. 1992). The Appellate Division has held that when candidates for law enforcement titles, including the title of Police Officer, present an expungement, the foundation for that expungement is treated as "[t]he equivalent of 'evidence of rehabilitation' in these circumstances." See *In re J.B.*, 386 *N.J. Super.* 512 (App Div. 2006). *N.J.A.C.* 4A:4-6.3(b), in conjunction with *N.J.A.C.* 4A:4-4.7(d), provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his or her name from an eligible list was in error.

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)9, allows the Commission to remove an eligible's name from an eligible list for other sufficient reasons. Removal for other sufficient reasons includes, but is not limited to, a consideration that based on a candidate's background and recognizing the nature of the position at issue, a person should not be eligible for appointment. *N.J.A.C.* 4A:4-6.3(b), in conjunction with *N.J.A.C.* 4A:4-4.7(d), provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his or her name from an eligible list was in error.

Finally, although an eligible's arrest and/or conviction for a disorderly persons offense cannot give rise to the disability arising under *N.J.A.C.* 4A:4-4.7(a)4, the fact that an eligible was involved in such activity may reflect upon the eligible's character and ability to perform the duties of the position at issue. *See In the Matter of Joseph McCalla,* Docket No. A-4643-00T2 (App. Div. November 7, 2002) (Appellate Division affirmed the consideration of a conviction of a disorderly persons offense in removing an eligible from a Police Officer eligible list). Here, as the appellant was convicted of simple assault, a disorderly persons offense, that offense did not rise to the level of a crime. Nevertheless, the appellant's arrests could still be considered in light of the factors noted in *N.J.S.A.* 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4 to determine whether they adversely related to the employment sought.

In the instant matter, the totality of the circumstances supports East Orange's and Bloomfield's removal of the appellant from the subject eligible list. The appellant's background includes a 2003 arrest, the record of which was expunged in 2009, and a 2006 conviction for simple assault. However, as noted

above, an expungement will not serve to automatically prevent an appointing authority from requesting the removal of an individual seeking a municipal Police Officer position. In applying the factors set forth in *N.J.A.C.* 4A:4-4.7(a)4, the fact the appellant attained a Bachelor's degree; completed a trade school and assorted programs; and has been employed in the title of Family Service Worker since 2012 are factors that mitigate in her favor. On the other hand, the Commission notes that the appellant has a 2006 conviction for simple assault in her record, which cannot be considered an isolated incident, as the underlying charges were similar to the charges which followed her 2003 arrest. Additionally, it is recognized that the appellant was an adult when both incidents occurred, being 22 years old at the time of her 2003 arrest and 25 years old at the time of her 2006 arrest. Moreover, the appellant's employment record also includes a May 2011 resignation in good standing, in lieu of removal, from the title of Juvenile Detention Officer. Furthermore, her record includes three TROs filed against her by her children's former babysitter in 2011, which were eventually dismissed. Finally, the 2006 arrest occurred within seven years of the closing date and the expungement of the 2003 arrest occurred less than four years prior to the closing date for the subject examination.

The appellant's driving record, particularly when viewed in concert with her other background issues, adds further support for the removal of the appellant's name from the subject eligible list by both East Orange and Bloomfield. Specifically, the nine violations shown in her driver's abstract, including a post-closing date summons for failing to obey a traffic control device in December 2014, raise further questions about her suitability for a law enforcement position. In that regard, it is recognized that a municipal Police Officer is a law enforcement employee who must enforce and promote adherence to the law. Municipal Police Officers hold highly visible and sensitive positions within the community and the standard for an applicant includes good character and an image of the utmost confidence and trust. It must be recognized that a municipal Police Officer is a special kind of employee. Her primary duty is to enforce and uphold the law. She carries a service revolver on her person and is constantly called upon to exercise tact, restraint and good judgment in her relationship with the public. She represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560, 566 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). Clearly, the appellant's background, including two arrests, a simple assault conviction, a mixed public employment record, multiple TROs and a significant pattern of driving infractions, reflects poorly upon her ability to enforce and promote adherence to the law. Accordingly, given the totality of the circumstances, both East Orange and Bloomfield have presented sufficient cause to remove the appellant's name from the Police Officer (S9999R) eligible list. It is therefore unnecessary to address the appellant's negative credit history.

ORDER

Therefore, it is ordered that these appeals be denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: April Scott
Solomon Steplight
Michael D'Aquanni, Esq.
Matthew Watkins
Kelly Glenn
Records Center

4-4-18

A-1

STATE OF NEW JERSEY

In the Matter of Rohan Stevens
Trenton Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2016-3320
OAL DKT. NO. CSV 05035-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 4, 2018 BW

The Civil Service Commission, at its meeting of April 4, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 05035-16
AGENCY DKT. NO. 2016-3320

IN THE MATTER OF ROHAN STEVENS,
DEPARTMENT OF HUMAN SERVICES,
TRENTON PSYCHIATRIC HOSPITAL.

Rashidad Hasan, Esq., for appellant, Rohan Stevens

Anita Pinkas, Director, for respondent, Department of Human Services, Trenton Psychiatric Hospital, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 12, 2018 Decided: March 12, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on April 1, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared two Settlement Agreements (J-1 and J-2), which are attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to each settlement as evidenced by their signatures or their representatives' signatures.

2. Each settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 12, 2018 — Judith Lieberman

DATE — **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: 3/12/18

Date Mailed to Parties: 3/13/18

/vj

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement between Rohan Stevens and the Union representative

J-2 Settlement Agreement between Rohan Stevens and the Trenton Psychiatric Hospital

State of New Jersey
Department of Human Services
P.O. BOX 700
TRENTON NJ 08625-0700

PHILIP D. MURPHY
Governor

Sheila Y. Oliver
Lt. Governor

Carole Johnson
Acting Commissioner

RECEIVED
2018 FEB 12 P 3:59
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

February 12, 2018

(Sent via fax to 609-689-4100)
Honorable Judith Lieberman, ALJ
Office of Administrative Law
PO Box 049
Trenton, NJ 08625

Subject: Rohan Stevens v Dept. of Human Services/Trenton Psychiatric Hospital; CSV 5035-2016/Agency Re. No.: 2016-3320

Dear Judge Lieberman:

Attached please find two settlement agreements between Rohan Stevens, his Union representative, and Trenton Psychiatric Hospital. The subject contested matter has now been resolved pursuant to these agreements as part of an all-encompassing settlement. I provided opposing counsel, Rashidah Hasan, with the agreements and she responded with her acknowledgement.

With Your Honor's approval, the subject appeal should be considered closed as the appeal has now been resolved.

If you require any additional information please contact me at: 609-292-9267 or anita.pinkas@dhs.state.nj.us. Thank you for your consideration in this matter.

Sincerely,

Anita Pinkas, Director
Office of Employee Relations

AP
Attachments
c: Rashidah Hasan (Sent Via rhasanlaw@aol.com)
Yvonne Soto-Colon – Trenton Psychiatric Hospital

STATE OF NEW JERSEY
DEPARTMENT OF HEALTH
DISCIPLINARY ACTION APPEAL SETTLEMENT AGREEMENT

1. Institution/Agency — Name/Title Representative
   Trenton Psychiatric Hospital — Yvonne Soto-Colon, ERC
2. Name/Title Employee
   Rohan Stevens, LPN
3. Name/Title Representative of Employee
   Debbie Parks, AFSCME
4. Disciplinary Action Appealed:
   a. [ ] Removal b. [X] Suspension of 6 days [ ] Official Reprimand d. [ ] Demotion e. [ ] Fine of ____
5. a. Offense (s) B2-1, C9-2, NJAC4A:2-2.3(a) 6, and 12 b. Number of Infraction (s) 2, 1 c. Offense Date (s) 03/20/13.
   d. Date of Disciplinary Actions 7/31/13.
6. **The employee agrees to withdraw the appeal and accept:**

   a. [ ] Suspension of _ days b. [ ] Official Reprimand c. [ ] Demotion d. [ ] Fine of e. [ ] Counseling
   f. [ ] Oral Warning g. [X] Written Warning

7. a. [ ] Not-Applicable b. [X] Applicable – The institution/agency agrees to reimburse the employee **1 day** of backpay; with the reduction of this 6-day suspension to a Written Warning, 5 of those days which have already been served will be credited to the 10-day suspension that was agreed to in lieu of a removal (see attached executed agreement). The other 5-days will be for record purposes only.

8. This settlement resolves the pending appeal at the Office of the Administrative Law, CSV 5035-2016, Agency Ref. No: 2016-3320, hereby withdrawing the appeal.

9. The employee waives all claims against the State of New Jersey, the Department of Human Services, their employees, agents or assigns with regard to this matter, including, but not limited to, counsel fees, other monetary relief, or any award of back pay except as may be noted in 7.b. above.

10. The parties to this Settlement Agreement agree that its terms do not establish any precedents and will not be referred to in any forum or manner, except for the assessment of the employee's disciplinary record in any subsequent disciplinary proceedings.

11. The parties voluntarily enter into this Settlement Agreement which fully disposes of all issues and controversies related to the disciplinary action appealed.

Rohan Stevens — Employee — 2/5/18 — Date

Representative of Employee — 2/5/18 — Date

Yvonne Soto-Colon — Institution/Agency Representative — 2/5/18 — Date

I, ROHAN Stevens, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this settlement agreement voluntarily.

STATE OF NEW JERSEY
DEPARTMENT OF HEALTH
DISCIPLINARY ACTION APPEAL SETTLEMENT AGREEMENT

1. Institution/Agency **Trenton Psychiatric Hospital**	Name/Title Representative Yvonne Soto-Colon, ERC
2. Name/Title Employee Rohan Stevens, LPN	
3. Name/Title Representative of Employee Debbie Parks, AFSCME	
4. Disciplinary Action Appealed: 1. a. [ ] Removal b. [X] Suspension of 10 days c. [ ] Official Reprimand d. [ ] Demotion e. [ ] Fine of _____ 2. a. [X] Removal b. [ ] Suspension of days c. [ ] Official Reprimand d. [ ] Demotion e. [ ] Fine of _____	
5. a. Offense (s) A4, E1, NJAC4A:2-2.3(a) 4, 6, and 12 b. Number of Infraction (s) 1. 1 c. Offense Date (s) 4/26/17. d. Date of Disciplinary Actions 5/10/17	

6. **The employee agrees to withdraw the appeal and accept:**

1. [ ] Suspension of _ days b. [ ] Official Reprimand c. [ ] Demotion d. [ ] Fine of e. [ ] Counseling f. [ ] Oral Warning g. [X] Written Warning

2. [X] Suspension of 10 days with 5 to be served b. [ ] Official Reprimand c. [ ] Demotion d. [ ] Fine of e. [ ] Counseling f. [ ] Oral Warning g. [ ] Written Warning

7. a. [X] Not-Applicable b. [ ] Applicable – The institution/agency agrees to reimburse the employee _____ of backpay.

8. The employee agrees to withdraw his/her appeal and agrees not to initiate and/or pursue other appeals.

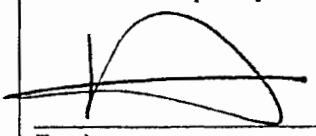
9. Mr. Stevens acknowledges that he must follow all supervisory direction and interact with peers and supervision in a professional manner. Any further incident will be cause for disciplinary action up to and including removal.

10. This settlement resolves the suspension of 6 days which is pending appeal at the Office of Administrative Law therefore the appeal at OAL identified as CSV 5035-2016, Agency Ref. No: 2016-3320 is hereby withdrawn.

11. The employee waives all claims against the State of New Jersey, the Department of Human Services, their employees, agents or assigns with regard to this matter, including, but not limited to, counsel fees, other monetary relief, or any award of back pay except as may be noted in 7.b. above.

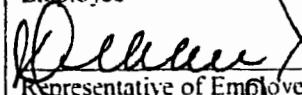
12. The parties to this Settlement Agreement agree that its terms do not establish any precedents and will not be referred to in any forum or manner, except for the assessment of the employee's disciplinary record in any subsequent disciplinary proceedings.

13. The parties voluntarily enter into this Settlement Agreement which fully disposes of all issues and controversies related to the disciplinary action appealed.



Rohan Stevens — 1/29/18

Employee — Date



1/29/18

Representative of Employee — Date

Yvonne Soto-Colon, ERC — 1/29/18

Institution/Agency Representative — Date

I, Robin Stevens, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this settlement agreement voluntarily.

4-4-18

A-9

STATE OF NEW JERSEY

In the Matter of Rhonda West
Jersey City School District

CSC DKT. NO. 2017-2002
OAL DKT. NO. CSV 01509-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2018 BW

The appeal of Rhonda West, Security Guard, Jersey City School District, seven working day suspension, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on January 16, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 4, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF APRIL, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01509-17
AGENCY DKT. NO. 2017-2002

IN THE MATTER OF RHONDA WEST,
JERSEY CITY SCHOOL DISTRICT.

Seth Gollin, Esq., AFSCME, for appellant Rhonda West pursuant to N.J.A.C. 1:1-5.4(a)(6)

Teresa L. Moore, Esq., for respondent Jersey City School District (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: November 30, 2017 Decided: January 16, 2018

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Jersey City School District suspended security guard Rhonda West for seven working days for insubordination, conduct unbecoming a public employee, and other sufficient cause, including violation of Security Department policies.

PROCEDURAL HISTORY

On or about October 14, 2016, the Jersey City School District served Rhonda West with a Preliminary Notice of Disciplinary Action (PNDA). (J-1.) A departmental hearing was held on October 20, 2016, and the charges of insubordination, conduct unbecoming a public employee, and other sufficient cause, including violation of Security Department policies, were sustained. (J-2.) On or about December 16, 2016, the Jersey City School District served West with a Final Notice of Disciplinary Action (FNDA), suspending her for seven working days, beginning January 1, 2017, and ending January 11, 2017. (J-2.)

West appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on February 1, 2017. The hearing was held on October 30, 2017, and the record remained open for post-hearing submissions. The record closed on November 30, 2017.

FACTUAL DISCUSSION

Lakeisha McGoy and Celeste Williams testified on behalf of the Jersey City School District. Rhonda West testified on her own behalf.

Background

I **FIND** the following **FACTS** in this case:

On January 7, 2002, West was appointed by Jersey City Public Schools as a security guard. In the 2016–2017 school year, West was assigned as a security guard at Snyder High School. The chain of command for security is director of security, chief of security, field supervisor, senior security guard, and security guard.

On Saturday, October 1, 2016, the Snyder High School football team had a game at Cochrane Field at Caven Point in Jersey City, beginning at approximately 1:00 p.m. West was assigned as a security guard at the football game, beginning at 12:00 p.m. The

assignment was voluntary, for overtime pay. West's position at the football game was in front of the spectator stands. The stands are located on one side of the football field only, behind the visiting team's bench.

Security guard supervisor Lakeisha McGoy has been employed as a security guard by Jersey City Public Schools for approximately twelve years, and has been the chief of security since August 25, 2017. Prior thereto she was a security guard supervisor for three years. McGoy travels to the various schools and makes sure the other security guards are performing their jobs as required. McGoy was working as the field supervisor at the October 1, 2016, football game, and supervising six security guards, including West. West had previously worked other football games. The assignment begins at noon and ends when the game is over. McGoy assigned the guards to their posts and made sure they had their equipment, which consisted of vests and radios. West went to her assigned location in the spectator stands. West was positioned in the stands by the visiting-team fans (#5 on the drawing), another security guard was positioned in the stands by the home-team fans (#4 on the drawing), and McGoy was positioned near the Board of Education security (#6 on the drawing). (R-2.)

West's duties at the football game were to ensure: no spectators were leaning on the fence in front of the stands, for safety reasons; the walkways were clear; spectators were sitting and not throwing anything; and that there were no fights or other prohibited contact. McGoy advised West of her duties when she handed her the equipment.

McGoy relieved West of her duties prior to the end of the football game. West turned in her work vest and radio to McGoy before she left the football game. West wrote an Incident Report. (R-7.) McGoy wrote an incident report, dated October 1, 2016, to Arthur Youmans, director of security for the Jersey City School District. (R-6.)

McGoy's Incident Report (R-6) states:

> While working the Snyder High School football game at Caven Point, I addressed West to inform her that a spectator was leaning over the fence. The spectator was right in view of her. She told me that I didn't have to tell her the same thing over

> and over. She was waiting for her to finish talking to the coach before she interrupted them. I kept trying to explain to her that it was a safety risk with the spectator leaning over the fence regardless of who she was speaking to. She kept insisting that she should not interrupt them from their conversation. Her voice began to elevate in an aggressive manner and the fans appeared to be listening to her aggressiveness so I asked for her to step away so we could handle the situation without people listening but in an area where her post could still be monitored. She refused. At that time, I informed West that she was being removed from her duties. She told me that she was not going anywhere. At 2:30 pm, I radioed in to central office to inform the desk to log in that West is being removed from her work duties as of 2:30 pm. As Rhonda was handing in her radio and work vest she said to me "Now who's going to tell them not to lean over the fence now." I told her that it was not her concern at this point. She also stated that my actions were harassment. I informed West that my job is to make sure the guards are performing their duties correctly.

West's Incident Report (R-7) states:

> On October 1, 2016 I Rhonda West arrived at my overtime location at 1:00 p.m. At that time I was met by Supervisor Lakeisha McGoy. She then gave me my smock and radio. I then went to the post I was assigned. Twenty minutes later Supervisor McGoy walked to my post and asked me to make sure my radio was turned up and on, I did as she asked while she stood in front of me to make sure. After she was satisfied Supervisor McGoy walked away. About forty minutes later the cheerleader coach from Belleville High School asked a mother from one of the cheerleaders about a concern of her daughter. Supervisor McGoy walked over to my post once again. I stated to Supervisor McGoy the cheerleader coach from the visiting team needed to speak to one of her parents about a concern for her daughter. Supervisor McGoy then said to me "I don't care. I told you YOU NOT TO LET ANYONE LEAN OVER THE GATE." I tried to explain, but Supervisor McGoy didn't want to hear what I had to say. She then asked to speak to me but at that time everyone was looking and listening. I believed I was harassed and humiliated, because she reprimanded me in front of everyone. Supervisor McGoy informed me that I was relieved of my duties at 2:38 p.m., at which time the area I was assigned to became unsafe. Due to this forsaken situation, I will not receive the wages I am entitled to in its entirety. The parent then apologized to me for any trouble she may have caused.

West was charged with insubordination, "unbecoming conduct," and "other just cause, including violation of Security Department policies." (J-1; J-2.)

Petitioner's disciplinary history includes a three-day unpaid suspension in September 2015 for neglect of duty, failure to perform duties, insubordination, and other just cause; a four-day unpaid suspension in September 2013 for conduct unbecoming a public employee; and a two-day unpaid suspension in April 2010 for conduct unbecoming a public employee.

Testimony

Lakeisha McGoy

From her position, McGoy saw a spectator lean over the fence near West. McGoy tried to reach West over the radio. West did not respond, so McGoy had to walk over to West. As McGoy walked up to the West, the spectator moved back. McGoy saw the radio inside West's right pocket, clipped to the pocket, with the speaker facing West's body. McGoy asked West if her radio was on, and West said that it was. McGoy asked where it was and West said that it was in her pocket. McGoy asked to see it to verify it was turned up. When West turned the knob on the radio it beeped, which is what it does when the radio is first turned on, so McGoy knew the radio had not been on.

Later, from her position McGoy saw a female spectator, approximately 5'7" or 5'8" tall, lean all the way over the fence to talk to the football coach, who was on the field. McGoy was certain that the female spectator was talking to a football coach, because it was a male, wearing headphones and holding a clipboard. The cheerleading coach is female and was next to the cheerleaders. The spectator was located a few feet from West. McGoy tried to reach West over the radio, but West did not respond. McGoy walked over to West, and as she addressed West the spectator moved back and walked up into the stands. McGoy told West that she needed to remove the spectator from the fence, and that she had been calling her over the radio and received no response. West said that she did not hear McGoy. McGoy told West that she needed to turn her radio up and that she never has her radio up. West also told McGoy that she was not going to

move the spectator until the spectator was finished with her conversation, because she was not going to interrupt her while she was talking. McGoy told West that the spectator was almost over the fence and that if anyone had tapped her, she would have fallen over the fence. West was getting loud and McGoy noticed that spectators were looking at them, so she told West to move to the side to avoid having the conversation in public. West refused to move to the side to discuss the situation. As a result, McGoy instructed West to turn in her vest and radio and sign out for the day. West initially refused to turn over the vest and radio, so McGoy, to document it, radioed in to the central station that as of 2:35 p.m. West was being relieved of her duties. Only then did West walk to the security truck and turn in her vest and radio. West was replaced by another security guard for the remainder of the game.

For safety reasons, spectators cannot lean on the fence or over the fence, as they could fall or the fence could give out. McGoy took several photographs of the stands to show why it was important that spectators not lean on or over the fence. (R-3; R-4; R-5.) The silver fence is approximately 3.5 feet high, and there is also a black fence on the field. If a spectator were to fall, the spectator could land between the two fences, or on the field.

After the game, McGoy wrote up an incident report for Director Youmans to explain why West was relieved of her duties, and to request a disciplinary hearing. (R-6.) Her incident report did not document everything that happened. She did not mention that West's radio was off, or that it was in her pocket. She only mentioned the reasons related to why West was relieved of her duties. West was disrespectful and going back and forth with her superior.

Security guards are provided with the Security Department Manual and are expected to review it. According to McGoy, various portions of the Security Department Manual were violated, including: ability to understand, remember, and carry out oral and written directions; ability to learn quickly from oral and written explanations and from demonstrations; ability to note significant conditions by observation and to take proper action; ability to work harmoniously with associates, visitors, and other groups of people; ability to follow prescribed procedures; ability to react promptly to situations requiring

action; ability to remain alert; ability to maintain order among individuals; ability to be courteous but firm with individuals; ability to make judgments; ability to take proper action in preventing potential accidents; ability to deal with people politely and helpfully beyond giving and receiving of instruction; and ability to learn to use various types of equipment. The Code of Conduct applies because it requires that the security guards provide a safe environment in their assigned school/building for staff members, students, and the general public, and protect life and property.

West knew the spectator should not have been leaning over the fence, so upon seeing her do so, West should have immediately gone over to the spectator and moved her from the fence. West did not follow procedure because she did not move the spectator away from the fence and did not have her radio on and up.

McGoy could see straight down the walkway from her location. West and the spectator were not standing where West marked the photograph (R-5). The spectator was not sitting at the front of the stands. When McGoy first walked up to West the spectator was where McGoy circled the photograph (R-5).

Celeste Williams

Williams has been the chief of talent for Jersey City Public Schools for almost three years. She oversees all human-resources functions, including the disciplinary process for non-instructional personnel, like security guards. Once the director of security requests a disciplinary hearing, Williams reviews the information from the director of security and requests any additional documentation detailing the incident and employee history. She determines whether to forward the information to counsel for a discipline case. Sometimes she discusses type or level of discipline with the director. Williams recommended a seven-day suspension based on Civil Service Commission rules on major discipline and West's prior disciplinary history.

Rhonda West

West did not hear McGoy the first time McGoy was trying to contact her. West's radio was attached to her uniform pants, but the speaker part was turned to the inside instead of the outside. She had the radio on, and thought it was not turned all the way up, but it was not. West did not hear McGoy because the music from the press box was playing. When McGoy walked over she told West to turn the radio outward when she turned it up. The radio was not off. The radio was not in her pocket. At prior football games, West always wore her radio on the inside. It was usually all the way up.

West's radio was physically on her uniform pants, "attached to my belt." The radio was clipped to her the way McGoy's radio was clipped to McGoy at the hearing, but facing the inside. The clip is on the back of the radio. The speaker is on the front. She put it against her belt. West did not know the radio was that low. It would have been her responsibility to have her radio turned up to hear a call. She was a little confused about the location of her radio. She had it clipped inside the pocket of her uniform. Her uniform pants are not loose, so it was not all the way in that pocket. The clip was clipped to her pocket, not to her belt.

Later, a female parent went up to the fence.[1] She did not lean over the fence or touch the fence. She stood in front of the fence. She was speaking to the female cheerleading coach for the other team. West asked her to sit down, which she did, and that was the end of it. The spectator continued speaking to the cheerleading coach while she was sitting down. West had no other interaction with that spectator. Maybe McGoy saw it from a distance because McGoy came over and asked West why she did not tell the female spectator to stop leaning over the fence. West explained to McGoy that she did tell the spectator, and that was why the spectator stopped leaning over the fence. West told McGoy that she asked the spectator to sit down and told the spectator that for her safety she could not lean over the fence. But she was not leaning over the fence. She was standing at the fence. McGoy again told West that she had told her not to allow

[1] West referred to the fence as a "gate," but fence is used to avoid confusion, as McGoy testified it was a fence and the photos depict a fence.

anyone to lean over the fence. West tried to explain to McGoy that the spectator was not leaning over the fence, and it escalated from there. McGoy said she was not going to argue with West and that West was given an order and did not listen. West was trying to explain, but McGoy did not want to hear what West had to say and kept interrupting West. The spectator was just sitting there. McGoy asked to speak with West. They moved over to the side, but the band was playing. When the band stopped playing, West was still trying to explain about the fence situation. McGoy said she did not care, and she told West not to let anyone lean on the fence. McGoy did not want to hear West's explanation, and relieved her of her duties. After McGoy left, the spectator came up to West and said she was sorry if she caused West any trouble. West told her that she did not, and then walked over and handed in her radio and smock. McGoy was on the other side of the field and could not see, or it could have looked like the spectator was standing up. The spectator was a little close to the fence, but West asked her to move for her safety, because she could not be that close to the fence or in the walkway.

West read the Security Department Manual. West understood that if a supervisor gives a direction, she is to follow the direction.

Additional Findings of Fact

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

Appellant's testimony was inconsistent with and overborne by the record, including the documentary evidence and the concise, consistent, and credible testimony of McGoy. By way of example, West was specifically asked, "Was the radio in your pocket?," and her response was "No." West also testified that the radio was on, but it was turned down. However, West later changed her testimony regarding the location of her radio. After initially testifying that the radio was not in her pocket and was clipped to her belt, she later testified that she had become confused, and the radio was clipped to and inside her pocket. West's testimony was overborne by the credible testimony of McGoy that West's radio had been off because McGoy heard it turn on, and that McGoy saw the radio inside West's pocket, clipped to the pocket with the speaker facing West's body. Further, given the demonstration by West as to how the radio was located in her uniform pants pocket, the clip was at the top and the speaker would not have been exposed because it would either have been turned in toward West's body.

West and McGoy each indicated on photograph R-5 where the spectator and the coach had been standing. West indicated that the spectator was standing just in front of the bottom of the stands on the opposite side of the walkway from the fence and that the coach was at the fence on the field, while McGoy indicated that the spectator was standing at the silver fence, and the coach was standing back from the black fence on the field. It is unlikely that the spectator would have been standing where West indicated, if she was trying to speak to a coach on the field, and she would have been standing in front of and blocking the view of others watching the game. Further, had the spectator not been leaning on the fence or obstructing the walkway, there would have been no reason for McGoy to have walked from her location all the way to the other side of the field to speak with West.

In view of the foregoing, I credit the testimony of McGoy and not the testimony of West, and **FIND** the following additional **FACTS** in this case:

When McGoy first walked over to speak with West, a spectator had been leaning over the fence and continued to do so until McGoy approached. West failed to instruct the spectator to move from the fence. West also failed to respond to the radio call from

McGoy. West's radio was inside West's pocket, clipped to the pocket, with the speaker facing West's body, and it was turned off.

When McGoy next walked over to speak with West, a spectator had been leaning on the fence talking to a coach and continued to do so until McGoy approached. West again failed to instruct the spectator to move from the fence. West again failed to respond to the radio call from McGoy. West's voice in speaking to McGoy became elevated and spectators were watching. When McGoy advised West that she was being removed from her duties, West refused to comply until McGoy radioed it in to the central office.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the executive branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including insubordination, conduct unbecoming a public employee, and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(2), (6), and (12). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

West is charged with insubordination, conduct unbecoming, and other sufficient cause, including violation of the Security Department Manual. The burden of proof is on

the Jersey City School District to prove the charges by a preponderance of the credible evidence.

N.J.A.C. 4A:2-2.3(a)(2) does not define insubordination. Black's Law Dictionary (10th ed. 2014) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Likewise, N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Emmons, which involved a police officer charged with conduct unbecoming, the Appellate Division also held that conduct unbecoming is "any conduct which adversely affects the morale or efficiency of the bureau." Ibid. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

West acknowledged reading the Security Department Manual, which requires, inter alia, that she remember and carry out oral directions, work harmoniously with associates, follow prescribed procedures, remain alert, and react promptly to situations requiring action. In both instances, the spectators remained leaning over the fence until McGoy approached. West twice failed to respond to radio calls and twice failed to instruct the spectators to move from the fence. West became combative with McGoy in view of spectators when McGoy approached her the second time, and then when West was removed from her duties, she refused to comply until McGoy radioed it in. Accordingly, I **CONCLUDE** that the charges of insubordination, conduct unbecoming a public employee, and other sufficient cause, including violation of the Security Department Manual, are sustained.

The penalty imposed by the Jersey City School District was a seven-working-day suspension. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission

must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations, and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated.

In view of West's conduct on October 1, 2016, as well as her disciplinary history of three prior suspensions, ranging from two to four days, I **CONCLUDE** that a seven-working-day suspension is an appropriate penalty in this matter.

ORDER

I **ORDER** that the charges of insubordination, unbecoming conduct, and other just cause, including violation of Security Department policies, are **SUSTAINED**, and that the penalty of a seven-working-day suspension is **AFFIRMED**.

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

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

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

1/16/18
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 1/16/18

Date Mailed to Parties: JAN 18 2018

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Appellant:

Rhonda West

For Respondent:

Lakeisha McGoy
Celeste Williams

EXHIBITS IN EVIDENCE

Joint

J-1 PNDA
J-2 FNDA
J-3 Stipulation of Facts

For Appellant:

None

For Respondent:

R-1 Security Department Manual excerpt
R-2 School drawing
R-3 Photograph
R-4 Photograph
R-5 Photograph
R-6 Request memo, dated October 1, 2016
R-7 Security Department Incident Report

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
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DEIRDRE L. WEBSTER COBB
Chair/Chief Executive Officer

October 9, 2018

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Re: *In the Matters of Satrice Thomas, City of Newark, Department of Law* (CSC Docket No. 2017-419; OAL Docket No. CSV 15862-16)

Dear Ms. Stehling and Mr. Zidziunas:

The appeal of Satrice Thomas, a Telephone Operator, City of Newark, Department of Law, of her removal, effective December 28, 2015, was before Administrative Law Judge Barry E. Moscowitz (ALJ), who issued his initial decision on April 6, 2018 recommending upholding the removal. Exceptions to the initial decision was filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The Civil Service Commission (Commission) received this matter on April 18, 2018 and received one 45-day extension of time, as required, to make its final decision no later than July 17, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Since one of the Commission members must be recused from this matter, leaving no quorum to vote, the Commission requested and received the consent of the parties, as required, for two additional 45-day extensions. However, the appointing authority did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective October 16, 2018.

Sincerely,

Nicholas F. ~~Angiulo~~
Deputy Director

Attachment

c: The Honorable Barry E. Moscowitz, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 15862-16
AGENCY DKT. NO. 2017-419

IN THE MATTER OF SATRICE THOMAS,
CITY OF NEWARK, DEPARTMENT OF LAW.

Lynsey A. Stehling, Esq., for appellant (Law Offices of Daniel J. Zirrith, LLC, attorneys)

John J. Zidziunas, Esq., for respondent

Record Closed: February 1, 2018 Decided: April 6, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

Satrice Thomas is a telephone operator in the City of Newark, Department of Law, but she has created an atmosphere of hostility and uneasiness within the Municipal Prosecutor's Office, and its personnel is unable or unwilling to work with her. Should Thomas be terminated even though she has no prior discipline? Yes. Progressive discipline may be bypassed when its application would be contrary to the public interest. See In re Herrmann, 192 N.J. 19, 33 (2007).

PROCEDURAL HISTORY

In a Preliminary Notice of Disciplinary Action dated December 28, 2015, the City of Newark notified Thomas that she had been charged with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). In the notice, Newark specified that it was seeking her immediate suspension because her actions in the Municipal Prosecutor's Office had created an atmosphere of hostility and uneasiness within the office and its employees are unwilling to work with her. The notice further specified that the latest incident, which triggered the immediate suspension, was when Thomas intentionally and violently bumped into an assistant municipal prosecutor without apology or explanation. As a result, Newark specified that it is a hazard and a disruption for Thomas to remain in its employ, and suspended her.

Thomas did not request a departmental hearing, and a Final Notice of Disciplinary Action was issued.

In the Final Notice of Disciplinary Action dated July 22, 2016, Newark notified Thomas that it had sustained the charges in the preliminary notice and that it had added additional charges: incompetency, inefficiency, or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1), and insubordination, in violation of N.J.A.C. 4A:2-2.3(a)(2).

Newark also added additional specifications. In its narrative, Newark specified that Thomas was insubordinate to an assistant municipal prosecutor when she twice returned work to him that he had previously assigned. In addition, Newark specified that Thomas engaged in conduct unbecoming a public employee when she continually talked over the chief prosecutor when he attempted to address her, and that she also engaged in conduct unbecoming a public employee when she talked over others during a staff meeting. Newark also specified that Thomas frequently initiated unpleasant conversations with other employees, including attorneys, in front of the public, causing a hostile and uncomfortable work atmosphere for its employees. Similarly, Newark specified that some members of the public complained that Thomas was "rude" and "nasty" to them on the telephone. Finally, Newark specified that Thomas would absent herself from the office

and then notify her supervisor after the fact, when she knew that she was supposed to notify her supervisor before the fact to ensure that her station would be sufficiently staffed.

On August 1, 2016, Thomas appealed the determination.

On October 18, 2016, the Civil Service Commission transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On December 13, 2017, I held the hearing; on February 1, 2018, the parties submitted their post-hearing briefs, and on that date, I closed the record.

DISCUSSION AND FINDINGS OF FACT

Warrick

Wynesha Warrick is an assistant corporation counsel for the City of Newark. She currently serves as an assistant municipal prosecutor for Newark and has worked in that capacity for more than two years. Warrick described her hire in September 2015 and the staffing in the Municipal Prosecutor's Office that followed. Significantly, Warrick detailed the work that prosecutors in the office need to do and the work that staff in the office need to do to support them.

"Follow-Up"

Warrick testified that when she was first hired, the office was not fully staffed. There were more desks than lawyers, more courtrooms than lawyers, and more work than lawyers, so the support staff, which consisted of Thomas and a paralegal, sat in the back of the office with the assistant prosecutors who were already on staff. Warrick explained that when additional prosecutors were hired about a month later, they displaced Thomas and the paralegal from their desks in the back of the office, and Warrick was

given her choice of desks. Warrick stated that when she was given her choice of desks, she chose the one where Thomas sat, and that is when her troubles with Thomas began. "If bitches wanted my desk, they should have said something," Warrick recounted Thomas muttered when Warrick chose her desk.

Warrick testified that the office was eventually staffed with five assistant prosecutors, and that the chief prosecutor and his first assistant were working prosecutors, so the number of prosecutors who needed support was seven. Including Thomas, the number of support staff, however, was only three. Warrick explained that support staff was needed for "follow-up," that is, they were needed after court to file documents, issue subpoenas, and contact witnesses, including police officers and victims of crime, and that all support staff, including Thomas, had been directed to perform this follow-up work by the chief municipal prosecutor. Specific prosecutors were assigned to specific courtrooms, and specific staff were assigned to those courtrooms to support the prosecutors assigned to the courtrooms.

Warrick testified that Thomas refused to perform any follow-up work for her when she asked her to do any. Warrick explained that when she handed Thomas work, Thomas just handed it back to her, so Thomas filed no documents, issued no subpoenas, and contacted no witnesses. As a result, Warrick had to do it all by herself—causing her to stay late most workdays.

Warrick testified that she complained about it at least three times a week to the first assistant municipal prosecutor and to the chief municipal prosecutor, but they complained in response that they already knew about it because Thomas had refused to perform any follow-up work for too.

Warrick testified that Thomas would spend time on Facebook and on Facetime instead of performing the follow-up.

Significantly, Warrick did not complain that she had to do all the follow-up work herself or that she had to stay late to complete it. What Warrick complained about was the fact that the office was not functioning as it should. Indeed, Warrick prides herself on

the work that she does for the victims of crime and for the people of Newark. That is why Warrick cannot accept Thomas spending time on Facebook or on Facetime instead of performing the follow-up. Stated otherwise, Warrick was not complaining about some internecine conflict between her and Thomas; she was pleading for the restoration of the proper functioning of a public office.

Warrick testified that she witnessed the incident alleged in the first enumerated specification attached to the Final Notice of Disciplinary Action. Warrick explained that she saw Thomas hand work back to the first assistant municipal prosecutor twice in one day (once before lunch and once after lunch) but that she did not know which day. Similarly, Warrick stated that she had also seen Thomas return work to other prosecutors on other days.

Warrick acknowledged on cross-examination that she did not know the dates that Thomas returned work, and that follow-up is not specified in the job description for Thomas. In addition, no supervisor testified that follow-up was required of Thomas. Nevertheless, the record contains no evidence that Thomas filed a complaint or grievance that she was being asked to perform work out of title.

"Hostility and Uneasiness"

Warrick testified that everyone was uncomfortable around Thomas and that no one wanted to interact with her. Warrick explained that Thomas would curse and tantrum. For example, Warrick stated that Thomas would bang on the supply cabinets if they were locked and yell for someone to open them when she needed supplies. More significantly, Warrick said that Thomas was rude to the victims who came to the office and acted frustrated with the fact that she even had to deal with them in the first place.

The most egregious incident about which Warrick testified, however, was when Thomas bumped into her as described in the specifications attached to the Preliminary Notice of Disciplinary Action. Warrick subscribed to the specifications as written and repeated that Thomas intentionally and violently bumped into her without apology. Warrick asserted that Thomas, who had been in a cubicle in the back of the office, had

heard her walking back to her desk and timed it so that Thomas would bump into her when Thomas stepped out of the cubicle. Warrick added that she had been carrying a stack of files and that Thomas bumped into her with such force that she slammed against and fell into the cubicle behind her nearly dropping all the files. Moreover, Warrick noted that Thomas walked away without apology or explanation even after Warrick asked Thomas why she had bumped into her.

Warrick testified that she "couldn't take it anymore" and considered filing charges against Thomas, but explained that she did not do so because she knew she had "something to lose" and did not want to jeopardize her career.

Enumerated Specifications

Warrick also addressed the other enumerated specifications attached to the Final Notice of Disciplinary Action. Regarding the first enumerated specification, Warrick repeated that she witnessed Thomas return work to the first assistant municipal prosecutor. Thus, Warrick agreed with the specification as written.

Regarding the second enumerated specification, Warrick testified that she attended the staff meeting and witnessed Thomas continually talk over the chief municipal prosecutor when he tried to talk to her. Warrick explained that the only reason why the staff meeting was called in the first place was to confront Thomas and address her behavior, but Warrick stated that Thomas would not stand for the constructive criticism and was loud and belligerent in response. Thus, Warrick agreed with the specification as written.

Regarding the third specification, Warrick repeated that she witnessed Thomas being rude with the public in person, but added that she had also overheard Thomas being rude with the public over the phone. Warrick explained that these unpleasant confrontations with the public and with attorneys created a hostile and uncomfortable work atmosphere. Thus, Warrick agreed with the specification as written.

Regarding the fourth specification, Warrick repeated that that she witnessed Thomas being "rude" and "nasty" with the public over the phone and in person. In fact, Warrick explained that she witnessed Thomas doing this all the time. Thus, Warrick agreed with the specification as written.

Regarding the fifth specification, Warrick testified that she noticed when Thomas was not in the office, and explained that it left the staff short-handed. Warrick stated that no one knew where Thomas was, and that she only informed her supervisors when she returned. Thus, Warrick agreed with the specification as written.

Warrick acknowledged on cross-examination that she was not Thomas's supervisor and that she did not know if Thomas had permission to leave her station.

Benjamin

Avion Benjamin was working as the first assistant corporation counsel in the Department of Law and served as a supervisor of the Municipal Prosecutor's Office when Thomas was working there. Before then, Benjamin served as the assistant section chief and then the section chief for the Municipal Prosecutor's Office. As a supervisor of the Municipal Prosecutor's Office, Benjamin had received the complaints about Thomas that the notices specify.

Benjamin testified that the chief municipal prosecutor had complained to her about Thomas's ethic and attitude. Specifically, Benjamin explained that the chief municipal prosecutor had complained to her that Thomas did not get along with the assistant municipal prosecutors in his office, and that she did not get along with members of the public either. Indeed, Benjamin stated that the chief municipal prosecutor had complained to her that Thomas was often absent from her station, so she did not answer the phones as was her duty, and that she refused to do the follow-up work for the assistant municipal prosecutors as she was directed. Moreover, Benjamin said that the chief municipal prosecutor had complained to her that he considered answering the phones and performing the follow-up integral to the job of telephone operator, so he filed these charges against Thomas to underscore the seriousness of the complaints about her.

In addition, Benjamin testified that the paralegal in the Municipal Prosecutor's Office complained to her about Thomas. Benjamin explained that the paralegal complained to her that Thomas had been confrontational with her and had created a hostile work environment. Benjamin stated that she was not surprised by these complaints based upon her own experience with Thomas when Thomas had worked with her in the Department of Law before Thomas's transfer to the Municipal Prosecutor's Office.

Moreover, Benjamin testified that these complaints about Thomas were made so often, and that the work environment had become so untenable, that the chief municipal prosecutor ultimately decided that Thomas was unsuitable for continuation in her position and should be terminated.

Thus, Benjamin testified that Thomas had created an atmosphere of hostility and uneasiness within the office and that all stakeholders (municipal prosecutors, defense attorneys, support staff, police officers, and even volunteers) were unable or unwilling to work with her.

Benjamin acknowledged on cross-examination that she was not a witness to any of the alleged events or incidents, but explained that she did speak to Thomas after the staff meeting Thomas attended where she is alleged to have continually talked over the chief municipal prosecutor and others, and that she told Thomas that such conduct was unbecoming and that she had to stop it.

"It was unacceptable," Benjamin said.

Thomas

Thomas denied all the allegations and refuted all the specifications. She testified that her job duties were limited to those in the job specification and that she performed all of them without complaint and without criticism. Thomas stated that she answered and transferred calls, documented and distributed mail, checked attorneys in and out, and

scheduled conference rooms as needed. Thomas said that she never refused to do any work assigned to her and that she was never disciplined for not doing work assigned to her. In short, Thomas held herself out as a model employee.

Thomas addressed every specification in the Final Notice of Disciplinary Action. She testified that she did not create an atmosphere of hostility and uneasiness within the office and that it was never brought to her attention that anyone expressed an inability or unwillingness to work with her because of her behavior. She explained that she never returned work to a prosecutor, that she was never brought to a meeting to discuss her behavior, and that she never engaged in unbecoming conduct by continually talking over the chief prosecutor when he talked to her. Thomas stated that she never initiated unpleasant conversations with anyone, that she was never "rude" or "nasty," and that she was never away from her desk without permission. Moreover, Thomas said that all the witnesses who testified against her at the hearing were liars and that all the specifications contained in the Final Notice of Disciplinary Action were fabrications.

Regarding the specification contained in the Preliminary Notice of Disciplinary Action that she bumped into Warrick intentionally, purposefully, and violently, Thomas was emphatic that she never bumped into Warrick, let alone intentionally, purposefully, and violently. Thomas did not even allow for the possibility that she could have bumped into Warrick accidentally at some unknown time. As such, Thomas repeated that Warrick is a liar.

Discipline

Thomas has no prior discipline, save for a verbal reprimand for an unspecified incident that occurred in the reception area of the Department of Law on May 19, 2015. This was before her transfer to the Municipal Prosecutor's Office. According to its documentation, her conduct was deemed unprofessional and she was advised that any further conduct deemed unprofessional would result in a written warning.

Credibility

What Thomas said and what Warrick said at the hearing cannot both be true. Given the two options, the choice is clear: Warrick is the more credible witness and I accept her testimony as fact.

More pointedly, Warrick's testimony was straightforward, candid, and descriptive. It also rang true. What Thomas said, on the other hand, did not. Moreover, it was stunning in its denial.

For Thomas to refute every allegation, to call each witness a liar, and to deny every specification is incredible. She also did it with a cold and calm that smacked of insincerity and perfidy. The way she testified aside, I simply cannot accept Thomas's testimony that she never bumped into Warrick. Nor can I accept Thomas's testimony that she was never brought into a staff meeting to discuss her behavior.

Part of this assessment turns on whether either witness had a self-interest to lie. On this score, Thomas had a self-interest to lie to keep her job, whereas Warrick put her professional reputation on the line by complaining about Thomas and then having to testify about it. If anyone is a liar, it is Thomas.

Finally, in denying all allegations and specifications, and in denouncing Walker and Benjamin, Thomas provided a residuum of competent evidence for everything Walker and Benjamin said.

Given this discussion of the facts, I **FIND** that a preponderance of legally competent evidence exists to support all the specifications contained in the Final Notice of Disciplinary Action—including the allegation that Thomas intentionally and violently bumped into Warrick without apology or explanation.

CONCLUSIONS OF LAW

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

Progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. at 33.

In this case, I found that a preponderance of legally competent evidence exists to support all the specifications contained in the Final Notice of Disciplinary Action. Thomas created an atmosphere of hostility and uneasiness within the office, returned work to prosecutors, continually talked over the chief prosecutor when he talked to her, initiated unpleasant conversations with staff, was rude and nasty with the public, and was away from her desk without permission. Moreover, Thomas intentionally and violently bumped into Warrick without apology or explanation. Given this discussion of the law, I **CONCLUDE** that the respondent has proven by a preponderance of the evidence that Thomas violated N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(2), insubordination; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

Since some of the misconduct was severe—such as intentionally and violently bumping into Warrick without apology or explanation—I further **CONCLUDE** that Thomas is unsuitable for continuation in her position.

As a result, I **CONCLUDE** that progressive discipline should be bypassed, and that Thomas should be terminated from her position.

Indeed, application of progressive discipline would be contrary to the public interest.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Thomas be terminated from her position as a telephone operator with the City of Newark.

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

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

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

4/6/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 4-6-18

Date Mailed to Parties: APR - 9 2018

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Appellant:

Satrice Thomas

For Respondent:

Avion Benjamin

Wynesha Warrick

Documents

For Appellant:

A-1 Letter from Newark to Thomas undated

For Respondent:

R-1 Memorandum from Benjamin to Thomas dated May 19, 2015

R-2 Final Notice of Disciplinary Action dated July 22, 2016

R-3 Job Description

R-4 Preliminary Notice of Disciplinary Action dated December 28, 2015

R-5 Appellant's Answers to Respondent's First Set of Interrogatories dated December 5, 2017

4-13-1

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of
Alex Navas
Town of West New York

CSC DKT. NO. 2018-2765

Hearing Denied

ISSUED: APR 16 2018 BW

The Civil Service Commission considered the request for a hearing concerning Alex Navas, from his appeal of a 30 working day suspension from the position of Laborer 1, Town of West New York and made the following findings of fact:

1. The Final Notice of Disciplinary Action was sent by certified mail and delivered on October 25, 2017.

2. The letter of appeal was postmarked March 9, 2018.

Since the appeal in this matter was not perfected within 20 days of receipt of the Final Notice of Disciplinary Action, the request for a hearing was denied.

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

RE: Alex Navas

DECISION RENDERED BY THE
DIRECTOR, DIVISION OF APPEALS
AND REGULATORY AFFAIRS
ON April 13, 2015

CHRISTOPHER S. MYERS
DIRECTOR

Inquiries
And
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Hearings Unit
PO Box 312
Trenton, NJ 08625-0312

c: Alex Navas
CWA Local 1045
Agency Services
Pensions
Town of West New York

4-13-18

A-1

STATE OF NEW JERSEY

In the Matter of Geneva Bergen
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-2200
OAL DKT. NO. CSV 02430-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02430-18

AGENCY DKT. NO. 2018-2200

IN THE MATTER GENEVA BERGEN, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

Robert Little, Staff Representative, AFSCME, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6), for Geneva Bergen, appellant

Danna Brown, Director, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2) for the Department of Health, Ancora Psychiatric Hospital, respondent

Record Closed: March 22, 2018 Decided: March 26, 2018

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE

This case concerns the appeal of Geneva Bergen from the action of the appointing authority. The parties agreed to a settlement of all issues in dispute and prepared a Settlement Agreement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 26, 2018
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 3/27/18

Date Mailed to Parties: 3/27/18
/lam

CVS 02426-2018S
CVS 02428-2018S
CVS 02430-2018S
CVS 02434-2018S
OAL DKT. NO. CSV CVS 02435-2018S
AGENCY DKT. NO. 20__ 2018-2201
SETTLEMENT AGREEMENT 2018-2194
2018-2200
2018-2196
2018-2199

IN THE MATTER OF

Geneva Bergen

AND

Arcora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Five **Final** Notice of Disciplinary Action dated (all date 1/9/18) contained the following charges and proposed discipline:

NJAC 4A:2-2.3(a)4
NJAC 4A:2-2.3(a)6
NJAC 4A:2-2.3(a)12

	Charge	Discipline	Dates Effective
1.	A.5.5 | A.8.5 | C-8.1 | E.1.5	Removal	1/10/18
2.	A4.7 | A5.4 | A-8.4 | E.1.4	Removal	1/10/18
3.	A.2.8 | E.1.4	Removal	1/10/18
4.	A-5.6 | A.6.3 | A.8.6 | E-1.7	Removal	1/10/18
5.	A-2.9 | E.1.6	Removal	1/10/18

B. The Appellant Geneva Bergen withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	See above	Sustained	60 Day Suspension (inclusive of all charges)
2.	See above	Sustained	

OAL DKT. NO. CSV CVS 02426-2018 CVS 02434-2018 CVS 02429-2018 CVS 02435-2018 CVS 02430-2018

3. See above Sustained
4. See above Sustained
5. See above Sustained

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 52 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: treated as approved leave of absence without pay.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Geneva Bugen's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

CVS 02426-2018S CVS 02434-2018S
CVS 02428-2018S CVS 02435-2018S
OAL DKT. NO. CSV CVS 02432-2018S

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

Ha- Appellant acknowledges that any further attendance / tardiness related infractions will result in the Department seeking termination from employment

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/22/18 — DATE
Appellant

3/22/18 — DATE
Respondent (DOH)

3-22-18 — DATE
ON BEHALF OF APPELLANT

DATE
ON BEHALF OF

CVS 02426-2018S CVS 02434-2018S
CVS 02428-2018S CVS 02435-2018S
OAL DKT. NO. CSV CVS 02430-2018S

CERTIFICATION

I, Geneva Berger, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/22/18
DATE

NAME

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Geneva Bergen
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-2201
OAL DKT. NO. CSV 02426-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
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Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02426-18

AGENCY DKT. NO. 2018-2201

IN THE MATTER GENEVA BERGEN, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

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Record Closed: March 22, 2018 Decided: March 26, 2018

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I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 26, 2018
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 3/27/18

Date Mailed to Parties: 3/27/18
/lam

CVS 02426-2018S
CVS 02425-2018S
CVS 02430-2018S
CVS 02434-2018S
OAL DKT. NO. CSV CVS 02435-2018S
AGENCY DKT. NO. 20__ 2018-2201
SETTLEMENT AGREEMENT 2018-2194
2018-2200
2018-2196
2018-2199

IN THE MATTER OF

Geneva Burgen

AND

Arlota Psychiatric Hospital
Department of Health

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NJAC 4A:2-2.3(a)6
NJAC 4A:2-2.3(a)12

	Charge	Discipline	Dates Effective
1.	A.5.5 | A.8.5 | C-8.1 | E.1.5	Removal	1/10/19
2.	A4.7 | A5.4 | A-8.4 | E 1.4	Removal	1/10/19
3.	A.2.8 | E.1.4	Removal	1/10/19
4.	A-5.6 | A6.3 | A.8.6 | E-1.7	Removal	1/10/19
5.	A-2.9 | E 1.6	Removal	1/10/19

B. The Appellant Geneva Burgen withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	See above	Sustained	60 Day Suspension, Gretchen (of all charges)
2.	See above	Sustained	

OAL DKT. NO. CSV CVS 02426-2015 CVS 02429-2015 CVS 02432-2015 CVS 02434-2015 CVS 02435-2015

3. See above Sustained
4. See above Sustained
5. See above Sustained

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 52 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: NONE.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: treated as appeal time of absence without pay.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Donna Butler's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

Hca- Appellant acknowledges that any further attendance / tardiness related infractions will result in the Department seeking termination from employment.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/22/18 — DATE
Appellant

3/22/18 — DATE
Respondent (DOH)

3-22-18 — DATE
ON BEHALF OF APPELLANT

DATE
ON BEHALF OF

CVS 02426-2018S CVS 02434-2018S
CVS 02429-2018S CVS 02435-2018S
OAL DKT. NO. CSV CVS 02430-2018S

CERTIFICATION

I, Geneva Berger, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/22/18
DATE

NAME

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Geneva Bergen
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-2194
OAL DKT. NO. CSV 02428-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02428-18

AGENCY DKT. NO. 2018-2194

IN THE MATTER GENEVA BERGEN, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

Robert Little, Staff Representative, AFSCME, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6), for Geneva Bergen, appellant

Danna Brown, Director, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2) for the Department of Health, Ancora Psychiatric Hospital, respondent

Record Closed: March 22, 2018 Decided: March 26, 2018

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE

This case concerns the appeal of Geneva Bergen from the action of the appointing authority. The parties agreed to a settlement of all issues in dispute and prepared a Settlement Agreement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 26, 2018
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 3/27/18

Date Mailed to Parties: 3/27/18
/lam

CVS 02426-2018S
CVS 02428-2018S
CVS 02430-2018S
CVS 02434-2018S
OAL DKT. NO. CSV CVS 02435-2018S
AGENCY DKT. NO. 20__ 2018-2201
SETTLEMENT AGREEMENT 2018-2194
2018-2200
2018-2196
2018-2199

IN THE MATTER OF

Geneva Bergen

AND

Ancora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Five **Final** Notice of Disciplinary Action dated (all date 1/9/18) contained the following charges and proposed discipline:

NJAC 4A:2-2.3(a)4
NJAC 4A:2-2.3(a)6
NJAC 4A:2-2.3(a)12

	Charge	Discipline	Dates Effective
1.	A.5.5 | A.8.5 | C-8.1 | E.1.5	Removal	1/10/18
2.	A4.7 | A5.4 | A-8.4 | E.1.4	Removal	1/10/18
3.	A.2.8 | E.1.4	Removal	1/10/18
4.	A-5.6 | A6.3 | A.8.6 | E-1.7	Removal	1/10/18
5.	A-2.9 | E.1.6	Removal	1/10/18

B. The Appellant Geneva Bergen withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	See above	Sustained	60 Day Suspension (inclusive of all charges)
2.	See above	Sustained	

OAL DKT. NO. CSV CVS 02426-2018 CVS 02434-2018 CVS 02429-2018 CVS 02435-2018 CVS 02430-2018

3. See above Sustained
4. See above Sustained
5. See above Sustained

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 52 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: treated as approved leave of absence without pay.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Geneva Burgin's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

CVS 02426-2018-S CVS 02434-2018-S
CVS 02428-2018-S CVS 02435-2018-S
OAL DKT. NO. CSV CVS 02432-2018-S

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

Ha- Appellant acknowledges that any further attendance / tardiness related infractions will result in the Department seeking termination from employment

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/22/18 — DATE
Appellant

3/22/18 — DATE
Danna Brown
Respondent (DOH)

3-22-18 — DATE
Robert C Little IV
ON BEHALF OF APPELLANT

DATE
ON BEHALF OF

CVS 02426-2018S CVS 02434-2018S
CVS 02428-2018S CVS 02435-2018S
OAL DKT. NO. CSV CVS 02430-2018S

CERTIFICATION

I, Geneva Bergen, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/22/18
DATE

Geneva Bergen
NAME

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Geneva Bergen
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-2198
OAL DKT. NO. CSV 02435-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02435-18

AGENCY DKT. NO. 2018-2198

IN THE MATTER GENEVA BERGEN, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

Robert Little, Staff Representative, AFSCME, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6), for Geneva Bergen, appellant

Danna Brown, Director, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2) for the Department of Health, Ancora Psychiatric Hospital, respondent

Record Closed: March 22, 2018 Decided: March 26, 2018

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE

This case concerns the appeal of Geneva Bergen from the action of the appointing authority. The parties agreed to a settlement of all issues in dispute and prepared a Settlement Agreement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 26, 2018
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 3/27/18

Date Mailed to Parties: 3/27/18
/lam

CVS 02426-2018S
CVS 02428-2018S
CVS 02430-2018S
CVS 02434-2018S

OAL DKT. NO. CSV CVS 02435-2018S

AGENCY DKT. NO. 20__ 2018-2201

SETTLEMENT AGREEMENT 2018-2194
2018-2200
2018-2196
2018-2199

IN THE MATTER OF

Geneva Bergen

AND

Ancora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Five **Final** Notice of Disciplinary Action dated (all date 1/9/18) contained the following charges and proposed discipline:

NJAC 4A:2-2.3(a)4
NJAC 4A:2-2.3(a)6
NJAC 4A:2-2.3(a)12

	Charge	Discipline	Dates Effective
1.	A.5.5 | A.8.5 | C-8.1 | E.1.5	Removal	1/10/18
2.	A4.7 | A5.4 | A-8.4 | E 1.4	Removal	1/10/18
3.	A.2.8 | E.1.4	Removal	1/10/18
4.	A-5.6 | A6.3 | A.8.6 | E-1.7	Removal	1/10/18
5.	A-2.9 | E 1.6	Removal	1/10/18

B. The Appellant Geneva Bergen withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	See above	Sustained	60 Day Suspension (inclusive of all charges)
2.	See above	Sustained	

OAL DKT. NO. CSV CVS 02426-2018S CVS 02434-2018S CVS 02428-2018S CVS 02435-2018S CVS 02430-2018S

3. See above Sustained
4. See above Sustained
5. See above Sustained

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 52 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: treated as approved leave of absence without pay.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Geneva Bergen's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

CVS 02426-2018S CVS 02434-2018S
CVS 02428-2018S CVS 02435-2018S
OAL DKT. NO. CSV CVS 02430-2018S

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

Ha- Appellant acknowledges that any further attendance/tardiness related infractions will result in the Department seeking termination from employment

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/22/18 — DATE
Appellant

3/22/18 — DATE
Danna Brown
Respondent (DOH)

3-22-18 — DATE
Robert C Little IV
ON BEHALF OF APPELLANT

DATE
ON BEHALF OF

CVS 02426-2018S CVS 02434-2018S
CVS 02428-2018S CVS 02435-2018S
OAL DKT. NO. CSV CVS 02430-2018S

CERTIFICATION

I, Geneva Bergen, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/22/18
DATE

Geneva Bergen
NAME

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Geneva Bergen
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-2196
OAL DKT. NO. CSV 02434-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02434-18

AGENCY DKT. NO. 2018-2196

IN THE MATTER GENEVA BERGEN, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

Robert Little, Staff Representative, AFSCME, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6), for Geneva Bergen, appellant

Danna Brown, Director, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2) for the Department of Health, Ancora Psychiatric Hospital, respondent

Record Closed: March 22, 2018 Decided: March 26, 2018

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE

This case concerns the appeal of Geneva Bergen from the action of the appointing authority. The parties agreed to a settlement of all issues in dispute and prepared a Settlement Agreement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 26, 2018
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 3/27/18

Date Mailed to Parties: 3/27/18
/lam

CVS 02426-2018S
CVS 02428-2018S
CVS 02430-2018S
CVS 02434-2018S
OAL DKT. NO. CSV CVS 02435-2018S
AGENCY DKT. NO. 20__ 2018-2201
SETTLEMENT AGREEMENT 2018-2194
2018-2200
2018-2196
2018-2199

IN THE MATTER OF

Geneva Bergen

AND

Arcora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Five **Final** Notice of Disciplinary Action dated (all date 1/9/18) contained the following charges and proposed discipline:

NJAC 4A:2-2.3(a)4
NJAC 4A:2-2.3(a)6
NJAC 4A:2-2.3(a)12

	Charge	Discipline	Dates Effective
1.	A.5.5 | A.8.5 | C-8.1 | E.1.5	Removal	1/10/18
2.	A4.7 | A5.4 | A-8.4 | E 1.4	Removal	1/10/18
3.	A.2.8 | E.1.4	Removal	1/10/18
4.	A-5.6 | A.6.3 | A.8.6 | E-1.7	Removal	1/10/18
5.	A-2.9 | E.1.6	Removal	1/10/18

B. The Appellant Geneva Bergen withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	See above	Sustained	60 Day Suspension (inclusive of all charges)
2.	See above	Sustained	

OAL DKT. NO. CSV CVS 02426-2018 CVS 02434-2018
CVS 02428-2018 CVS 02435-2018
CVS 02430-2018

3. See above Sustained
4. See above Sustained
5. See above Sustained

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 52 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: treated as approved leave of absence w/out pay.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Geneva Burgin's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

CVS 02434-2018S CVS 02435-2018S
CVS 02428-2018S
OAL DKT. NO. CSV CVS 02432-2018S

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

Ha- Appellant acknowledges that any further attendance / tardiness related infractions will result in the Department seeking termination from employment

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/22/18
DATE

Appellant

3/22/18
DATE

Danna Brown
Respondent (DOH)

3-22-18
DATE

Robert C Little IV
ON BEHALF OF APPELLANT

DATE

ON BEHALF OF

CVS 02426-2018S CVS 02434-2018S
CVS 02428-2018S CVS 02435-2018S
OAL DKT. NO. CSV CVS 02430-2018S

CERTIFICATION

I, Geneva Bergen, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/22/18
DATE

NAME

4-17-18

A-1

STATE OF NEW JERSEY

In the Matter of Michelle Bruno
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-3047
OAL DKT. NO. CSV 5964-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

IN THE MATTER OF MICHELLE BRUNO HUNTERDON DEVELOPMENTAL CENTER, DEPARTMENT OF HUMAN SERVICES.

OAL DKT. NO. CSV 5964-17
AGENCY DKT. NO. 2017-3047

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Emily M. Bisnauth, Deputy Attorney General, for respondent Hunterdon Developmental Center (Gurbir S. Grewal, Attorney General, attorney)

Record Closed: March 28, 2018 Decided: April 5, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

Appellant, Michelle Bruno, Human Services Assistant, Hunterdon Developmental Center, received a resignation not in good standing effective October 8, 2016. Appellant filed an appeal and the matter was transmitted to the Office of Administrative Law on May 1, 2017, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13.

The parties appeared on March 27, 2018, for the settlement conference and agreed to a settlement of all issues in dispute and prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 5, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 4/5/18

Date Mailed to Parties:

mph

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

J-1

OAL DKT. NO. CSV 05964-2017S

SETTLEMENT AGREEMENT

MICHELLE BRUNO,

Appellant,

v.

DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER,

Respondent.

RECEIVED
2018 MAR 28 A 11:28
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them:

A. The Final Notice of Disciplinary Action dated March 7, 2017 contained the following charges and proposed discipline of removal for all charges effective October 8, 2016:

1. Administrative Order 4:08, A3 Job Abandonment
2. N.J.A.C. 4A:2-6.2(c) Resignation Not in Good Standing
3. N.J.A.C. 4A: 2-2.3(a)(6) Conduct Unbecoming a Public Employee
4. N.J.A.C. 4A: 2-2.3(a)(12) Other Sufficient Cause

B. Appellant Michelle Bruno withdraws her appeal and request for a hearing and the Respondent Appointing Authority agrees that the following result will occur with regard to each charge:

1. Administrative Order 4:08, A3 Job Abandonment - Withdrawn
2. N.J.A.C. 4A:2-6.2(c) Resignation Not in Good Standing - Withdrawn
3. N.J.A.C. 4A: 2-2.3(a)(6) Conduct Unbecoming a Public Employee - Withdrawn
4. N.J.A.C. 4A: 2-2.3(a)(12) Other Sufficient Cause - Withdrawn

C. The parties have agreed to the following: Reinstatement with the following conditions: and JW

1. Total number of work days of suspension without pay Respondent will impose on Appellant: Zero and JW

2. The total number of days of back pay to be paid by the Appointing Authority to the Appellant is as follows: two months back pay and no other fees or compensation

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Voluntary Leave of Absence Without Pay

4. Appellant Michelle Bruno is advised that if there should be a need for a leave in the future she shall ensure any documentation faxed by her doctor to Human Resources H.R. at Hunterdon Developmental Center is received by H.R. promptly upon transmission. It is the responsibility of all employees to follow up on medical documentation being received by their employer, and not that of the physician's office. This settlement agreement shall form as a formal warning. Additionally, the parties agree to the following:

- The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for periods for which the employee is not paid by the employer.
- ~~Appellant shall not seek or accept future employment with the Department of Human Services and the Department of Health or any of its subsidiaries~~ and JW
- ~~Respondent shall not intentionally interfere or obstruct Appellant's application for retirement.~~ and JW

D. The Appointing Authority shall amend Appellant's personnel records to reflect the terms of this agreement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with state or federal law. Any information regarding the underlying charges will be provided

to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. This agreement resolves any and all disciplinary actions pending against Appellant.

F. Nothing in this agreement shall constitute an admission or stipulation of facts regarding the charges listed in Section A. By entering into this agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the parties' collective negotiations agreement. This agreement shall not constitute precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose

prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable..

I. By signing this Settlement Agreement, the signatories represent that they have read this agreement and fully understand its terms.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

03-27-2018
DATE

Michelle A. Bruno
Appellant
Ms. Michelle Bruno

8-27-18
DATE

On Behalf of Appellant
William Nash, Esq.

March 27, 2018
DATE

On Behalf of Dept. of Human Services,
Hunterdon Developmental Center
Kim Heft

CERTIFICATION

I, Michelle Bruno, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

March 27, 2018
DATE

Michelle Bruno
Appellant
Ms. Michelle Bruno

RECEIVED
2018 MAR 28 A 11:28
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Sarah Cooke
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-1297
OAL DKT. NO. CSV 01386-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01386-18

AGENCY DKT. NO. 2018-1297

IN THE MATTER OF SARAH COOKE, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

Jenna A. Curley, Senior Staff Representative, CWA Local 1040, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Marc Malfara, Employee Relations Coordinator, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: March 27, 2018 Decided: March 28, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Sarah Cooke from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on January 25, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 28, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 3/29/18

Date Mailed to Parties: 3/29/18

cmo

OAL DKT. NO. CSV 1386-18

AGENCY DKT. NO. 2018 - 1297

SETTLEMENT AGREEMENT

IN THE MATTER OF

Sarah Cooke

AND

Ancora Psych. Hospital - Dept of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The ~~Final Notice of Disciplinary Action~~ dated _____ contained the following charges and proposed discipline:

	~~Charge~~	~~Discipline~~	Dates Effective
1.	Release at end of Working Test Period		
2.			
3.			
4.			
5.			

B. The Appellant Sarah Cooke withdraws his/her appeal and request for a hearing, and the Respondent appointing authority Dept. of Health - Ancora Psych Hosp. agrees that the following result will occur with regard to each charge:

	~~Charge~~	~~Disposition~~	~~New Penalty~~
1.	Management agrees to a new Working Test Period.		
2.			
3.			
4.			
5.			

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. _____ (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority _____ will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of _____'s disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, _____, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3-27-18
DATE

Appellant

3-27-18
DATE

Respondent

3/27/18
DATE

ON BEHALF OF

DATE

ON BEHALF OF

OAL DKT. NO. CSV 13986-18

CERTIFICATION

I, Sarah Cooke, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3-27-18
DATE

Sarah Cooke
NAME

4-18-18

A-2

STATE OF NEW JERSEY

In the Matter of Peter Delcollo
South Woods State Prison,
Department of Corrections

CSC DKT. NO. 2017-3628
OAL DKT. NO. CSV 07665-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 20, 2018 BW

The appeal of Peter Delcollo, Institutional Trade Instructor 1, South Woods State Prison, Department of Corrections, 45 working day suspension, on charges, was heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on March 8, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07665-2017

AGENCY DKT. NO. 2017-3628

IN THE MATTER OF PETER DELCOLLO,
SOUTH WOODS STATE PRISON
DEPARTMENT OF CORRECTIONS.

John P. Morris, Esq., appearing for appellant, Peter Delcollo

Kathleen L. Krieger, Esq., appearing for respondent, South Woods State Prison, Department of Corrections pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: January 22, 2018 Decided: March 8, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Appellant, Peter Delcollo (Delcollo) an Institutional Trade Instructor 1, Cooking, with the respondent, South Woods State Prison (South Woods), Department of Corrections (DOC) appeals a Final Notice of Disciplinary Action and the forty-five-day suspension for: 1) Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(a)(6); 2) Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)(12)); Human Resource Bulletin (HRB) 84-17 (as amended): C-4 - Verbal Abuse of an Inmate, Patients, Client, Resident or

Employee; C-5 - Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; C-11 - Conduct Unbecoming an Employee; C-24 - Threatening, intimidating, Harassing, Coercing or Interfering with a Fellow Employee on State Property. Respondent's basis for the suspension originates from appellant allegedly yelling, grabbing and hitting Senior Corrections Officer, Bethzaida Malpica (Malpica) while in the workplace in violation of the New Jersey Department of Corrections prevention of violence in the workplace policy.

PROCEDURAL HISTORY

On November 21, 2016, Delcollo was issued a Preliminary Notice of Disciplinary Action ("PNDA") suspending him for forty-five days on a date to be determined. A departmental hearing was held on March 1, 2017, the result of which was the issuance of a Final Notice of Disciplinary Action ("FNDA") on March 29, 2017, suspending Delcollo for forty-five days. Delcollo requested a hearing and the matter was transmitted to the Office of Administrative Law, on May 31, 2017, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. A prehearing conference was held on August 10, 2017 and thereafter, a Prehearing Order was entered on September 1, 2017. The matter was heard on December 6, 2017 and December 11, 2017. Upon receipt of written summations, the record closed on January 22, 2018.

FACTUAL DISCUSSION

Bethzaida Malpica (Malpica), testified that she has been in the corrections system since 1996 when she started working at the Cumberland County Jail. In 1998, she was hired at South Woods and has been employed there ever since. Throughout her employment at South Woods, she has held various positions and has worked in both the male and female populations. In 2015, she successfully bid into Facility 1 Kitchen (kitchen) as a kitchen officer. As part of her responsibilities, she oversees the inmates and civilians that work in the kitchen to ensure that the area is safe and secured.

According to Malpica, one of the civilians that worked in the kitchen in January 2016 was Delcollo who was an institutional trade instructor (ITI) for South Woods. As an

ITI, Delcollo oversaw inmates assigned to him for the shift. Malpica, in turn, was responsible to oversee both Delcollo's position and the inmates assigned to the kitchen.

On January 3, 2016, inmates arrived for their shift in the kitchen. As part of their responsibilities/tasks, inmates cleaned dishes and assisted in preparing the meals. Starting around 2:10 p.m., when the inmates were done their tasks, she started releasing them to go back to their units through the inmate dining hall. As she was getting ready to go back into the kitchen area from the dining hall area, Delcollo approached her and grabbed her arm. According to Malpica, she demanded that he release her several times, but he insisted that he needed to talk to her, still holding her arm and pulling back into the dining hall. Delcollo was so close to her that the front of his body was up against the side of her body and his face was six inches from her face. Given how close he was, she could not get to her radio to call for assistance.

Malpica testified that she repeatedly told Delcollo to let her go as he was yelling at her questioning why she was disrupting his kitchen and commanding her to stop. As he was yelling at her, Delcollo was hitting her left forearm. After about ten minutes, Delcollo let her go, turned around and went back into the kitchen stating that he was going to call the Sergeant. Throughout the incident, because there were inmates in the area, she tried to stay focused and controlled. Malpica explained that Delcollo's conduct undermined her authority in the room which is very dangerous in a prison setting. In this case, she was concerned that inmates would attack either Delcollo or herself which could potentially lead to a riot. After Delcollo walked away, Malpica composed herself and finished her shift which ended around 3:15 p.m. – 3:30 p.m. During this time, inmates came up and asked her if she was okay. This added to her concern for Delcollo's safety as the inmate population does not take assaulting a female lightly.

At the end of her shift, when she was walking towards the officer's desk, Malpica saw Delcollo on the phone at the ITI desk which is located across the room. She assumed he was calling the sergeant. Seeing this, she went into the restroom and broke down. When she came out there were no supervisors in the area and due to her state of mind, she went home. At the time she mentally questioned whether Delcollo had actually called anyone.

Upon arrival at work the next day, she immediately went to speak to her Lieutenant, Sergeant and the Assistant Superintendent about the incident after which she was referred to the Special Investigation Division (SID) where she spoke to Senior Investigator Donna Alexander (Alexander). After speaking to Alexander, she wrote a "special" documenting the incident in which she noted that this was the second incident involving Delcollo. (R-3).

According to Malpica, in 2015, there was a prior incident with Delcollo wherein he started yelling and screaming at her in front of inmates over trays that had been delivered to the officer's desk by an inmate. Delcollo attempted to grab the trays back, causing him to invade her personal space by leaning across her to get to the trays. As Delcollo was attempting to grab the trays, she kept trying to push him away - telling him to get off.

On January 6, 2016, three days after the second incident, Malpica went to the Bridgeton Police Department (PD) and filed a report. (R-5). Accompanying her was a friend and fellow officer - Annie Palmer (Palmer). When she received a copy of the police report, she didn't read it right away however, when she did review it days later, she noticed a couple of discrepancies. On January 20, 2016, she contacted the police officer who took her initial statement and asked that the report be amended to clarify a couple of points. Specifically, that the prior incident with Delcollo was handled internally and second, that she had developed bruising on her arm because of the incident, which she herself photographed. Malpica informed the officer that the photos had been provided to the SID. According to Malpica, when she was at the PD to file the report, she rolled her sleeve up to show the officer her arm however, he stated that he did not see any bruising.

In describing how the incident affected her, Malpica stated that between the incident and having to go to court multiple times, she left her "bid" in the kitchen because of her stress and duress on the job.

On cross-examination, Malpica was questioned about the 2015 incident with Delcollo and her same day reporting of the matter to her supervisor. In response, Malpica stated that given the severity of that incident, she immediately reported the incident and

the matter was resolved without a referral to SID. Two months later, the second incident occurred.

When questioned regarding the number of inmates that were present during the second incident, Malpica estimated that while there may have been twenty to twenty-two inmates in the area, there were none in the back dining room where she had been releasing them. No supervisor was present nor did she attempt to immediately contact one after the incident occurred. She did not report the incident to anyone on that date including the other officer who was at the officer's podium, given her frame of mind. Malpica reiterated the incident, adding that when he grabbed her left arm, he continued to hit her forearm until he finished saying what he had to say. When she kept telling him to let go, he would state, "Oh, come on now, it doesn't hurt."

Malpica was also questioned about the "special" which she filed and why information such as Delcollo's body touching hers was left out and the fact that she couldn't reach her radio. In response Malpica stated that it happened the way she testified however she did not put it in the "special." Regarding her delay in filing a criminal complaint against Delcollo, she stated that initially she was too distraught to go to the police and wanted to keep the matter internal, however ultimately decided to file a complaint. She continued to work in the kitchen until she could put in a "bid" to another location which was several months later. Delcollo was not working in the kitchen during this time as he had been transferred to another location the day after the incident.

In going through the IAD report and her statement that she (Malpica) would be filing a complaint against Delcollo after work that day, Malpica stated that she delayed in filing a complaint because she wanted the matter to be handled internally. Regarding her statement that she did not recall seeing any witnesses to the incident, she was referencing "custody" witnesses or fellow officers, not inmate witnesses. According to Malpica, there were a number of inmates present when the second incident occurred. She could not recall if she provided the names of the inmates to Alexander during their meeting nor did she mention inmate witnesses when she went to the PD.

When questioned about the changes to the police report, Malpica admitted that she did not immediately review the report after she picked it up. When she finally read

the report, she noticed that a couple of items were not as she described them to the officer. Specifically, the first incident with Delcollo needed to be clarified and the fact that she did have bruising. According to Malpica, the officer did not want to see her arm when she attempted to pull her sleeve up - he only wanted to know if she had any pain. While she took pictures on January 7, 2016 – four days after the incident and the day after she went to the PD, she did not send the photos to the police. Malpica could not recall if she showed Alexander the bruises on her arm.

Throughout her testimony, Malpica appeared extremely anxious, physically shaking at times and tearful. She would not make eye contact, looking straight ahead when responding to questions.

Annie Marie Palmer (Palmer), testified that she has been employed by South Woods for over twenty years and is currently a Senior Corrections Officer in Facility 1. Palmer has known and been friends with Malpica for approximately eight years. Palmer became aware of the incident after she received a call on January 6, 2016, from a distraught Malpica who told her what had occurred on January 3, 2016. Specifically, how Delcollo got in her space; grabbed her; and told her how to do her job – all in front of inmates. After speaking to Malpica on the phone, Palmer met her at which time Malpica again described the incident and showed Palmer her arm. After seeing her arm, Palmer told Malpica that her authority had been undermined in front of the inmates and that she could not let the matter ride and needed to go to the police.

Palmer stated that after work that day, she accompanied Malpica to the PD. When they got to the station and prior to going in, Palmer took a picture of Malpica's arm and sent it to her. When they were called to go in for an interview, it appeared that the officer was in training given the fact that he was being walked through the process by a senior police officer. At one point, the younger officer asked Malpica if she was in pain. When Malpica tried to pull her sleeve up and show him the bruising on her arm, the officer told her that that was not necessary.

On cross-examination, Palmer stated that Malpica did not tell her that she had spoken to SID until after she met her on January 6, 2016. Additionally, while Malpica told Palmer that the incident occurred in front of inmates, she did not mention their names.

Donna Alexander (Alexander), testified that she has been employed by DOC for twenty years and has been in the SID as a Senior Investigator since 1998. Prior to taking her current position and throughout the years since she has been in SID, Alexander has attended multiple training seminars relevant to her position. As part of her current responsibilities, she conducts administrative as well as criminal investigations.

Alexander became aware that an incident had occurred on January 3, 2016, when Malpica came to see her on January 4, 2016 and reported an incident of workplace harassment between her and Delcollo. After speaking briefly to Malpica, she had Malpica speak to Cline to see if it was an Equal Employment Division (EED) matter. Cline determined it was not an EED matter and referred Malpica back to SID. Malpica returned to SID on January 5, 2016, at which time Alexander requested that she write a statement. The statement was handwritten due to Malpica being too emotional to talk about the incident.

In speaking to Malpica, Alexander learned that on January 3, 2016, around 2:10 p.m., Malpica was approached by Delcollo who starting yelling at her, questioning why she was sending back his inmates. After informing Delcollo that the inmates were just sitting around, Delcollo told her that it wasn't her job to send his inmates back – her job was to ensure safety and security in the kitchen. According to Malpica, Delcollo, who was directly in her space, grabbed her arm and started hitting it with his fingers. Malpica told Delcollo several times to back off but he did not. While Malpica stated that there were inmates in the area, she could not recall their names. Malpica did not report any injuries at the time of the interview.

After speaking to Malpica, Alexander testified that she obtained a copy of the inmate kitchen detail list for January 3, 2016, interviewed several of the inmates, and synopsized their statements in her report. (R-2). On January 3, 2016, there were two officers on shift and approximately twenty to thirty inmates in the kitchen area. Alexander

went on to state that one of the concerns when there is a conflict between custody and non-custody civilians is that it creates a problem for the inmates – particularly if one of the participants in the conflict is a female. If a female is involved, the inmates going forward will view her differently - approach her in a more hostile manner because they sense a weakness. That is why there is a zero-tolerance policy. Alexander further commented that it is important for an officer and the ITI to work together and be cordial, as it can go bad very quickly if inmates get involved.

Also interviewed was Delcollo who informed her that after Officer Bauman (Bauman) informed him that Malpica was releasing inmates, he went to her and asked why she was releasing the inmates back to their units. In response, she stated that they were not doing anything, so she released them. According to Delcollo, he did not touch Malpica or raise his voice. As the interview was ending, Delcollo commented that he may have raised his voice a little.

In describing the kitchen area as part of her testimony, Alexander provided a physical descriptor of the kitchen area, commenting on the row of refrigerators, ovens and tables. Equipment in the kitchen included heavy pots, pans and utensils. Alexander stated that if an altercation broke out, the equipment in the kitchen could be used as a weapon.

On cross-examination, Alexander testified that there were no photographs of Malpica's arm in or attached to her report. While Malpica showed her photographs of her arm on her phone which showed marks and bruising, by the time copies were provided, her report had been finalized. Alexander could not say for certain that the pictures provided were of Malpica's arm. Additionally, the only PD report that she received from Malpica was the initial report, dated January 6, 2016, not the supplemental report, dated January 20, 2016.

Christopher Cline (Cline), testified that he started with the DOC in 1997 and worked his way up the ranks to his current position in 2014 of Assistant Superintendent. Among his responsibilities, he oversees: social services; mental health; is the EED Ethics

Liaison; and reviews the policies and procedures when incident happen to make sure that protocol was properly followed.

Cline became aware of the January 3, 2016, incident between Malpica and Delcollo when Malpica was referred from IAD to his office to determine if there was an EED component to the complaint. Specifically, if there was a violation of any of the protected categories (age, gender, sex, religion, military status, pregnancy). Malpica was provided an EED packet which she filled out and forwarded to the Director's office for handling. Thereafter, the matter was investigated by SID who handled the investigation and submitted a report to the Administrator who in turn sends it to the Office of Employee Relations (OER). The OER determines what if any charges should be brought and appropriate sanctions.

Cline testified that he reviewed the SID report and in so doing, noted a couple of things. First, there was an allegation that Delcollo grabbed and hit Malpica. Delcollo by his own admission stepped into her personal space. According to Cline, officers are trained to have at least an arms-length protection when they are around any aggressors be it inmates or civilians. This is to enable the officer to protect themselves. This is particularly important in a kitchen area where there are lots of potential weapons and multiple inmates doing multiple things. As such, an officer must stay focused always on the inmates and surroundings.

Second, there was an allegation of yelling which is not professional and is not tolerated – the DOC has a zero tolerance of such conduct. The DOC's zero tolerance policy includes any type of harassment, violence (threat or actual), intimidation (verbal and non-verbal). The DOC has a Prevention of Violence in the Workplace Policy (Policy) which all employees receive. (R-6; R-7).

In looking at the allegations and the Policy, Cline stated that assuming the alleged conduct was true, Delcollo's conduct by stepping into Malpica's personal space and yelling at her would constitute "intimidation." Hitting Malpica on her arm would also violate the policy. The policy is particularly applicable to all individuals who work in areas where

there is contact with potentially violent inmates. (R-6). Cline went on to state that it is not unusual for a victim of workplace violence to wait a day or so to report the incident.

Cline testified that the DOC, under Human Resource Bulletin (HRB) 84-17 has a disciplinary action policy. (J-3). Under Section (C)(4) there is an offense titled "Personal Conduct – Verbal Abuse" which carries a potential penalty of five days up to removal for the first infraction. Under Section (C)(5) there is an offense titled "Personal Conduct – Inappropriate Physical Contact or Mistreatment of an . . . Employee" which carries a potential penalty of official written reprimand (OWR) up to removal. Under Section (C)(11) there is an offense titled "Personal Conduct – Conduct Unbecoming An Employee" which carries a penalty of three days suspension up to removal for the first infraction. Under Section (C)(24) there is an offense titled "Personal Conduct – Threatening, Intimidating, Harassing, Coercing, or Interfering With Fellow Employees on State Property" which carries a penalty of official written reprimand up to removal.

On cross-examination, Cline admitted that other than in his capacity as the Assistant Administrator, he is not involved in the SID report or determining sanctions. His only role in this matter was to provide Malpica with a EED packet. In review of the SID report which was sent to him, he found that what Malpica wrote in her "special" was consistent with what she told him when they met. Cline could not say whether Delcollo was asked to submit a "special" as he did not control the investigation - that was SID's purview.

Mark Yoshioka (Yoshikoa), testified that he was hired by the Bridgeton Police Department in June 2015, as a Patrolman however, has since been promoted to Detective. In January 2016, he was in his second month on the job having just returned after attending the Police Academy. As a new officer, he was assigned to a field training officer who worked with him on the departmental policies and procedures.

On January 6, 2016, he was dispatched to take a walk-in report by a complainant who was a corrections officer at South Woods. He and his training officer, Patrolman Broomall (Broomall) met with Malpica and her friend Palmer. According to Yoshioka, it

was his investigation however, he was being supervised by Broomall who was present throughout the interview.

During the interview, Malpica stated that while at her post in the kitchen area, Delcollo approached her and grabbed her left forearm. When she told him to get off, he started striking her left forearm telling her that he was the boss. This went on for approximately ten minutes. When questioned why she delayed in reporting, Malpica stated that she was dealing with personal issues but had already reported the matter to the SID. In asking if she had pain, Malpica stated "yes." When asked if she had marks on her arm, Malpica who was wearing a long sleeve shirt, looked at her arm and told him that she did not have any visible injuries at that time. He did not request to see or look at her arm himself. Malpica also described an earlier incident in 2015, after an inmate brought food trays to her desk and Delcollo running up behind her - yelling and grabbing at the trays. According to Yoshioka, Malpica was very upset throughout the interview. At the end of the interview, Malpica signed a complaint against Delcollo for harassment and aggravated assault. Yoshioka generated an Investigation Report (IR) outlining the interview with Malpica and closed the case. (R-5).

On January 20, 2016, Yoshioka received a call from Malpica who wanted to clarify information in the IR – regarding the first incident with Delcollo in 2015; the reason she waited to report the incident to the PD was due to personal issues; and that she did later develop bruising on her arm, photos of which she provided to SID. A supplemental IR was generated based upon the call. (R-5).

Peter Delcollo (Delcollo), testified that he has been with the DOC since 2004 as an ITI. In January 2016, he was assigned to the Facility 1 kitchen area where he was responsible for working with and training inmates in different aspects of cooking, kitchen sanitation and trash removal. He also handles the evening meal for all of the officers as well as the inmates of which there are nine hundred and ninety-two.

Delcollo explained that the kitchen area has three sections - the Officer's Dining Room (ODR); the kitchen area itself; and the old dining room which is used for food

staging. The kitchen itself contains industrial size refrigeration units and hot boxes, ovens, sinks and fans for heat. He described the kitchen area as noisy.

On Sunday, January 3, 2016, he was the only ITI working in the kitchen area however, two officers were working, Malpica and Bauman. While on break around 2:15 p.m. or 2:20 p.m., he was approached by Bauman who informed him that Malpica had sent two of his inmates back to their unit. According to Delcollo, he has a regular roster of inmates that work a specific shift every day. On this particular day, given the menu, there were two workers/inmates that he would typically keep back to assist in clean up. These were among the inmates that Malpica had sent back to their units.

After hearing this, he approached Malpica who was near the officer's desk, located in the kitchen and asked to speak to her. In response, Malpica went towards the old dining room, located off the kitchen and stood in the doorway with her back facing the old dining room. He was on the other side of the doorway with his back facing the kitchen. No one else was present in the area at that time.

Delcollo stated that he questioned Malpica why she was sending the workers/inmates back as she knew he needed them specifically stating: "Why are you constantly interfering with my job? Let me do my job and you do yours." According to Delcollo, Malpica's job was safety and security and her responsibilities were to take care of the trash that goes out and things in the back. Malpica responded by telling him that he could not tell her how to run the kitchen and "went off" at which point Delcollo called her "crazy" and told her that he was going to call the sergeant. He walked away and went to the ITI desk, located across from the officer's desk in the kitchen, and called for a sergeant. At no time did he yell at Malpica; grab her arm; pull her; strike her; or get in her face. Delcollo admitted however, that he had to speak louder than normal to Malpica due to the fans and other kitchen noise. The whole conversation took three or four minutes.

After receiving a call from Delcollo, Sergeant Conti (Conti) came to the Kitchen area where they met in the ODR. Delcollo explained what had happened and informed Conti that he was "...tired of the way Malpica tries to control everything and run everything." After assuring Conti that he could finish out his shift which ended at 6:30

p.m., and that he would address the issue with the regular weekday Sergeant (Sheppard), he went back to work.

Upon his arrival to work the next day, he was informed he had been transferred to another kitchen facility ultimately ending up in Kitchen Facility 2 in March 2016. He later learned that his transfer was due to the complaint filed by Malpica. Delcollo noted that he was not contacted by SID until mid-March 2016 and never asked to write up a "special". He additionally commented that Malpica bid into the same kitchen as the one he is currently working in, last December 2016.

In describing the 2015 incident, Delcollo stated that one of the things that ITI's request is that no food comes out of the ODR without first checking with the ITI. This is to ensure that there is enough food for officers and staff. On that particular occasion, he saw an inmate place two trays of food on the officer's desk. When questioned, the inmate stated that Malpica had requested them. He got up and took the trays off the desk. When Malpica found out, she called Sheppard who came down and spoke to them and requested that they just try to get along. The first he heard Malpica state that he reached over her and grabbed the tray was when she testified at the hearing.

On cross-examination, Delcollo admitted that "custody" was in charge of the inmates and safety and security in the kitchen. Custody was also in charge of letting inmates in and out of the kitchen area. On January 3, 2016, he wanted to talk to Malpica about what had occurred. The only reason he asked her to step away was because Malpica had previously asked him to take her aside if there was ever an issue. When he spoke to her, he was a foot away. When challenged on this, Delcollo's statement changed and he stated the distance between them was between six to eight inches however, he was not in "her face". While his voice was louder than normal conversation, it was because of the noise of the kitchen. He went on to state that he was not angry at Malpica for releasing his inmates, he was "frustrated" because it was an ongoing issue. Delcollo again reiterated that no inmates were in the area where he and Malpica were speaking.

FINDINGS

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After hearing the testimony presented and review of the documentary evidence submitted, and having had an opportunity to observe the witnesses and assess their credibility, I **FIND** as **FACT** that the testimony presented by Malpica, while melodramatic at times, to be credible in that an incident occurred between herself and Delcollo on January 3, 2016. I **FIND** Alexander's testimony to be credible in that she performed an extensive investigation, which included interviews of officers and inmates. Two inmates, whose interviews were taped, substantiated Malpica's version of events. One officer, Bauman, provided a written statement. None of these individuals were present to testify.

Their interviews, as well as the totality of Alexander's investigation, were outlined in her SID report.

Hearsay is admissible in an administrative proceeding, per N.J.A.C. 1:1-15.5, which provides as follows:

Subject to the Judge's discretion to exclude evidence under N.J.A.C. 1:1-15(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the Judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and generally, its reliability.

Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5(b) recites what is commonly referred to as the residuum rule, which is best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

> It is common practice for administrative agencies to receive hearsay evidence at their hearings . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) ... However, in our State as well as in many other jurisdictions, the rule is that the fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may not be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But, in the final analysis for a court to sustain an administrative decision, which effects the substantial rights of a party, there must a residuum of legal and competent evidence in the record to support it.

Here, competent evidence was presented to support Malpica's claims and Alexander's findings in her report by Delcollo himself. Delcollo testified that he was informed by Bauman that inmates had been released by Malpica. This was consistent with Bauman's report. Delcollo testified that he immediately got up from where he was sitting and went to find Malpica as he was "frustrated" with her. This too was consistent with Bauman's report. Upon finding her, he questioned why she was interfering with his job and told her to do her own job. This was consistent with Delcollo's testimony, the inmates taped statements and Malpica's testimony. Delcollo initially testified that he was an arm's length away from Malpica but subsequently changed the distance to six or eight inches. This was consistent with both Alexander's report wherein Delcollo's admitted to her that he may have been "too close" to Malpica and Malpica's testimony that he was in "her space." Delcollo further testified that he had to speak "loudly" due to the kitchen equipment and that Malpica "went off." This statement was inconsistent with his statement to Alexander, wherein he at first stated that he never raised his voice but then later stated that there may have been a point in time that he raised his voice. Malpica testified that the incident lasted approximately ten minutes. This is consistent with Bauman's written statement.

I **FIND** that on January 3, 2016, Malpica, in accordance with her job responsibilities, commenced sending inmates back to their units upon completion of their duties in the kitchen area. I **FIND** that Delcollo, upon learning of this fact, became angry and immediately went to confront Malpica. I further **FIND** that in confronting Malpica, Delcollo was at least six to eight inches from Malpica if not closer, which caused physical contact between the two. I **FIND** that Delcollo grabbed Malpica's left forearm however, no credible evidence was presented that such action caused bruising.

I **FIND** that when Delcollo confronted Malpica, he did so in the presence of inmates and/or in utter disregard of whether any were present. I **FIND** that Malpica was distraught as a result of the incident. I **FIND** that in a prison setting, a unified workforce is absolutely required to ensure the safety of inmates and personnel working in the area. Any demonstration of weakness or lack of respect, will undermine a correction officer's authority. I **FIND** that the DOC has a zero-tolerance policy for harassment, intimidation, violence or threats of violence by or against employees in the workplace.

LEGAL DISCUSSION AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14, 2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

This matter involves a major disciplinary action brought by South Woods against Delcollo seeking a forty-five-day suspension. Specifically, Delcollo has been charged with the following offenses: 1) Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(a)(6); 2) Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)(12)); HRB 84-17 (as amended): (C)(4) - Verbal Abuse of an Inmate, Patients, Client, Resident or Employee; (C)(5) - Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; (C)(11) - Conduct Unbecoming an Employee; (C)(24) -Threatening,

Intimidating, Harassing, Coercing or Interfering with a Fellow Employee on State Property.

Conduct Unbecoming a Public Employee is found under N.J.A.C. 4A:2-2.3(a)(6) and is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); See also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, Supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The "incident" giving rise to the FNDA identifies the following basis for the sustained charges:

> On January 3, 2016, you confronted SCO Malpica in Facility 1 Kitchen. You were reported to have argued with/yelled at SCO Malpica, grabbed the SCO's arm and hit it and stood very close to the SCO invading her personal space. The incident was reported to SID and an investigation was done due to allegations of work place violence. The investigation revealed witnesses to the incident of yelling, grabbing and hitting. You admitted to standing too close to the SCO and raising your voice.

Delcollo's argument centers on credibility or lack thereof on the part of Malpica. For the reasons cited above - I disagree.

In a prison setting, it is imperative that rules are followed and discipline is maintained at all times given the inherent danger should either be disrupted. Here, it is undisputed that Delcollo, angry over the fact that Malpica was releasing "his" inmates,

confronted Malpica in the kitchen area where inmates were still present; started yelling at her, stood inches from her face and grabbed her arm to emphasize his point. Such conduct caused emotional distress to Malpica, but also undermined her authority in front of the inmate population.

Under the circumstances presented here, Delcollo displayed a significant lack of judgment in confronting, yelling and inappropriately touching Malpica, thereby violating his obligations and duties. I **CONCLUDE** that Delcollo's behavior did rise to a level of Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)(6).

The second charge against Delcollo was Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)12).

There is no definition in the New Jersey Administrative Code for Other Sufficient Cause. Other Sufficient Cause is generally defined in the charges against appellant. The charge of Other Sufficient Cause has been dismissed when "respondent has not given any substance to the allegation" Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <hjttp://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>.

In this case, as set forth more fully above, respondent has given substance to the allegations set forth in the FNDA. As such, I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Delcollo has also been charged with violating HRB 84-17, as amended; (C)(4) Verbal Abuse of an Inmate, Patient, Client, Resident or Employee; (C)(5) Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; (C)(11) Conduct Unbecoming an Employee; (C)(24) Threatening, Intimidating, Harassing, Coercing or Interfering with Fellow Employees on State Property;

HRB 84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

First, pursuant to HRB 84-17, as amended, Delcollo was required to follow all policies established by the DOC and as it relates to this case - The Prevention of Violence in the Workplace Policy. (R-6).

Under the policy, harassment or intimidation means "behavior or communication designed or intended to intimidate, menace or frighten another person." Behavior or communication can take the form of both verbal and non-verbal action.

In this instance, Delcollo's actions of stepping into Malpica's personal space - so close that his body came into physical contact with her; yelling at her; and grabbing her arm, were intended to intimidate, menace or frighten Malpica.

For the foregoing reasons, I **CONCLUDE** that Delcollo's conduct was in violation of (C)(4).

The Policy defines physical assault to mean "unwanted or hostile physical contact including, but not limited to, hitting, fighting, pushing, shoving or throwing objects."

For the reasons cited above, I **CONCLUDE** that Delcollo's conduct was in violation of (C)(5).

Workplace violence under the Policy includes but is not limited to "the utterance of threats and/or the display of threatening behavior, harassment, intimidation, physical assault or intentional property damage".

Delcollo's conduct fell within the purview of this definition and constitutes Conduct Unbecoming an Employee.

For the reasons cited above, I **CONCLUDE** that Delcollo's conduct was in violation of (C)(11).

With regard to violation of (C)(24), for the reasons cited above, it is undisputed that Delcollo's conduct rose to the level of Intimidation, Harassment and Interference of a Fellow Employee on State Property.

I **CONCLUDE** that Delcollo's conduct was in violation of (C)(24) by Intimidating, Harassing and Interfering with a Fellow Employee on State Property

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

Delcollo has been found guilty of Unbecoming Conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6); Other Sufficient Cause, in violation of N.J.A.C. 4A:2-2.3(a)(12); violations of HRB 84-17 (as amended): (C)(4) – Verbal Abuse of an Inmate, Patient, Client, Resident or Employee; (C)(5) – Inappropriate Physical Contact or Mistreatment of an Inmate Patient, Client, Resident or Employee; (C)(11) – Conduct Unbecoming an Employee; (C)(24) – Threatening, Intimidating, Harassing, Coercing or Interfering with a Fellow Employee on State Property.

A forty-five-day suspension was imposed against Delcollo for his actions. While Delcollo has no prior disciplinary history, given the egregiousness of his conduct - imposition of major discipline is warranted.[1] (R-8).

[1] In 2011, Delcollo received a Letter of Counselling which does not rise to the level of formal disciplinary action.

The DOC's Policy is a zero-tolerance policy which was put in place to prevent employees from being harassed, threatened, intimidated or assaulted in the workplace setting. Delcollo's actions against Malpica were not only in direct violation of the Policy but were in utter disregard of the order, discipline, safety and security that must be stringently maintained in a correctional facility.

Having considered the proofs offered in this matter and having given due deference to the concept of progressive discipline, I **CONCLUDE** that Delcollo's misbehavior on January 3, 2016, was so significant as to warrant the forty-five-working-day suspension imposed by the appointing authority, which, in part, is meant to impress upon him, as well as others, the seriousness of his infractions.

ORDER

I **ORDER** that the action of the respondent in imposing a forty-five-day working-day suspension on Delcollo is **AFFIRMED**.

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

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

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

March 8, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 3/8/18

Date Mailed to Parties: 3/8/18

/vj

APPENDIX

WITNESSES

For appellant:

Mark Yoshioka

Peter Delcollo

For respondent:

Bethzaida Malpica

Annie Marie Palmer

Donna Alexander

Christopher Cline

EXHIBITS

For appellant:

None

For respondent:

R-1 Amended and now identified as "J-1"

R-2 New Jersey Department of Corrections Special Investigations Division Administrative Investigation (5 pages)

R-3 Special Custody Report (page 1 only)

R-4 Special Investigation Division – SID statement of Senior Correction Officer Matthew Bauman (1 page)

R-5 Bridgeton City Police Department Investigation Report (3 pages)

R-6 New Jersey Department of Corrections Police Statement (12 pages)

R-7 Amended and now identified as "J-2"

R-8 Work History (1 page)

R-9 Amended and now identified as "J-3"

R-10 Taped statement of Inmate "F"

R-11 Taped statement of Inmate "S"

R-12 Not entered into evidence

Joint Exhibits

J-1 Preliminary Notice of Disciplinary Action and Final Notice of Disciplinary Action (2 pages)

J-2 Department of Corrections – New Hire Orientation Checklist (2 pages)

J-3 Department of Corrections – Human Recourses Disciplinary Action Policy (37 pages)

4-18-18

A-3

STATE OF NEW JERSEY

In the Matter of Joseph Ehiosa
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-3550
OAL DKT. NO. CSV 07315-17

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 20, 2018 BW

The appeal of Joseph Ehiosa, Cottage Training Technician, Hunterdon Developmental Center, Department of Human Services, removal effective January 6, 2017, on charges, was heard by Administrative Law Judge Catherine A. Tuohy, who rendered her initial decision on March 14, 2018 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority for the period of separation to the actual date of reinstatement. *See N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Public Safety*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues

concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Joseph Ehiosa. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07315-17
AGENCY DKT. NO. 2017-3550

IN THE MATTER OF JOSEPH EHIOSA,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPEMENT CENTER.

John F. McDonnell, Esq., for appellant (McDonnell, Artigliere, P.C., attorneys)

Rimma Razhba, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 29, 2017 Decided: March 14, 2018

BEFORE **CATHERINE A. TUOHY,** ALJ:

STATEMENT OF THE CASE

Appellant, Joseph Ehiosa, a Cottage Training Technician (CTT) at the Hunterdon Developmental Center (HDC), Department of Human Services (DHS), respondent appeals his removal, effective January 6, 2017 for alleged violations of various internal rules and policies including physical abuse of a client (C3.1); inappropriate physical contact or mistreatment of a client (C5.1); any improper conduct which violates common decency (C11.1); and violation of a rule, regulation, policy, procedure or administrative decision (E1.1). Appellant was also charged with violations of N.J.A.C. 4A:2-2.3(a)(1), Failure to

perform duties; N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause.

PROCEDURAL HISTORY

On January 6, 2017, and revised and amended on February 22, 2017, respondent issued a Preliminary Notice of Disciplinary Action (R-8) setting forth the charges and specifications made against the appellant. After a departmental hearing on March 22, 2017, the respondent issued a Final Notice of Disciplinary Action (R-9) on April 18, 2017 sustaining the charges in the Preliminary Notice and removing appellant from employment, effective January 6, 2017. Appellant appealed on April 25, 2017 and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on May 22, 2017 for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13. The matter was heard on September 26 and September 28, 2017. The record remained open to allow the parties to submit post-hearing submissions and the record closed on November 28, 2017. The record was reopened to allow for submission of the internal policies referred to in the notices of discipline. The record closed on January 29, 2018 after receipt of the New Jersey Department of Human Services Disciplinary Action Program (R-23).

FACTUAL DISCUSSIONS AND FINDINGS

Irene Carozza testified on behalf of the respondent. She is employed by the HDC as a Supervisor of Professional and Residential Services (SPR) and has held this position for the past two and a half years. She has worked for the state for twenty-three years. HDC provides twenty-four hour total care for developmentally disabled adults that reside in the facility. Cottage Training Technicians are direct care staff and take care of the residents that thy are assigned. HDC Administrative Procedure # 30 is their procedure for abuse, neglect and mistreatment and how to report same (R-1). HDC has a zero tolerance for abuse. If an allegation of abuse is substantiated, the person is removed from employment because their main goal is to protect their residents. Physical abuse is defined as "a physical act directed at a service recipient by a DHS employee, volunteer, intern, or

consultant/contractor of a type that could tend to cause pain, injury, anguish and/or suffering. Such acts include but are not limited to the service recipient being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/ or struck with a thrown or held object." (R-1, page 1). The staff are trained on physical abuse and on reporting abuse. The supervisor, the DHS, and the Office of Program Integrity and Accountability (OPIA) are all notified. An investigator is assigned to the case to conduct an investigation to determine whether the allegations of abuse are substantiated or unsubstantiated. If allegations of abuse are substantiated, removal proceedings are initiated. There is no progressive discipline for instances of abuse of a client. The HDC October 3, 2016 Memorandum dealing with the Mistreatment of Clients summarizes the policy regarding abuse and neglect which is provided to all employees. Mr. Ehiosa signed and acknowledged that he read the policy and understands the content of the Memorandum (R-2). Direct care employees receive an overview of "handle with care" techniques (R-17) which is a state approved physical restraint policy that allows employees to control a violent client. Physical control techniques shall be used in an emergency to control an individual to protect them or others from harm.

A 'code green' is called when a client is in a crisis situation or having a behavioral episode and assistance is needed. This request is made by telephone and announced over the loudspeaker. Employees are also made aware of each client's "Behavior Support Plan" (BHP). The employees receive in-service training by the psychology department as to the target behaviors of each client that they care for. Mr. Ehiosa was a CTT at cottage 20 where client J.C. resided. He received in-service training as to resident J.C.'s BHP which indicated that J.C. engages in aggressive and self-injurious behavior (R-3). He also received numerous classes from staff development at HDC, including handle with care training on May 31, 2016 and preventing abuse and neglect on July 8, 2016 (R-4).

On cross-examination, Ms. Carozza admitted that there are certain times when a direct care worker can touch a client in order to prevent injury to themselves or others. Grabbing or pulling a client to prevent the client from hurting themselves is not a permissible handle with care technique. Blocking a kick would be appropriate if a client is kicking you, but you cannot grab their legs.

Enock Berluche, testified on behalf of the respondent. He has been employed by HDC since 2003 and currently holds the title of Habitation Program Coordinator (HPC). He coordinates services for all of their clients, including doctor visits, psychological services and oversees all of the resident's treatment plans. He has provided training for direct care staff and is a certified trainer of the "Handle with Care" program developed by Bruce Chapman. The initial training is two days, eight hours each day. There is a recertification class that is four hours long. Handle with care is a program that uses self - defense techniques to get out of grabs and holds. It is intended to not be punitive, but to keep staff and clients safe. All CTTs are instructed in handle with care techniques and take a refresher course each year. The grabbing and pulling of a client is not an approved technique. If a client is in a state of crisis, blocks or a physical control technique can be used. If a client is just yelling, they can just be let be or attempts made to verbally redirect them. Intervention is not required until a client becomes a danger to themselves or staff. If a client is posing a threat to themselves or someone else, a physical control technique (PCT) could be employed. One of these techniques involves coming from behind a client and giving them a chest bump, then placing hands over their shoulders and under their arms, with the palm of the hands on the side of the client's back. The client would be held tight until they calm down for up to fifty minutes. The client can also be brought down to their knees in this hold. If a client is in a serious crisis, the supine position is employed which requires two staff members to implement. The client would be lying flat on their back and the staff member would be lying on their stomach with their shoulder in the crease of the client's shoulder. An ariel view of this position would resemble a "T". Physical control techniques are used as a last resort. If a client is attempting suicide by trying to wrap a cord around his neck, Mr. Berluche would remove the cord off his neck or apply a restraint if he could not remove it. There is a code green procedure to call for assistance. If an attempt to redirect a client is unsuccessful, a code green can be called which involves dialing extension 1400 on the phone. The operator will announce the code overhead on the radio and people will respond to assist. A code green can also be called in anticipation of a problem to prevent one from occurring.

Mr. Berluche is familiar with client J.C. He has never seen J.C. hiding under his bed or on top of his bed. He has heard reports of this fact but never witnessed it. If J.C. was hurting himself Mr. Berluche would call for help or move the bed. If J.C. was not

hurting himself, Mr. Berluche would attempt to talk him out from under the bed. Mr. Berluche recalls the incident involving appellant and J.C. It was close to the end of his shift and he received a call from the cottage training supervisor (CTS) Jacinta Goodwin to go to cottage 20. He was on his way there with another staff member, Kathy Kyne when he saw Joseph Ehiosa leaving to head to the unit office. Ms. Kyne proceeded to cottage 20 and Mr. Berluche walked with appellant and asked him what had happened. Mr. Ehiosa stated that he grabbed J.C. by the ankles. He demonstrated that he put his hands forward with his hands open and he stated he grabbed him by the ankles. He said J.C. was under the bed and he had to get him out. The incident was documented by an HDC-15 form which is a confidential incident report (R-5). According to the incident report, on January 3, 2017 at 7:55 a.m. Jacinta Goodwin, CTS reported to Mr. Berluche that J.C. accused Mr. Ehiosa of choking him and dragging him out of his room by his neck. J.C. had redness around his neck. The supervisor Kathy Kyne reviewed the incident report and completed the form (R-5). Mr. Berluche prepared a confidential incident statement the same day (R-6). Mr. Berluche stated that Mr. Ehiosa admitted to him that he had grabbed J.C. by the ankles in an attempt to prevent him from crawling underneath the bed (R-6). Mr. Berluche recalls being interviewed by an investigator from the Office of Integrity, an outside organization that investigates allegations of abuse. Mr. Berluche provided a written statement to the investigator, dated February 2, 2017 (R-7) which indicated that Mr. Ehiosa told Mr. Berluche that he grabbed J.C. by the ankles.

On cross-examination, Mr. Berluche stated that Mr. Ehiosa told him that he grabbed J.C. by the ankles but never said that he pulled J.C. Mr. Berluche made a point of telling the investigator, Kyle Smith that Mr. Ehiosa never said that he pulled J.C. by the ankles. Mr. Berluche received a call from Mr. Ehiosa's supervisor, Jacinta Goodwin who was the cottage training supervisor of cottage 20, that J.C. made an abuse allegation against Mr. Ehiosa. This occurred at approximately 7:50 and the shift ended at 8:00 a.m. Mr. Berluche did not recall Ms. Goodwin advising him that J.C. claimed that Mr. Ehiosa choked him and dragged him out of his room and down the hallway. Mr. Berluche admitted that one of the responsibilities of a direct care worker is to keep a client safe and to prevent a client from harming themselves. Mr. Berluche was asked what the difference was between a hold and a grab and Mr. Berluche indicated that a 'grab' implies an aggressive act. He explained that he 'holds' his wife but would 'grab' his child to prevent them from running into the

street. Nothing in the handle with care policy is aggressive. It is self-defensive and the purpose is to keep the individual safe. There are training materials for the "Handle with Care" procedures that describes the various moves and how to do each of the moves. He had not seen that document at the hearing.

Kathy D. Kyne testified on behalf of the respondent. She has been employed by the HDC for thirty-four years and has been an Assistant Supervisor of Professional and Residential Services (ASPR) for three years. She is in charge of two buildings and makes sure the clients are being taken care of and procedures are being followed. Ms. Kyne identified R-5 as their "Unusual Incident Report" or HDC-15 form. She filled out section two of the report and prepared the narrative. Ms. Kyne indicated that Jacinta Goodwin had reported that client J.C. indicated that Mr. Ehiosa grabbed client J.C. by the neck and dragged him out of the room into the hallway. She noted that there was a red line on J.C.'s neck. Ms. Kyne indicated that Mr. Ehiosa stated that J.C. had just received his medications and when Mr. Ehiosa noticed J.C. was not with the group he went looking for J.C. and found him under his bed. He lifted the bed to help J.C. out from under the bed, but J.C. would not come out. Mr. Ehiosa grabbed his feet to get him out from under the bed. Ms. Kyne explained that Mr. Ehiosa has a heavy accent and is sometimes difficult to understand.

On cross-examination, Ms. Kyne admitted that she did not write in her report that Mr. Ehiosa stated he pulled J.C.

Mark Piccolo testified on behalf of the respondent. He has been employed by the HDC for ten years, the last five years as a staff clinical psychologist. He writes behavioral support plans for the clients which basically instructs how staff should deal with a clients' behavior. He also conducts in-service training with staff as to how to deal with client's behaviors, crisis intervention and positive behavior supports to allow the clients to be as independent as possible. A 'code green' is called whenever there is a behavior crisis or one is imminent. A person would call in a code green on the telephone and the operator would announce the code green over the loudspeaker. Qualified Intellectual Disability Professionals (QIDP's) would respond to the code and render assistance in managing the behavioral crisis. However, sometimes there is not enough time to call a code green, if for

instance, a client was banging his head into a wall, then it would be necessary to intervene to protect the client. Sometimes, just a call for help is required but if there is no one else around to assist, a physical restraint would have to be applied. The "restraint" policy utilized at HDC is called "Handle with Care". The positions used are the "settle" and "supine" positions for restraining a client as well as a two person escort technique as well as blocking techniques. If a client is trying to harm themselves, they would probably have to be physically restrained. The settle technique can be done with one person and involves hooking somebody's arms from behind and going down on the knees with the person cradled in between the crotch. The supine restraint requires two people and involves laying the client down on their back and laying on top of the client with a shoulder placed in the clients' armpit and forming a "T".

Mr. Piccolo works with the clients in cottage 20 and is familiar with client J.C. He has a moderate intellectual disability and is very manipulative with the staff. J.C. also is very anxious and gets aggressive. He is a very difficult client to manage. Mr. Piccolo developed J.C.'s Behavioral Support Plan (BSP). The plan tries to focus on minimizing's J.C.'s anxiety and gives instructions on how to deal with J.C. when he is agitated and also deals with suicide precautions. All of the employees who work with the clients in cottage 20 receive in-service training on J.C.'s BSP (R-10). J.C. gets very anxious over going on trips or going to activities so they try and encourage him to communicate and provide other options. J.C. sometimes runs to his room in an attempt to escape demands and will not come out. Mr. Piccolo has seen J.C. run to his room and go under his bed because he is anxious or to avoid an activity. Usually, Mr. Piccolo can get J.C. to come out by talking to him because he is familiar with him and frequently works with J.C. He has never had to physically attempt to get J.C. from out from under his bed because there was no need to. J.C. was not in imminent danger to himself or others.

When asked if grabbing a client to try and get them out from under a bed was ever a method Mr. Piccolo would use he indicated that he could not answer that because he has never had an episode where someone has been in danger underneath their bed. J.C.'s BSP indicates that he has verbalized thoughts of committing suicide and made gestures such as putting cords, ropes, shirts and belts around his neck (R-10, page 7).

When asked what would he do if he had seen J.C. under his bed with something around his neck, Mr. Piccolo testified that was a difficult question to answer and that probably trying to get someone to help or calling for a code green is the correct answer but questioned whether you would be putting the client at risk by leaving him to get somebody to assist.

On cross-examination, Mr. Piccolo stated that he did see J.C. on the date of this incident after the incident and he observed that J.C. had red marks around the front of his neck. These marks would be consistent with J.C. having had something wrapped around his neck and trying to harm himself. Cottage 20 is one of the most difficult cottages at HDC housing the most violent males on the grounds who engage in aggressive and self-injurious behaviors. In Mr. Piccolo's opinion, J.C. is the most difficult client at HDC. J.C. is forty-three years old approximately 5' 8" and 200 lbs. In J.C.'s BSP, the target behaviors are the most pathological behaviors J.C. engages in and they are listed as aggressive and self-injurious behaviors (R-10, page 1). J.C. has a long history of engaging in these behaviors, including intentionally slamming his head on hard objects. Certain factors that cause J.C. to engage in aggressive or self -injurious behaviors are listed as "Antecedent Factors" in his BSP (R-10, page 2). One of those factors is telling J.C., he has to do something he does not want to do. Mr. Piccolo is aware that on the day of this incident January 3, 2017, J.C. was told he had to go on a trip. If he does not want to go on a trip he will engage in aggressive or self-injurious behavior to avoid going on the trip, including gestures such as putting cords, ropes or shirts around his neck. Anything that heightens his anxiety level would trigger these behaviors. J.C. also has a lengthy history of making false allegations against the staff. J.C. accused Mr. Ehiosa of choking him, which is consistent with J.C.'s past behavior of making false allegations of abuse against the staff.

Kyle Smith testified on behalf of the respondent. He is employed by the Office of Investigations, Department of Human Services which is an investigatory body that investigates allegations of abuse, neglect and exploitation. Mr. Smith has been employed as a Quality Assurance Specialist for twelve years and his job is to collect and review evidence and prepare an investigation report. Mr. Smith conducted an investigation and prepared a report concerning this incident involving the allegations of abuse against Mr. Ehiosa (R-14). Mr. Smith interviewed and obtained written statements from Mr. Ehiosa on

two occasions, January 5, 2017 (R-15) and February 3, 2017(R-16). The purpose of the second interview was to follow-up and clarify some of the answers from the first interview. Mr. Smith believed Mr. Ehiosa's answers were contradictory. Mr. Ehiosa was aware that J.C.'s behavioral support plan called for checking on J.C. every fifteen minutes if he was under his bed. Mr. Ehiosa explained that he found J.C. under his bed wrapped in blankets and believed J.C. was trying to commit suicide and that was the reason he did not just leave him under his bed. Mr. Ehiosa stated that he held J.C.'s legs to prevent him from injuring himself on the bed frame. The second interview focused on how Mr. Ehiosa was able to physically gain control of J.C.'s legs if he was kicking. Mr. Ehiosa indicated that he did not grab or pull J.C. but made a swiping gesture as if to bring J.C.'s legs into a hold against Mr. Ehiosa's body. Also, if Mr. Ehiosa thought J.C. was engaged in a suicide attempt, he should have called for a code green. Mr. Ehiosa told Mr. Smith that he could handle the situation.

Mr. Smith explained that there was a lack of evidence to substantiate a claim of abuse regarding J.C.'s allegation that Mr. Ehiosa grabbed J.C. by the neck and dragged him out of the room into the hall. However, Mr. Smith stated that the substantiation of abuse against Mr. Ehiosa was based upon Mr. Ehiosa's self-reported statement to his immediate supervisor and then to Mr. Berluche, that he grabbed J.C. and pulled him from underneath the bed.

On cross-examination, Mr. Smith admitted that he did not conduct the demonstration utilizing the bed or any props when he was questioning Mr. Ehiosa as to how he was able to control J.C. on the date of the incident. Mr. Smith also admitted that Mr. Ehiosa appeared for both interviews and was cooperative throughout the process. Mr. Smith was requested to read the written statement of Mr. Berluche contained in Mr. Smith's investigation report (R-14, page 3) and then admitted that Mr. Berluche submitted a statement saying Mr. Ehiosa admitted grabbing J.C. by the ankles, but there is no mention that Mr. Ehiosa pulled J.C. As part of the investigation, photographs were taken of client J.C.'s neck, although they were not attached to Mr. Smith's investigation report that was produced. Mr. Smith indicated that the photographs were taken by another investigator and depicted red marks around J.C.'s neck. Mr. Ehiosa had stated that the red marks were caused by J.C. wrapping something tightly around his neck. Mr. Smith found that

the allegations against Mr. Ehiosa by J.C. that Mr. Ehiosa grabbed J.C. by the neck and dragged him across the floor were not substantiated.

Joseph Ehiosa testified on his own behalf. Mr. Ehiosa has worked for the State of New Jersey since 2007, first at a northern New Jersey developmental center until it closed and he was reassigned to HDC in June 2014. He was employed as a Cottage Training Technician at cottage 20 where J.C. resides. Mr. Ehiosa is familiar with J.C. and has dealt with him daily. He is also familiar with J.C.'s behavioral support plan (R-10). J.C. is an aggressive, self-injurious client who will threaten the staff about losing their jobs and lie about the staff if he does not get what he wants. He also frequently threatens suicide and is then placed on a suicide watch.

On January 3, 2017, Mr. Ehiosa reported to work at 7:00 a.m. He was assigned to group 2 that day which consisted of seven clients including J.C. J.C. was the most difficult client to work with. Mr. Ehiosa described J.C. as approximately forty-two years old and weighing 200 pounds. Mr. Ehiosa is 5'8" and said J.C. is the same size as him except that Mr. Ehiosa is slightly taller. At approximately 7:20 a.m. medications were being dispensed to the clients and J.C. went to get his medication and failed to return to group 2. Mr. Ehiosa went looking for J.C. and found him under his bed with a bed sheet around his neck and a sweatshirt and blanket covering his body. Mr. Ehiosa believed that J.C. was going to harm himself. Mr. Ehiosa asked him why he left the group and J.C. responded that someone told him that he had to go on a trip. Mr. Ehiosa could not hear him clearly so he lifted up the bed and removed the blanket from him but the bedsheet was still around his neck. He attempted to calm J.C. down and told him that he did not have to go on the trip. J.C. was kicking his legs so Mr. Ehiosa tried to hold his legs down because he could not grab them as J.C. was kicking. He wanted to make sure J.C. did not hurt himself. Mr. Ehiosa was familiar with the Handle with Care policy and received training on the policy. He also was familiar with the abuse policy and was aware of the HDC zero tolerance for abuse policy. He was familiar with J.C.'s behavioral support plan which indicated if J.C. goes under his bed, check on him every fifteen minutes. However, that was only to be done if J.C. was not presenting any harm to himself which was not the case in this instance. If something happened to J.C. it would be Mr. Ehiosa's responsibility if he did not prevent injury to J.C. Mr. Ehiosa understood the HDC policy to allow physical

contact with a client to prevent them from injuring themselves. Mr. Ehiosa said that it is permissible to hold a client's feet down in order to prevent him from getting injured and that was included in the handle with care training taught at HDC.

On cross-examination, Mr. Ehiosa admitted that his first written statement dated January 3, 2017 did not indicate that J.C. had anything around his neck or that J.C. was kicking his feet. He explained that he wrote the first statement quickly for Mr. Berluche, as Mr. Berluche was in a rush to go home the morning of the incident. Mr. Ehiosa also indicated that J.C. may have gotten the marks on his neck when he was squeezing himself under the bed when he was being directed to come out (R-20). The psychology log collection report also makes no mention of J.C. attempting suicide or being wrapped in blankets (R-13). The January 5, 2017 statement given by Mr. Ehiosa to Mr. Smith included these facts. Mr. Ehiosa also indicated in that statement that J.C. went under the bed a second time and Mr. Ehiosa lifted up the bed with one hand and used the other hand to hold his feet down so when he lowered the bed back down it would not hurt J.C. When he found J.C. under the bed with clothes wrapped around his neck Mr. Ehiosa did not call for help because there was no one else there and it was an emergency situation so he could not leave J.C. Mr. Ehiosa believed the marks on J.C.'s neck may have been caused by the bedsheet, blanket and pullover in which he was wrapped (R-15). Mr. Ehiosa stated that Mr. Smith's interviews were longer and more detailed because he spent hours with him going over the facts. At times during the interview, Mr. Ehiosa felt that Mr. Smith was trying to twist his words. Mr. Ehiosa indicated that he did not tell anyone that he grabbed J.C. He held his legs down to prevent him from injuring himself on the bed. Mr. Ehiosa believed there was a conspiracy against him because he and Jacinta Goodwin do not get along.

On January 3, 2017 shortly following this incident, Mr. Ehiosa was directed to leave the cottage and was suspended. He has never returned. Mr. Ehiosa did not observe any marks on J.C.'s neck and only learned of same during his interview with Mr. Smith.

In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it

"hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Mr. Berluche testified that it was not permissible to grab a client and that "grabbing" implies an aggressive action. I do not find that testimony to be credible. The definition of 'grab' as set forth in the Merriam-Webster's Deluxe Dictionary, Tenth Collegiate Edition is: "to take or seize by or as if by a sudden motion or grasp." Mr. Berluche used an example of 'holding' his wife and 'grabbing' his child to prevent them from running into the street. That very example Mr. Berluche gave in describing the difference between a hold and a grab supports the position that a grab is not necessarily an aggressive action but a quick and sudden action that may be required to prevent harm from coming to someone. Certainly, grabbing a child's hand to prevent them from running into the street does not constitute child abuse. Likewise, grabbing a client to prevent them from sustaining harm is not abuse. Furthermore, the personal control techniques Mr. Berluche described as permissible according to the "Handle with Care" protocol would not only appear to be more personally offensive and intrusive than a simple grab to gain control, but also, those techniques cannot be utilized when someone is underneath a bed.

Although Mr. Ehiosa's written statements regarding the incident appear to get more detailed following his repeated interviews, I **FIND** that his testimony is credible based upon the overall assessment of the facts in this case, and especially in conjunction with the testimony of respondents' witness, Mr. Piccolo, the staff psychologist at HDC whose testimony was highly credible.

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

On January 3, 2017, appellant, Mr. Ehiosa was employed by HDC as a CTT and assigned to cottage 20 and responsible for the direct care of client J.C. Mr. Ehiosa was

familiar with the Handle with Care policy and received training on the policy. He also was familiar with the abuse policy and was aware of the HDC abuse policy of zero tolerance for abuse. Mr. Ehiosa was very familiar with J.C. and J.C.'s behavioral support plan (BSP) which indicated if J.C. goes under his bed, he should be allowed to remain there and be checked on every fifteen minutes. However, that was only to be done if J.C. was not presenting any harm to himself, which was not the case in this instance. J.C. was the most aggressive and difficult client at HDC and was well known to engage in certain behaviors when he is anxious including: aggression; making accusations of abuse against staff; and self-injurious behaviors such as intentionally slamming his head on hard objects and making suicidal gestures such as putting cords, ropes, shirts and belts around his neck. Certain factors trigger this behavior such as when J.C.'s anxiety level increases, including when J.C. is told to do something he does not want to do such as going on a trip. J.C. is also known to avoid something he does not want to do by leaving the group and going to his room and hiding underneath his bed. On January 3, 2017 J.C. was told that he was going on a trip, became anxious and left the group while they were receiving their medications. Mr. Ehiosa searched for J.C. and found him hiding underneath his bed stating he did not want to go on the trip. Appellant believed J.C. was going to harm himself because he had a bedsheet around his neck and a sweatshirt and a blanket over his body. There was no one else around. Appellant did not call for a code green because he could not leave J.C. alone and he thought he would be able to handle the situation. Mr. Ehiosa picked up the bed and removed the blanket off J.C. and was trying to calm J.C. down by telling him that he did not have to go on the trip. J.C. was kicking his feet and Mr. Ehiosa was able to get a hold of J.C.'s legs and held J.C.'s legs down so J.C. would not injure himself on the bed. Mr. Ehiosa was able to verbally direct J.C. out from under the bed. Appellant did not grab J.C. by the ankles and pull him out from under his bed. Appellant took no action against J.C. that could tend to cause pain, injury, anguish and/or suffering. Following the incident, J.C.'s neck was observed to have red marks around the front of his neck, consistent with something being wrapped around his neck.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Respondent has alleged that on January 3, 2017, at approximately 7:55 a.m. while in cottage 20, Mr. Ehiosa grabbed and pulled client J.C. by his feet and ankles to get him out from underneath his bed. Respondent alleged that this was considered physical abuse of a client, mistreatment of a client and conduct that violates common decency. It was further alleged that appellants actions were contrary to the redirection techniques specified in client J.C.'s Level 1 BSP. Respondent has charged appellant with the following violations of the Department of Human Services Disciplinary Rules set forth in Administrative Order 4:08: (C3.1) Physical or mental abuse of a client; (C5.1) Inappropriate physical contact or mistreatment of a client; (C11.1) Any improper conduct which violates common decency; (E1.1) Violation of a rule, regulation, policy, procedure order or administrative decision; as well as violations of N.J.A.C. 4A:2-2.3(a)(1), Failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause (R-9).

Physical abuse of a client is defined as "a physical act directed at a service recipient by a DHS employee, volunteer, intern, or consultant/contractor of a type that could tend to cause pain, injury, anguish, and/or suffering. Such acts include but are not limited to the service recipient being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object." (R-1, page 1). It is noted that "grabbing" is conspicuously absent from this definition. The facts indicate that the actions of appellant in this case did not constitute physical abuse of J.C. in that appellant did not grab appellant by the feet and ankles and pull him out from underneath his bed as respondent has alleged. There was testimony from both supervisors, Mr. Berluche and Ms. Kyne that Appellant never told them that he pulled J.C. out from under his bed. Appellant did admit that he held J.C.'s legs to prevent him from injuring himself on the bed and that this was permissible to prevent injury to the client. Even if appellant had 'grabbed' J.C.'s legs in order to prevent him from harm as opposed to 'holding' his legs to prevent him from harm it would not be considered abuse. J.C. was not kicked, pinched, bitten, punched, slapped, hit, pushed, dragged and/or struck with a thrown or held object. There was no physical act by appellant directed at J.C. that could tend to cause pain, injury, anguish or suffering. Therefore, I **CONCLUDE** that the respondent has not met its burden of proof that appellant physically abused J.C.

Mistreatment of a client is defined as "inappropriate treatment and can include vexing, verbal teasing, exposing a client to unnecessary danger, hardship, fatigue or strain. This also includes any indecent, immoral or unlawful act that may tend to endanger the morals of a client and withdrawing of personal items or foods that are not required by a medical order or approved Level III behavior support program" (R-2, page 1). Mr. Ehiosa was responsible for the safety of his client, J.C. and admitted that he held J.C.'s legs while he was kicking them to prevent J.C. from injuring himself. There was no testimony that Appellant pulled J.C. out from underneath his bed by the ankles. Therefore, I **CONCLUDE** that respondent has not met its burden of proof that appellant mistreated J.C.

Although respondent has charged appellant with improper conduct which violates common decency, this offense is not defined in the Disciplinary Action Program (R-23). This charge is based on the allegation that appellant grabbed and pulled J.C. by his feet and ankles to get him out from underneath his bed. Dragging a client out from underneath

their bed by their feet or ankles would offend notions of common decency, however, there has been no testimony that appellant grabbed and pulled J.C. by his ankles and feet to get him out from underneath his bed. Therefore, I **CONCLUDE** that respondent has not met its burden of proof that appellant engaged in conduct that violates common decency.

Appellant's actions were also alleged to be contrary to the redirection techniques specified in J.C.'s BSP. The BSP indicates that J.C. may at times run to his room in order to avoid something he does not want to do. Staff are directed to follow J.C. to his room and let him know that he can have time to calm down and that he will be checked on in a few minutes. If J.C. stays in his room he should be allowed ten minutes and then staff should approach him and ask him to talk about what is bothering him. If J.C. talks about his problems, he will usually comply with requests. (R-10, page 5, paragraph 11). The BSP also indicates that J.C. may verbalize thoughts of committing suicide and make gestures such as putting cords, ropes, shirts and belts around his neck. If J.C. makes suicidal ideations or gestures, the staff is not to discuss it with him, only keep him safe without conversing about the incident (R-10, page 7, paragraph H). On the day of this incident, January 3, 2017 J.C. did run to his room and hide underneath his bed when he became anxious when he learned he was to go on a trip that day. Appellant testified that J.C. had a sheet, a sweatshirt and a blanket around his neck and appellant believed J.C. would harm himself. Therefore, he could not leave him and go back and check on him. Mr. Ehiosa stayed with J.C. and talked to him and calmed him down and eventually was able to verbally redirect him out from under the bed. Mr. Ehiosa's primary obligation was to keep the client safe. One of the most compelling facts in this case supporting appellants testimony is that J.C. was found to have red marks around his neck following this incident that was consistent with his target behaviors of suicidal gestures when he becomes anxious. Therefore, I **CONCLUDE** that appellants actions were not contrary to the redirection techniques specified in J.C.'s BSP and that respondent has not sustained its burden of proof that appellant violated a rule, regulation, policy, procedure order or administrative decision as set forth in (E1.1).

Appellant was also charged with violating N.J.S.A. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties. There is no definition in the New Jersey Administrative Code for incompetency, inefficiency or failure to perform duties. However,

case law has determined incompetence is a "lack of the ability or qualifications necessary to perform the duties required of an individual [and] a consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield Police Dep't, CSV 9921-98, Initial Decision (December 6, 1999), adopted, Merit Sys. Bd. (January 24, 2000), http://njlaw.rutgers.edu/collections/oal/final/ (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980)). Mr. Ehiosa has worked at the HDC since June 2014 and has had daily contact with J.C., the most difficult client at the facility. He is trained on client abuse prevention and is familiar with J.C.'s BSP. One of the main duties of the appellant is to provide for the safety of the client's entrusted to his care. The facts in this case indicate that J.C. was in danger of harming himself and that appellant acted appropriately in protecting J.C. from injury by not allowing him to remain under the bed with a bedsheet and sweatshirt around his neck and by holding his legs while J.C. was kicking to prevent J.C. from hitting the bedframe while appellant was lowering the bed back down. Therefore, I **CONCLUDE** that the appointing authority has not met its burden of proof on this issue.

Appellant was also charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge of conduct unbecoming was the alleged physical abuse of a client by appellant grabbing and pulling client J.C. by his feet and ankles from underneath his bed. Appellant did not pull J.C. from under the bed by his ankles him but he did admit he held his legs to avoid the client from becoming injured while J.C. was kicking and could have injured himself on the bed. Furthermore, appellant acted appropriately by not allowing J.C. to remain under the bed with a bedsheet and sweatshirt wrapped around his neck. Following this incident, J.C. was found to have an injury to his neck which is consistent with appellant's testimony that when he found J.C. underneath his bed he had a sheet and a sweatshirt wrapped tightly around his neck and appellant believed J.C. was going to harm himself. Appellant's conduct was not such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services. To the contrary, appellants behavior was necessary and appropriate under the circumstances. Appellant was responsible for the safety of J.C. and his actions were reasonable. Therefore, I **CONCLUDE** that the appellant did not engage in conduct unbecoming a public employee and that the appointing authority has not met the burden on this issue.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Specifically, appellant has been charged with violating HDC Procedure #30/ Administrative Order 4:08 Physical abuse of a patient (R-1) for allegedly grabbing and pulling client J.C. by his feet and ankles to get him out from underneath his bed. There was testimony from two of appellants supervisors that appellant never stated to them that he pulled J.C. out from under his bed. Appellant testified that he believed J.C. would harm himself as he was under the bed with a sheet and sweatshirt wrapped around his neck. J.C. was upset that he was going to have to go on a trip which he did not want to go on. Appellant was able to talk to J.C., calm him down and eventually able to get him out from underneath the bed with verbal directions. However, appellant did admit that when he lifted the bed up to get J.C. to come out, J.C. was kicking his feet and appellant had to hold his feet to prevent J.C. from hurting himself on the bed while he placed the bed down again. Following this incident, J.C. was found to have red marks around his neck consistent with appellants testimony that J.C. was

underneath the bed with a sheet and sweatshirt wrapped around his neck. Appellant believed J.C. was attempting to harm himself which behavior is documented in J.C.'s BSP. "Physical Abuse", as defined in Administrative Order 4:08, Supplement 1, refers to a physical act directed at a service recipient by a DHS employee of a type that could tend to cause pain, injury, anguish, and/or suffering. (See R-1). Appellant's actions did not constitute physical abuse. Appellant was attempting to keep J.C. safe and prevent him from harming himself. Individuals who are developmentally disabled are entitled to humane treatment and care. Appellants actions were reasonable and necessary under the circumstances and did not violate this standard of good behavior. As such, I **CONCLUDE** that this charge should be **DISMISSED.**

ORDER

Based upon the foregoing, I **ORDER** that the action of the respondent is **REVERSED** and the appellant's appeal is **GRANTED**. I further **ORDER** that all charges filed against appellant in this matter are hereby **DISMISSED**.

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

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

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

March 14, 2018
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: March 14, 2018 (emailed)

Date Mailed to Parties: March 14, 2018 (emailed)

/mel

APPENDIX

WITNESSES

For Petitioner:

Joseph Ehiosa

For Respondent:

Irene Carozza
Enock Berluche
Kathy D. Kyne
Mark Piccolo
Kyle Smith

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Hunterdon Developmental Center (HDC) Procedure #30 Abuse, Neglect, Mistreatment and Reporting Reasonable Suspicion of a Crime (eight pages)

R-2 HDC Interoffice Memorandum dated October 3, 2016 re: Mistreatment of Clients (three pages)

R-3 HDC Psychology In-service Roster for J.C. (three pages)

R-4 Learner Transcripts Report for Joseph Ehiosa

R-5 Confidential Incident Report – HDC-15 dated January 3, 2017

R-6 Confidential Incident Report HDC dated January 3, 2017 by Enock Berluche

R-7 Written Statement Enock Berluche dated February 2, 2017

R-8 Revised Amended Preliminary Notice of Discipline (31-A)

R-9 Final Notice of Discipline (31-B)

R-10 HDC Behavior Support Plan (eight pages)

R-11 photocopy of picture of bed

R-12 Written Statement of Mark Piccolo dated January 12, 2017

R-13 Psychology Data Collection Sheet

R-14 Investigation Report (thirty-five pages)

R-15 Joseph Ehiosa Questionnaire dated January 5, 2017 (seven pages)

R-16 Written Statement of Joseph Ehiosa dated February 3, 2017 (two pages)

R-17 HDC Administrative Procedure No. 4 dated November 1, 2014 Defensive and Physical Control Techniques (fifteen pages)

R-18 Jacinta Goodwin Q & A dated January 11, 2017

R-19 Jacinta Goodwin Written Statement dated February 6, 2017 (two pages)

R-20 Confidential Incident Statement of Joseph Ehiosa dated January 5, 2017 (two pages)

R-21 HDC Interoffice Memorandum dated April 3, 2017 (ten pages)

R-22 Corrective/Disciplinary Action History – Joseph Ehiosa (three pages)

R-23 New Jersey Department of Human Services Disciplinary Action Program (twenty-two pages)

4-15-17

A-4

STATE OF NEW JERSEY

In the Matter of Luis Fermin
City of Paterson, Police Department

CSC DKT. NO. 2016-3075
OAL DKT. NO. CSV 4028-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 20. 2018 BW

The appeal of Luis Fermin, Police Officer, City of Paterson, Police Department, 180 calendar day suspension, on charges, was heard by Administrative Law Judge Gail M. Gookson, who rendered her initial decision on March 15, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 4028-16
AGENCY REF. NO. 2016-3075

IN THE MATTER OF LUIS FERMIN,
CITY OF PATERSON,
POLICE DEPARTMENT.

Sebastian B. Ionno, Esq., for appellant Luis Fermin (Ionno & Higbee, attorneys)

Steven S. Glickman, Esq., for respondent City of Paterson (Steven S. Glickman, LLC, attorneys)

Record Closed: January 29, 2018 Decided: March 15, 2018

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Luis Fermin (appellant) appeals from the decision of the Police Department of the City of Paterson (City) to suspend him from his position as a Police Officer for 180 days on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); misuse of public property in violation of N.J.A.C. 4A:2-2.3(a)(8); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). These charges arise as a result of a high-speed pursuit undertaken by appellant and his partner on June 17, 2014. Appellant denies the charges and claims that he reported the pursuit appropriately and completed accurate reports thereafter.

On January 22, 2015, a Preliminary Notice of Disciplinary Action was filed seeking to suspend appellant from his position. The departmental hearing was conducted on January 13, 2016. Thereafter, a Final Notice of Disciplinary Action was issued on February 24, 2016, sustaining the disciplinary charges and suspending appellant for 180 days beginning March 1, 2016 and ending September 6, 2016. Appellant appealed that disciplinary action on or about February 26, 2016. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 14, 2016, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was assigned to the undersigned on March 16, 2016. I convened a telephonic case management conference on April 13, 2016, and at that time hearing dates and discovery were discussed. The case was originally scheduled to be heard on September 29, 2016, but then adjourned at my request. After several other adjourned hearing dates, the plenary hearing was held on December 8, 2017. Post-hearing briefs were permitted and, after an extension, the last one was submitted on January 29, 2018, on which date the record closed.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

By way of background, appellant Luis Fermin has been a Police Officer with the City since 2005. On June 17, 2014, he and his partner – Police Officer Daniel Findlay – were assigned to patrol together. Officer Findlay was the driver. A motorcyclist who had violated multiple motor vehicle regulations was observed by the two officers at approximately 11:12 p.m. to be driving westbound on Governor Street but on the sidewalk with pedestrians present. Once they began their pursuit of him, speeds in excess of eighty miles per hour were reached. After the motorcyclist crashed, Officer Findlay called 9-1-1. Two Sergeants also came to the scene.

The issue herein is whether appellant called into headquarters on their radio to report the high-speed chase in accordance with proper procedures. There is also an issue as to the truthfulness of appellant's written report and statement on the incident.

Detective Sergeant Richard Botbyl testified on behalf of the City. At the time of this hot pursuit or high-speed chase incident, Sergeant Botbyl was an investigator with Internal Affairs. He has been in the Paterson Police Department for over twenty-two years, and was promoted to Sergeant and assigned to Internal Affairs for over six years. His current duties are now in Traffic.

Sergeant Botbyl reviewed the reports submitted by both officers following the conclusion of the incident. Each officer submitted one joint and one individual statement to Internal Affairs. Because there had been no communications from the officers during the incident, they were both asked why they had not called it into headquarters. Appellant stated at the time that he had called into the department, he was unaware that his partner had turned the vehicle radio off because the mic clip was broken and it kept falling to the floor of the car.

As part of his investigation, Sergeant Botbyl canvassed the area and interviewed available witnesses. He also reviewed a GPS report from the vehicle. In addition, Sergeant Botbyl reviewed any work orders that concerned the car radio in appellant's vehicle. On July 1, 2014, PageCom, a communications vendor the City used, checked the vehicle's radio for all functions, and adjusted the narrow bands on all channels and all levels. Later in December 2014, PageCom serviced that car radio again, checked all alignments, but this time "secured hang up button on mic." [R-9.]

Sergeant Botbyl testified that there were no communications into the Department from either appellant or his partner for the duration of the pursuit. Only after the chase was over did Officer Findlay call for an ambulance and notify headquarters. He went on to state that he did not find appellant's statements about the lack of communications to be credible. Appellant tried to excuse his failure to comply with pursuit policy by stating that the car radio was on the floor because of a broken mic clip and that Officer Findlay

must have turned it off unbeknownst to appellant. Sergeant Botbyl explained that the car radio would have been emitting chatter throughout the course of their shift, as would their individual portable radios. Silence during their shift would have been so odd as to have served as notice to appellant that the radio was off. When being used, a red light would so indicate on the base radio.

Sergeant Botbyl reviewed the pursuit and forcible stopping policies of the Paterson Police Department and the Attorney General. [R-22, -23.] Both guidelines set forth the mandatory requirement to notify communications and list the information that must be conveyed. He also detailed appellant's prior discipline history of a suspension for 180 days, later resolved by agreement down to 120-day suspension, for failing to maintain a New Jersey driver's license and for filing a false affidavit of residency to the State of Pennsylvania in order to obtain license, registration and insurance in that state.

On cross-examination, Sergeant Botbyl acknowledged that he only took the officers' written statements and did not interview them, but that would be normal for this type of internal investigation. He did not personally look at the police vehicle and its base radio, nor was he familiar with whether just a broken clip would have needed a work order before it could be repaired. Sergeant Botbyl also reiterated that the lack of response from headquarters to appellant's alleged attempt to communicate would have been additional notice to him that communications had failed.

The City also presented Manuel Hernandez as a witness. Sergeant Hernandez has been with the City Police Department for thirty-two years, and was assigned to Internal Affairs between June 2004 and December 2016. His testimony centered on the prior disciplinary action against appellant. That settlement, which occurred at the OAL, reduced the 180-day suspension to 120-day suspension and a 60-day leave of absence without pay.

Appellant testified on his own behalf.[1] He has been employed as a Police Officer

[1] Lieutenant Washington Griffin was also presented but his testimony was very limited in scope – the departmental hierarchy on disciplinary action decisions – and neither party relied upon it in their closing statements.

in the City since 2005, assigned to patrol. On June 17, 2014, Officer Findlay and he had begun their shift at 1:30 p.m. The incident with the motorcyclist began at approximately 11:12 p.m. He stated that he transmitted to headquarters at the beginning of the pursuit, as Officer Findlay was driving, using the vehicle radio. He could not recall whether the mic was on the floor of the vehicle or on the base, even though he said the clip was broken. Appellant also had his portable radio clipped to his duty belt. He agreed that there were no communications received back from headquarters but at the time, he did not consider that to be abnormal. He was told by Officer Findlay only after the incident was over that he had turned the radio off and he never said why. Appellant had been involved in probably only one other pursuit much earlier in his career.

On cross-examination, appellant attributed his failure to realize that headquarters had not responded to his pursuit call to the tunnel vision and adrenaline that kicks in during a chase when safety and the pursuit itself are paramount. Appellant believed that the mic was on the floor on his side of the center console. He was the one who kept hitting it with his foot. He could not recall when his partner turned the radio off during that shift. Appellant stated that he was talking to headquarters throughout the pursuit and might not have even been leaving gaps for a person on the other end to comment. Appellant also clarified that they were assigned on the subject evening to just patrol and be a presence in this particular area due to high gang and drug activity. Accordingly, they would not have been dispatched to other areas but that did not mean they would not be privy to dispatch chatter as usual.

In the reports prepared by both officers contemporaneously with the incident and the Internal Affairs investigation, Officer Findlay, who was not presented as a witness, set forth that he had not noticed that appellant was transmitting with the vehicle radio. He stated that he had turned it off because it was laying on floorboards on passenger side and appellant was inadvertently keying or transmitting it with his body. Officer Findlay then wrote that "we were utilizing our portable radios." [R-6.] Both officers reported that they could not hear the pursuit transmission from headquarters out to other units on their portable radios because the volume on those were turned down out of habit to avoid feedback with the base car radio. Engine noise and their own sirens

contributed to their inability to hear whether the Department had made a return transmission. [R-5, -6.] Officer Findlay's statement goes on to report that after they had made a U-turn and were about to call off the pursuit, he prepared to "utilize [his] portable radio to notify headquarters of the motorcycle pursuit." In fact, he states twice that he was about to utilize his portable radio. The second time he states that in the report, he adds that he saw that the motorcyclist had crashed to the ground. Accordingly, Officer Findlay used his portable radio to call for an ambulance.

I **FIND** that appellant was not a credible witness. Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Appellant's testimony and his earlier statements do not hang together and are incredible because they do not make sense. Appellant is an experienced officer who certainly knows when a radio is on or not through its red light, chatter and crackling. Even recognizing the fact that pursuits do not happen often and adrenaline may be pumping, that is what officers train for. Neither officer mentioned in any report that the vehicle's windows were down. I **FIND** that appellant testifying to that only at the hearing is embellishment. I **FIND** it more likely than not that appellant forgot to call into headquarters in the heat of the moment insofar as this was an unusual incident both in that it was a hot pursuit and that it was a motorcycle traveling on a sidewalk at a high rate of speed.

I **FIND** that it was Officer Findlay who made the first call to headquarters on this pursuit and only after it was essentially over. He did so using his portable radio which was the one he earlier stated was what both were utilizing. This clearly contradicts appellant's testimony and his reports that he used the base radio to transmit the pursuit to headquarters at the start of the chase but then could not hear any response on either his own portable or the vehicle radio. My finding is supported by Sergeant Botbyl's review of radio transmissions into headquarters at the time of the incident.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be

described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

As set forth above, I found that appellant's testimony and earlier statements to Internal Affairs are not credible. Accordingly, I **CONCLUDE** that appellant provided false statements and failed to comply with the relevant policy requirements.

Having concluded that an incident occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Nevertheless, law enforcement officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47

N.J. 80 (1966). Citizens must be able to depend on the veracity and honesty of the law enforcement officers in their community.

In this case, I **CONCLUDE** that the substantiation of this breach of the vehicular pursuit policy by appellant, and subsequent false claims asserted in appellant's reports, warrant the penalty imposed of 180 days. Appellant had a prior major disciplinary incident in 2013 that resulted in a penalty of 180 days. That disciplinary action was also premised upon false statements made to authorities and appellant's failure to abide by the City's policies on maintaining a valid New Jersey driver's license. [R-25.] Subsequent to an appeal on that incident to the OAL, appellant and the City settled those charges with a Memorandum of Agreement which reduced the 180-day suspension to 120 days. [R-26.] Accordingly, I **CONCLUDE** that the penalty of 180 days here is not excessive.

ORDER

Accordingly, it is **ORDERED** that the appeal of Luis Fermin from the disciplinary action entered in the Final Notice of Disciplinary Action of the City of Paterson Police Department is hereby **DISMISSED**. It is further **ORDERED** that major disciplinary action is **AFFIRMED** and that the penalty imposed for this disciplinary action shall remain one hundred and eighty (180) days.

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

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

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

March 15, 2018
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

MAR 16 2018

Date Mailed to Parties:

mm

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Luis Fermin

Washington Griffin

For Respondent:

Richard Botbyl

Manuel Hernandez

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-14 Official Report, Sgt. Kevin Collins, dated June 22, 2014

For Respondent:

R-1 Final Notice of Disciplinary Action, dated February 24, 2016

R-2 Preliminary Notice of Disciplinary Action, dated January 22, 2015

R-3 Internal Affairs Report, dated August 26, 2014

R-4 Joint Report of Officers Fermin and Findlay, undated

R-5 Official Report, Officer Fermin, dated June 23, 2014

R-6 Official Report, Officer Findlay, dated June 23, 2014

R-7 Fax from PageCom, dated February 20, 2015

R-8 PageCom, Work Order No. 126783, dated July 1, 2014, with E-Mail dated July 24, 2017

R-9 PageCom, Work Order No. 131162, dated December 11, 2014, with E-Mail dated March 16, 2015

R-10 – R-21 [not in evidence]

R-22 Paterson Police Dept., Pursuit & Forcible Stopping Guidelines, Standard Operating Procedure, eff. April 19, 2013

R-23 New Jersey Attorney General Police Vehicular Pursuit Policy, dated September 17, 2009

R-24 Preliminary Notice of Disciplinary Action, dated January 7, 2013

R-25 Final Notice of Disciplinary Action, dated October 10, 2013

R-26 Memorandum of Agreement, dated May 2015

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Michael J. Gismondi
County of Gloucester,
Department of Public Works

CSC DKT. NO. 2017-1408
OAL DKT. NO. CSV 17105-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 17105-16
AGENCY DKT. NO. 2017-1408

IN THE MATTER OF MICHAEL J. GISMONDI, COUNTY OF GLOUCESTER, DEPARTMENT OF PUBLIC WORKS.

Jason L. Jones, Esq., for appellant (Weissman and Mintz, LLC, attorneys)

Kathleen E. Dohn, Esq., for respondent (Brown & Connery, LLP, attorneys)

Record Closed: March 29, 2018 Decided: March 29, 2018

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on Novemebr 10, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 29, 2018
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: 4/3/18

Date Mailed to Parties: 4/3/18

/cb

OAL Docket No. CSV 17105-2016 S

MICHAEL GISMONDI v. COUNTY OF GLOUCESTER, DEPARTMENT OF PUBLIC WORKS	OFFICE OF ADMINISTRATIVE LAW OAL Docket No. CSV 17105-2016 S Agency Docket No. 2017-1408 **SETTLEMENT AGREEMENT**

The above parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated October 20, 2016, contained the following charges:

1. Incompetency, inefficiency or failure to perform duties;
2. Insubordination;
3. Conduct unbecoming a public employee;
4. Neglect of duty;
5. Misuse of public property, including motor vehicles;
6. Other sufficient cause.

The discipline proposed by the County of Gloucester ("Respondent") for these charges was termination.

B. Appellant Michael Gismondi ("Appellant") withdraws his appeal and request for a hearing, and Respondent will dismiss all of the above charges with prejudice.

C. Appellant resigns in good standing, effective immediately. Appellant shall not receive any back pay or other compensation other than his accrued, unused vacation time of forty-five (45) hours totaling $1,354.84 upon his resignation. The parties agree that all time between the effective date of his removal, October 4, 2016, and the effective date of resignation

shall be treated as a leave without pay. The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Respondent shall amend Appellant's personnel records to conform to the terms of this Settlement Agreement. All internal records of Respondent will be kept intact. Nothing herein shall preclude Respondent from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief.

F. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in other legal proceedings or matters involving other employees.

G. Appellant, on behalf of himself, his successors, heirs and assigns, releases Respondent, all related departments and entities, its and their officers, employees, directors, elected officials, and agents (in their individual and official capacities) from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Appellant has, ever had, or may have had, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the date that he signs this Agreement. This specifically includes

but is not limited to all of the claims Appellant may have asserted under the following: the National Labor Relations Act; the Public Employee Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Civil Rights Act; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract, policy, plan and/or procedure; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed. It applies to any further appeal rights Appellant may have had in this matter, any continuing effects of actions or practices that began prior to the date he signs this Settlement Agreement, and to any and all claims and potential claims whatsoever, including those of which Appellant is not aware, resulting from anything that has happened up to the date he signs this Agreement. Appellant warrants that he is not aware of any work related injury of which he has not already provided notice to the County and/or its workers compensation carrier. Each party shall bear its own attorneys fees and costs.

H. . Respondent agrees that in the event of an inquiry by a third-party to its Human Resources Department related to Appellant, that it shall only state the relevant dates of employment and job title. This provision shall not be construed so as to prohibit Respondent from truthfully responding to a subpoena duces tecum or subpoena for a deposition seeking

information related to Appellant's employment and/or production of documents upon a duly made legal request to do so and/or with Appellant's written authorization. This provision shall not be construed so as to prohibit Respondent from truthfully responding to any inquiry by any third-party to whom it has a legal obligation and/or duty to provide a complete and truthful response.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. This Settlement Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3-20-2018
Date

Appellant, Michael J. Gismondi

3/26/18
Date

Chad Bruner, County Administrator
Respondent, County of Gloucester

3/22/18
Date

Jason L. Jones, Esq.,
Counsel for Appellant

3/27/18
Date

Kathleen E. Dohn, Esq.,
Counsel for Respondent

OAL Docket No. CSV 17105-2016 S

CERTIFICATION

I, Michael J. Gismondi, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3-20-18 Michael J Gismondi

Date Appellant, Michael J. Gismondi

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Kimberly Hampton
Superior Court of New Jersey,
Atlantic and Cape May Vicinage

CSC DKT. NO. 2018-2071
OAL DKT. NO. CSV 03150-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03150-18

AGENCY DKT. NO. 2018-2071

IN THE MATTER OF KIMBERLY HAMPTON,
SUPERIOR COURT OF NEW JERSEY,
ATLANTIC AND CAPE MAY VICINAGE.

Marcus King, Teamsters Local 331, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Susanna J. Morris, Esq., for respondent

Record Closed: April 3, 2018 Decided: April 5, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Kimberly Hampton from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on February 28, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Prior to the settlement conference scheduled for March 27, 2018, the parties agreed to a settlement and have prepared a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 5, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 4/6/18

Date Mailed to Parties:

cmo

RECEIVED
2018 APR -3 P 12: 45
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is made and entered into by and between Kimberly Hampton (hereinafter referred to as the "Employee"), JCAU Support Staff Unit/International Brotherhood of Teamsters, Local 331, (hereinafter referred to as the "Union"), and the State of New Jersey Judiciary, Atlantic & Cape May Vicinage (hereinafter referred to as the "Vicinage"), with its principal offices located at Atlantic City, New Jersey.

WITNESSETH:

WHEREAS, the Employee, the Union, and Vicinage desire to fully and finally settle all matters in dispute between them regarding the Final Notice of Disciplinary Action (31-B) issued by the Vicinage against the Employee on February 20, 2018, a copy of which is attached hereto and incorporated into this Agreement; and

WHEREAS, in consideration for the settlement of all claims that have been, or could have been, raised by the Employee and/or Union in this matter, in connection with the Employee's employment, and for other good and valuable consideration, including the mutual promises and terms and conditions contained in this Agreement;

IT IS HEREBY AGREED AS FOLLOWS:

1. The Employee admits to charges set forth in the Final Notice of Disciplinary Action dated February 20, 2018. Further, the Employee agrees to accept a six day suspension. The suspension shall be served without pay on dates determined by the Employer. The Judiciary shall issue an amended Final Notice of Disciplinary Action specifying the aforementioned suspension. The Employee and the Union understand and agree that the Employee's disciplinary record will reflect the six day suspension and that such suspension may be used in the future by the Judiciary for purposes of progressive discipline.

2. The Employee and the Union agree not to appeal these matters in any other forum, including, but not limited to a court of law, grievance proceeding, arbitration, the Civil

Service Commission, and/or the Public Employee Relations Commission. The Employee further agrees to withdraw with prejudice all pending appeals, including, but not limited to, the following: OAL Docket. No. CSV 03150-2018 S.

3. In consideration of the promises made herein by management, the Employee agrees to release and forever discharge all potential and existing claims arising out of this matter, including, but not limited to, any alleged violation of the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, Section 1981 et seq. of Title 42, the New Jersey Civil Rights Act, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Occupational Safety and Health Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the Family and Medical Leave Act, the New Jersey Family Leave Act, each of the foregoing as amended, and any and all other federal, State or local wage and hour laws, civil or human rights laws, or any other alleged violation of any local, State or Federal law, regulation, or ordinance, and/or public policy, collective negotiations agreement, contract, tort or other common law claim and/or any claim for attorneys' fees having any bearing whatsoever on this matter which the Employee now has, or may have, as of the date of this Agreement. The Employee acknowledges and agrees that this release extends to anyone who succeeds to her rights and responsibilities, including, but not limited to, her heirs and assignees, and that this release is given for the benefit of the State of New Jersey Judiciary, the Atlantic & Cape May Vicinage and such entities' employees, agents and representatives.

4. This settlement shall not be considered binding or as precedent in any other matter, except as set forth herein.

5. In consideration of the promises made herein by the Vicinage, the Union agrees to release and forever discharge all potential and existing claims arising out of this matter, including, but not limited to, any alleged violation of the New Jersey Employer-Employee Relations Act, or any other alleged violation of any local, State or Federal law, regulation or

ordinance, and/or public policy, collective negotiations agreement, contract, tort or other common law claim and/or any claim for attorneys' fees, having any bearing on this matter, which the Union now has, or may have, as of the date of this Agreement.

6. The Employee acknowledges that she has carefully read and fully understands all of the provisions of this Agreement and that she was afforded the opportunity to review and discuss each provision of this Agreement with an attorney and/or union representative. To the extent that the Employee utilized the services of any attorney or union representative, she acknowledges that she is satisfied with the advice and services provided by said individual(s). The Employee further acknowledges that she is voluntarily executing this Agreement of her own free will.

7. The parties acknowledge and agree that each party is responsible for its own attorneys' fees and costs and that neither party is a prevailing party.

8. This Agreement contains the entire agreement between the parties and fully supersedes any and all prior agreements or understanding pertaining to the subject matter addressed in this Agreement. The parties represent and acknowledge that in executing this Agreement neither the Employee nor the Vicinage has relied on any representation or statement not set forth herein with regard to the subject matter of this Agreement.

9. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed an original, but all of which together shall constitute one and the same instrument. Any signatory hereto may indicate acceptance of this Agreement with a facsimile signature, provided that an original signature is provided to all other parties thereafter.

10. If any term or condition of this Agreement shall be invalid or unenforceable to any extent or in any application, then such term or condition shall automatically, and without any further action, be reformed so as to retain the fullest extent of any restriction therein

permitted by law and the remainder of this Agreement, and such term or condition, except to such extent or in such application, shall not be affected thereby, and each and every term and condition of this Agreement shall be valid and enforced to the fullest extent and in the broadest application permitted by law.

11. The construction, interpretation and performance of this Agreement shall be governed by the laws of the State of New Jersey.

12. This Agreement is subject to review and approval by either the Labor and Employee Relations Unit or the Counsel's Office.

13. Both parties agree to waive the right to file exceptions and cross-exceptions in the above-referenced appeal, OAL Docket. No. CSV 03150-2018 S.

Dated: March 26, 2018

Employee – Kim Hampton

Union Representative 3/27/18

Vicinage Management 3/27/18

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
Superior Court - Atlantic & Cape May Vicinage	1201 Bacharach Blvd. Atlantic City, NJ 08401	2/6/2018

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Meryl Nadler, Esq.	(609) 815-2900 ext. 52400

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Kimberly Hampton	Judiciary Clerk 3	

Address/ Phone Number	Pension Number
68 Hampton Lane Willingboro, NJ 08046	1366980

On 4/27/2017 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ You requested a hearing which was held on 10/12/2017 ☐ You did not request a hearing

☐ You requested a hearing and did not appear at the designated time and place

Sustained Charges:

N.J.A.C. 4A:2-2.3
#1. Incompetency, inefficiency or failure to perform.
#7. Neglect of duty.
#12. Other sufficient cause (Code of Conduct for Judiciary Employees 1B).

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

On 3/21/17 you failed to perform data entry regarding a defendants court schedule as directly requested by the Supervisor of Court Clerks. These performance errors resulted in the denial of liberty for the court client. Your failure to perform these data entry duties resulted in a bench warrant being issued against the defendant. Based on the invalided bench warrant, the defendant was incarcerated in the county jail from 4/7/17 to 4/10/17.

☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for ten working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ (amount) which is equal to _____ (number of working days)

Appointing authority or authorized agent's signature and title.

Signature _____ Title Trial Court Administer

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☐ Receipt Number _____

☑ Signature of Server _____ ☑ Date of personal service 02/20/2018

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
Superior Court - Atlantic & Cape May County	1201 Bacharach Blvd. Atlantic City, New Jersey 08401	03/27/2018

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Meryl Nadler, Esq.	(609) 815-2900 ext52400

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Kimberly Hampton	Judiciary Clerk 3	****

Address/ Phone Number	Pension Number
56 HAMPTON LANE WILLINGBORO, NJ 08046	1366980

On_____ you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ **You requested a hearing which was held on** Settlement ☐ **You did not request a hearing**

☐ **You requested a hearing and did not appear at the designated time and place**

Sustained Charges:

N.J.A.C. 4A:2-2.3
#1. Incompetency, inefficiency or failure to perform.
#7. Neglect of duty.
#12.Other sufficient cause (Code of Conduct for Judiciary Employees 1B).

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

On 3/21/17 you failed to perform data entry regarding a defendants court schedule as directly requested by the Supervisor of Court Clerks. These performance errors resulted in the denial of liberty for the court client. Your failure to perform these data entry duties resulted in a bench warrant being issued against the defendant. Based on the invalided bench warrant, the defendant was incarcerated in the county jail from 4/7/17 to 4/10/17.

☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for six working days, beginning_____ and ending_____

☐ Indefinite suspension pending criminal charges effective (date)_____

☐ Removal, effective (date)_____

☐ Demotion to position of_____ effective (date)_____

☐ Resignation not in good standing, effective (date)_____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing authority or authorized agent's signature and title.

Signature_____ **Title** Trial Court Administrator

This form must be personally served on the employee or sent by certified or registered mail.

☐ **Certified or Registered Mail** ☐ **Receipt Number** _____

☒ **Signature of Server**_____ ☐ **Date of personal service**_____

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Kerianne Hefferon
Department of Children and Families,
Ocean South Local

CSC DKT. NO. 2017-4084
OAL DKT. NO. CSV 11977-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11977-17
AGENCY DKT. NO. 2017-4084

IN THE MATTER OF
KERIANNE HEFFERON,
DEPARTMENT OF CHILDREN
AND FAMILIES, OCEAN SOUTH LOCAL.

Kerianne Hefferon, appellant, pro se

Francis A. Raso, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 12, 2018 Decided: March 26, 2018

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

This matter, concerning petitioner's appeal of her release at the end of the working test period, was transmitted to the Office of Administrative Law on August 18, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following several prehearing conferences, the parties filed a Stipulation of Settlement (J-1) on March 12, 2018, which resolves all issues in this proceeding. Said Stipulation of

Settlement has been signed by petitioner and respondent, Department of Children and Families. It indicates the terms of settlement, and is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement, attached hereto as Exhibit J-1.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 26, 2018
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: 3/28/18

Date Mailed to Parties: 3/28/18

nd

APPENDIX

EXHIBITS

Jointly Submitted

J-1 Stipulation of Settlement

J-1

RECEIVED
2018 MAR 12 P 2:46
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

OAL DKT. NO. CSV 11977-2017 S

AGENCY DKT. NO. 2017-4084

SETTLEMENT AGREEMENT

IN THE MATTER OF

Kerianne Hefferon

v.

Department of Children and Families

RECEIVED
DEP OF CHILDREN & FAMILIES
OFF OF EMPLOYEE RELATIONS
2018 FEB 27 P 1:12

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Notice of Termination at End of Working Test Period**, dated May 26, 2017, contains the following allegations concerning Kerianne Hefferon's performance as a Family Service Specialist II for the Division of Child Protection and Permanency:

> (1) [Ms.] Hefferon has not successfully been able to improve, develop[,] [or] master her engagement, communication, documentation[,] and overall CPS casework skills.
>
> (2) [Ms. Hefferon] continues to struggle with engaging and communicating with the youth and/or families and her supervisor.
>
> (3) [Ms. Hefferon] struggles with reporting back important information from MVR's to conference with her supervisor.
>
> (4) [Ms. Hefferon] struggles with approaching or calling her supervisor to inquire about case decisions.
>
> (5) [Ms. Hefferon] struggles with communication and asking her supervisor for guidance when planning and scheduling multiple appointments in one day.
>
> (6) [Ms. Hefferon] needs to ask her supervisor for permission to take a buddy in the field.

(7) [Ms. Hefferon] is also struggling with accurately completing Court Reports and Case Plans. [Ms. Hefferon] needs to proofread Court Reports and Case Plans prior to submitting them to her supervisor.

. . . .

(8) Overall, [Ms. Hefferon] [has] not proven that she is competent to service the children under DCPP.

B. In lieu of termination, the parties have agreed to the following terms:

(1) Ms. Hefferon will voluntarily resign from her position as a Family Service Specialist II for the Division of the Child Protection and Permanency.

(2) The Department of Children and Families will treat Ms. Hefferon's resignation as a General Resignation pursuant to N.J.A.C. 4A:2-6.3.

(3) Ms. Hefferon will not seek, apply for, or accept future employment with the Department of Children and Families.

(4) Ms. Hefferon will waive her right to a hearing before the Office of Administrative Law.

C. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Children and Families shall amend Ms. Hefferon's personnel records to conform to the terms of this settlement agreement. All internal records of the Department of Children and Families will be kept intact. Nothing herein shall preclude the Department of Children and Families from releasing information on this matter to anyone who has a release executed by Ms. Hefferon or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Ms. Hefferon waives all other claims against the Department of Children and Families with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Ms. Hefferon waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Department of Children and Families, its employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/5/18
DATE

3/5/18
DATE

ON BEHALF OF

DATE

ON BEHALF OF

RECEIVED
DEP OF CHILDREN & FAMILIES
OFF OF EMPLOYEE RELATIONS
2018 FEB 27 P 1:12

CERTIFICATION

I, Kristine Hefferon, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand and accept its meaning and terms. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms, and answered any questions I had to my satisfaction. If I did not review this agreement with a representative, I recognize that I was given an opportunity to do so. I further acknowledge that I am entering into this Settlement Agreement voluntarily and of my own free will.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Department of Children and Families will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/19/18

DATE

RECEIVED
DEP OF CHILDREN & FAMILIES
OFF OF EMPLOYEE RELATIONS
2018 FEB 27 P 1:12

4-18-18

A-5

STATE OF NEW JERSEY

In the Matter of Keisha Lewis
City of Orange Township, Police Department

CSC DKT. NO. 2017-3367
OAL DKT. NO. CSV 05933-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 20, 2018 BW

The appeal of Keisha Lewis, Police Officer, City of Orange Township, Police Department, removal effective March 29, 2017, on charges, was heard by Administrative Law Judge Joann LaSala Candido, who rendered her initial decision on March 14, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Keisha Lewis.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05933-17
AGENCY DKT. NO. 2017-3367

IN THE MATTER OF KEISHA LEWIS, CITY OF ORANGE TOWNSHIP POLICE DEPARTMENT.

Keisha Lewis, petitioner, appearing pro se

Dan Smith, Esq., appearing on behalf of respondent, City of Orange Township

Record Closed: March 2, 2018 Decided: March 14, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Petitioner, Keisha Lewis, appeals her removal as a recruit with the City of Orange Township (respondent or City). The City contends that petitioner lacks respect of authority, defying the way the agency performs.

PROCEDURAL HISTORY

On March 29, 2017, petitioner was served with a Preliminary Notice of Disciplinary Action charging her with incompetency, inefficiency or failure to perform duties in violation of N.J.A.C. 4A:2-2.3.

On March 29, 2017, petitioner was served a Final Notice of Disciplinary Action sustaining the charges based upon the following incidents:

2/28/17	Ordered to write a report due to appearance
2/28/17	Could not name the President of the United States
3/01/17	Ordered to write a report showing a lack of interest in the job as a police officer
3/01/17	Addressed a sergeant as "bro"
3/02/17	Wore earrings in Recruit uniform knowing she was not permitted to do so
3/22/17	Made threatening gestures to a detective behind the detective's back

Petitioner filed a request for a hearing and the matter was then forwarded to the Office of Administrative Law (OAL), where it was filed on May 1, 2017, as a contested case. The matter was assigned to ALJ Richard McGill before being assigned to me on January 18, 2018, due to an illness. Hearings took place on January 18, 2018, and March 2, 2018, on which date the record closed.

ISSUES

Did the respondent carry its burden of proving the charges referenced above by a preponderance of the credible evidence? If so, what disciplinary action, if any, is appropriate?

TESTIMONY

Keisha Lewis

On January 13, 2017, Keisha Lewis started the Essex County Police Academy. She suffered an injury at the Academy February 2, 2017, an ACL sprain and a locked knee. She was dismissed from the Academy on February 23, 2017. She was sent back to Orange Police Academy on February 28, 2017. There was an issue with her hair and she was instructed to go into the bathroom and wet down her hair. She did so and was told to write a report why her hair was the way it was. She completed the report. On February 28, 2017, petitioner was unable to name the President of the

United States and referred to him as the 'orange guy.' She was asked to write a seven-page report on Donald Trump and a five-page report on respect.

On March 1, 2017, she was ordered by the Director to write a report on her interest as an officer. She did not finish to the last line and it was ripped up. She was ordered to re-write it. Petitioner contends that all recruits were required to write about their interest as a police officer. She was also ordered to write a two-page essay on how to properly write a report.

On March 1, 2017, she referred to a sergeant as "bro" and was ordered to write a report that she completed.

On March 2, 2017, she was ordered to write a report and two-page essay after inappropriately wearing earrings to a promotional ceremony.

On March 8, 2017,[1] she was accused of making a threatening gesture behind a detective's back during a class, which she denies.

Petitioner testified that she would never disrespect a superior and she had passed up many towns to be an officer in Orange.

Sergeant Michael Tingolie

Sergeant Tingolie testified on behalf of respondent. Sergeant Tingolie supervised petitioner at the Orange Police Department. On March 1, 2017, there was a pursuit from Newark towards Orange being broadcast on the police radio and petitioner stated to him "that's my call bro." Recruits must address officers by their rank. Petitioner wrote a satisfactory essay. This conduct is not fitting for a police officer. On March 2, 2017, petitioner was wearing earrings while in the police academy uniform, which is impermissible. Until a recruit completes the academy they must wear that uniform and comply with academy policy and rules. He instructed her to remove the

[1] The Final Notice of Disciplinary Action incorrectly reflects March 22, 2017, rather than March 8, 2017.

earrings and write a report, which she did. He was also present when petitioner referred to the President as the orange guy when the Director asked her to name him. That is a lack of respect.

Sergeant Tingolie submitted a report outlining a summary of all information pertaining to Lewis while she was at the Essex County Police Academy. (R-1.)

Sergeant Jean-Paul Barbosa

Sergeant Barbosa testified on behalf of respondent. He is employed by the Orange Police Department in Internal Affairs. Barbosa investigated the reports dated March 23 and 24, 2017, as well as the PNDA and the report authored by Detective Kovach dated March 9, 2017. (R-2 thru R-5.) He confirmed that a poem was to be recited by all recruits and she was not able to recite from memory. Because petitioner was considered an at-will employee during a working test period she can be terminated for any reason.

Detective April Kovach

Detective Kovach testified on behalf or respondent. She has been employed by respondent for the past seventeen years. Kovach testified that every day there was an issue with petitioner. On petitioner's first day back from the academy she had to be spoken to about her hair. Kovach confirmed the incident when petitioner referred to the President as the orange guy. Kovach was embarrassed because she oversaw petitioner. This was petitioner's second chance to get it together since she failed the police academy.

Kovach also confirmed through eye-witnesses that petitioner made a threatening gesture behind her back when she walked behind her. Petitioner was given three chances to recite the poem "See it Through" from memory but she was unable to do so. She filed a report dated March 9, 2017. Petitioner wore earrings to a promotional ceremony while in recruit uniform. This is impermissible. Petitioner was asked to write a two-page essay on why it was inappropriate to wear earrings but she did not complete

the assignment. Petitioner did refer to the President as the orange guy but there were further questions that were not addressed at this hearing. (R-5.)

Police Officer Lamar Payne

Officer Payne is employed by the Orange Police Department. Payne was in the group of recycled recruits with petitioner. He witnessed petitioner make a gesture behind Kovach's back when petitioner walked behind her. Payne described the table in the room and how petitioner would walk behind Kovach after her leaving the podium and on the way back to her seat. (R-8.)

Recruits who are still considered trainees when not completing the academy were made aware of how to wear their hair and that no jewelry or make-up is permissible. He was present when petitioner was seen wearing earrings and he heard petitioner refer to the President as orange.

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it hangs together with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself, in that it must be such as the common experience and observation of mankind can approve as probable in the circumstances. In re Perrone, 5 N.J. 514, 522 (1950). A fact finder is free to weigh the evidence and to reject the testimony of a witness when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). In other words, a trier of fact may reject testimony as inherently incredible, and may also reject testimony when it is inconsistent with other testimony or with common experience or overborne by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). The choice of

rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable choice. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

I **FIND** the testimony offered by respondent's witnesses to be compelling and credible. All witnesses offered consistent versions leading up to the termination of petitioner. Each of the witnesses' testimony was wholly consistent with their written reports and nearly contemporaneous with the incidents. Petitioner's testimony, on the other hand, was in direct contradiction to the credible testimony offered by respondent's witnesses and was not deemed credible.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Petitioner failed out of the Essex County Police Academy on February 23, 2017, for obtaining more than the allowable nineteen physical training zeros.
2. Petitioner, as well as three other recruits, were permitted to return to the Township of Orange Police Department after failing the Police Academy. Two of the recruits were recommended to be recycled back into the Academy. All recruits were still considered trainees and must comply with rules and policies of the Academy.
3. The first day petitioner returned to the Police Department on February 28, 2017, Lieutenant Brown ordered her to write a report why her hair was in disarray and her appearance inappropriate.
4. Petitioner was unable to name the President of the United States when asked on February 28, 2017, and she referred to him as the "orange guy."
5. On February 28, 2017, Director T. Warren ordered petitioner to write a report on the President of the United States. She, as well as the other recruits, were asked to write a five-page report on respect.

6. On March 1, 2017, petitioner was unable to recite a poem from memory assigned in January 2017. Sergeant Cassidy ordered petitioner to write a report on interest or lack thereof of becoming a police officer.
7. On March 1, 2017, petitioner referred to a ranked officer as "bro."
8. On March 2, 2017, petitioner wore earrings to a promotional ceremony while in uniform in violation of policy and procedure.
9. On or about March 7, 2017, while attending a lecture by Detective Kovach, petitioner made a threatening gesture when passing behind her.
10. Petitioner was removed from the police department effective March 29, 2017.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his duties. N.J.S.A. 11A:1-2(a). Such a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself.

Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris County Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

The other obligation of an appointing authority is to discipline an employee for misconduct to discourage a recurrence of such misconduct or, where appropriate, to remove an employee from public service because of the individual severity of the misconduct or because of the cumulative effect of multiple acts of misconduct. Disciplinary action may take the form of removal, suspension, fine, or disciplinary demotion. N.J.S.A. 11A:2-6a (1), (2), and (3); N.J.A.C. 4A:2-2 and -3. Probationary review and discipline are not mutually exclusive of one another. Certainly, a probationary employee may be disciplined during the working test period. N.J.S.A. 11A:4-15(c); N.J.A.C. 4A:4-5.4(b). Indeed, petitioner was disciplined during her working test period. Infractions occurring during a working test period logically can be factors to consider in making an ultimate determination of whether a probationer's overall performance is unsatisfactory at the conclusion of the working test period. However, the probationary review process cannot permissibly substitute for the disciplinary process. The agency recognizes the difference between the disciplinary and probationary review processes by placing them in separate subsections of N.J.A.C. 4A:4-5.4.

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(3), petitioner did exhibit an inability to perform her duties. There is no definition in the New Jersey Administrative Code for inability to perform duties. However, case law has determined a charge of inability to perform duties is appropriate where is the employee is incapable of carrying his or her own weight. Klusaritz v. Cape May County, CSV2690-98, Initial Decision (May 13, 2002), adopted, Merit Sys. Bd. (October 25, 2002), http://njlaw.rutgers.edu/collections/oal/final/csv2690-98.pdf (where appellant failed to complete assignments accurately, failed to follow prescribed formats and submitted inaccurate work); Richard Stockton College v. Parks, CSV 4279-03, Initial Decision (January 31, 2005), adopted, Merit Sys. Bd. (April 3, 2005),

http://njlaw.rutgers.edu/collections/oal/final/csv4279-03.pdf (where respondent failed prioritize and complete tasks in a timely manner).

The standard for proving a violation of N.J.A.C. 4A:2-2.3(a)(1), incompetence, inefficiency or failure to perform duties, is set forth in Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), adopted, MSB (May 23, 2005), <http://njlaw.rutgers.edu/collections/oal/search.shtml>, that is, considering the nature and frequency of the conduct. Charges of incompetence, inefficiency or failure to perform duties are sustained predominantly in instances where there is either continual poor performance by an employee or the employee is responsible for an incident resulting in serious repercussions to the employer. When describing the officer's misconduct, the ALJ in Glenn noted:

> [T]he persistence, pervasiveness and repetition of the misconduct of ignoring orders of his superiors, of neglecting to complete assignments, keep appointments or follow protocols and of failing to successfully perform the duties of the job . . . and the repeated disregard of training, directives, orders, admonishments, requests and warnings . . . can only draw one to a conclusion that the behavior was calculated and intentional . . . . A manifest rejection of the expectations of an appointing authority as occurred here is the epitome of a combination of . . . neglect of duty and inefficiency.
>
> [Glenn, CSV 5051-03, Initial Decision.]

In the instant matter, applying the standard of Glenn and looking at the nature and frequency of the conduct of the petitioner, it is apparent that there has been a consistent failure in performing her assigned duties beginning on the first day of petitioner's return from the Academy. She has had to write and re-write reports specific to her for being insubordinate, unable to name the President, and being in violation of the recruit uniform—clearly defying the rules and regulations of both the Academy and Police Department. I therefore **CONCLUDE** that petitioner is unable to perform her duties and that the charge of inability to perform duties, incompetency and inefficiency should be sustained.

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's removal be **AFFIRMED**.

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

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

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

March 14, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: March 14, 2018

Date Mailed to Parties: MAR 15 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

WITNESS LIST

For Petitioner:

Keisha Lewis

For Respondent:

Sergeant Michael Tingolie

Sergeant Jean-Paul Barbosa

Detective April Kovach

EXHIBIT LIST

For Petitioner:

P-1 Notice of Unemployment Determination

P-2 Newark Public Schools Letter of Recommendation dated January 29, 2018

P-3 Progress Report Lee Orthopedics

For Respondent:

R-1 Report of Recruit Keisha Lewis dated February 24, 2017, authored by Sergeant Tingolie

R-2 Report of Recruit Keisha Lewis dated March 23, 2017, authored by Sergeant Tingolie

R-3 Report of all recruits dated March 24, 2017, authored by Sergeant Tingolie

R-4 Preliminary Notice of Disciplinary Action dated March 29, 2017

R-5 Report of Detective April Kovach dated March 9, 2017

R-6 Writing assignment of President Donald Trump authored by petitioner

R-8 Drawing of conference room

4-18-18

A-6

STATE OF NEW JERSEY

In the Matter of Sean McGovern,
Hudson County Sheriff's Office

CSC DKT. NO. 2013-286
OAL DKT. NO. CSV 11113-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

CORRECTED DECISION

ISSUED: MAY 7, 2018 BW

The appeal of Sean McGovern, Sheriff's Officer Sergeant, Hudson County Sheriff's Office, 30 working day suspension, on charges, was heard by Administrative Law Judge Margaret M. Monaco, who rendered her initial decision on January 21, 2018. Exceptions were filed by the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 30 working day suspension to a 10 working day suspension.

Since the appellant did not serve the imposed suspension prior to his retirement, he is not entitled to back pay or other benefits as set forth in *N.J.A.C.* 4A:2-2.10.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 10 working day suspension.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11113-12
AGENCY DKT. NO. 2013-286

IN THE MATTER OF SEAN MCGOVERN, HUDSON COUNTY SHERIFF'S DEPARTMENT.

Sean P. McGovern, appellant, pro se

John J. Collins, Assistant County Counsel, for respondent Hudson County (Donato J. Battista, County Counsel)

Record Closed: January 16, 2018 Decided: January 31, 2018

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

This matter involves disciplinary charges against appellant Sean McGovern, who, prior to his retirement, was employed as a sergeant with respondent, the Hudson County Sheriff's Department (HCSD). Appellant appeals from a thirty-day suspension predicated on his alleged insubordination.

PROCEDURAL HISTORY

The HCSD issued a Preliminary Notice of Disciplinary Action (PNDA) dated June 28, 2010, informing appellant of the charges of insubordination and conduct unbecoming a public employee issued against him. Specifically, the PNDA states:

> On Monday, June 28, 2010, at 11:08 a.m., I, Captain Patrick J. Schifano, contacted Sergeant Sean McGovern, via telephone, and instructed him to leave me a detailed activity regarding a matter under investigation. Sergeant McGovern stated that he would not write the report and indicated that he was leaving work sick because he was stressed and hung up the telephone on me.

After a departmental hearing, the HCSD issued a Final Notice of Disciplinary Action dated July 10, 2012, sustaining the charge of insubordination and providing for appellant's suspension for thirty days. Appellant filed an appeal and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for a hearing as a contested case. Following the adjournment of hearing dates at the parties' request, the hearing was held on March 26, 2014. After the conclusion of the hearing, the record remained open for the receipt of a transcript of the hearing and post-hearing submissions. Briefs dated June 30 and July 31, 2017, were filed on behalf of the HCSD and appellant, respectively, and the HCSD submitted a reply brief dated September 5, 2017. On November 13, 2017, I issued an order granting a motion on behalf of appellant's former attorney to be relieved as counsel and affording appellant the opportunity to submit a reply brief. Appellant submitted a reply brief dated January 15, 2018, on which date the record closed.[1]

FACTUAL DISCUSSION

At the hearing, the HCSD presented testimony by Captain Patrick Schifano, and appellant testified on his own behalf. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the

[1] Appellant's submission includes certain facts, and attaches various documents, that were not addressed and/or introduced at the hearing. Inasmuch as this information goes beyond the record in this case, it will not be considered.

demeanor and assess the credibility of the witnesses who testified, I **FIND** the following preliminary **FACTS**.

Appellant was employed by the HCSD from 1997 until his retirement effective September 1, 2010, at which time he held the rank of sergeant. Patrick Schifano (Schifano) is employed as a captain in control of the HCSD's patrol bureau. He has served as a captain for over five years and has been employed by the HCSD for approximately twenty-four years.

During the relevant period, appellant was in charge of supervising certain civilian security guards. Part of appellant's duties included completing attendance sheets or time cards for the security guards under his charge and submitting this documentation to Payroll. Appellant worked under the command of Schifano, who served as appellant's superior officer.

On June 27, 2010, Schifano received a written order from the then undersheriff, Frank Schillari, directing Schifano to obtain a report from appellant regarding his actions for the past eight weeks during which, according to Schillari's memorandum, appellant had not reported to Payroll the work hours of several security guards. (R-2.)

Schifano contacted appellant by telephone at 11:08 a.m. on June 28, 2010. Divergent testimony was offered as to what transpired during that telephone call. On the same day, Schifano authored a report to Schillari regarding his conversation with appellant and drafted the PNDA charging appellant with insubordination and conduct unbecoming a public employee. (R-1; R-3.) Ultimately, the charge of insubordination was sustained and a thirty-day suspension imposed. (R-4.)

The Testimony

Apart from the evidence that forms the basis of the aforesaid findings of fact, a summary of pertinent testimony follows.

Patrick Schifano

Schifano testified that he was directed to contact appellant and obtain a report from him in reference to the eight-week period about which the undersheriff had questions concerning payroll and time cards for the security guards under appellant's command. Schifano contacted appellant by telephone on June 28, 2010, and he ordered appellant to make a report regarding this eight-week period and the time cards that appellant was responsible for. Although Schifano candidly acknowledged that he could not state the exact words that he said, he testified that he informed appellant that he needed a report covering the last eight weeks and recalled saying "time cards." Schifano stated that he had been ordered to get a report from appellant regarding the attendance sheets for the security guards under appellant's purview, and that is what he asked for. He explained that the order was for appellant to explain in a report what happened during the eight-week period regarding missing time sheets for the security guards under appellant's supervision, and he made that clear to appellant. The report did not deal with just one security guard.

Schifano testified that in response to his request, appellant stated that he was stressed, he was going home sick, and he was not doing the report. Schifano described that appellant responded in a "very loud" voice and then hung up the telephone on him. Schifano's conversation with appellant lasted approximately a minute or a minute and a half. Although Schifano acknowledged that he did not recall specifying a time when the report had to be submitted, he articulated his understanding that when a supervisor asks for a report it is to be completed by the end of the day.

Schifano authored a report to the undersheriff on the same day as his conversation with appellant. In the report, Schifano informed the undersheriff that he had contacted appellant and "ordered him to submit a report to [him] detailing the situation with Payroll, in particular his actions over the last 8 weeks and the missing time cards," and appellant "refused to write the report as ordered and said he was going home sick, that he was stressed and hung up on [him] while [he] was still talking to him." (R-3.) Schifano further advised that appellant's actions toward him were "inappropriate and unacceptable" and that he would "be contacting the Internal Affairs unit and filing

charges for the refusal to write the reports as directed and for [appellant's] conduct on that date."

Schifano testified that he made clear to appellant that he needed a report from him and that appellant said that he was not going to do it. Schifano recommended discipline for insubordination because Schifano gave appellant an order and appellant refused to do it. He believed that appellant acted insubordinate because he "blatantly refused to do something" that Schifano had given him an order to do.

Schifano testified that appellant never submitted the requested report to him and, as of his testimony, he still did not have the report. According to Schifano, he offered similar testimony regarding not receiving the report at appellant's disciplinary hearing. He further characterized as "inaccurate" appellant's testimony regarding a conversation with him and Chief Bartucci.

Sean McGovern

Appellant testified that on June 28, 2010, Schifano called him on the telephone and asked for a report regarding an eight-week period and attendance sheets. Appellant described that he had just returned to work after being out sick for seven days. Appellant stated his understanding that the requested report concerned the attendance sheets for one female security guard at the Meadowview Psychiatric Hospital. Appellant did not recall if Schifano mentioned the one security guard, but stated that he knew it involved her attendance sheets because they previously spoke about it. According to appellant, approximately two to three weeks earlier, he had a conversation with Schifano and Captain Bartucci, during which Schifano conveyed that Schillari wanted appellant to write a report about the attendance sheets of the one guard, but it was "all nonsense" and "bulls**t." According to appellant, he was also told that Schillari "wanted to get even" with appellant and wanted him investigated.

Appellant testified that, during his telephone conversation with Schifano, he told Schifano that he was sick and was going home. Appellant described that he had previously told Schifano that he had hives for about three or four weeks due to stress.

According to appellant, he left work on June 28, 2010, because he could not stop scratching; he had only come in to do something and intended on going home; and he went to the doctor the next day. Appellant denied that he spoke in a loud voice and did not believe that he was impolite to Schifano. He denied telling Schifano that he was not doing the report and denied hanging up on him. Appellant testified that Schifano did not convey the immediacy of submitting the report and did not inform him that he wanted the report that day. Appellant acknowledged that he did not tell Schifano when he would write the report.

Appellant testified that he was out of work from June 28 until September 17, 2010. He described conversations with Internal Affairs in July 2010 during which he told the lieutenant that he was going to write the report that day, and that he was later told, when he asked whether he should fax or mail the report, not to worry about it and to bring the report in when he felt better. Appellant testified that he wrote the report at home when he was sick and he submitted the report regarding the one security guard directly to Schifano when he returned to work on September 17, 2010. According to appellant, Schifano admitted that he had received the report during appellant's disciplinary hearing.

Analysis and Additional Findings of Fact

In view of the divergent testimony, it is necessary for me to assess the credibility of the witnesses for the purpose of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite

suspicion as to its truth." Id. at 521–22. A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

In judging the strength of the evidence and evaluating the demeanor and credibility of the witnesses, I found Schifano to be a forthright and credible witness. He presented candid and persuasive testimony as to the pertinent facts, which was consistent with the report that he authored on the day of the incident. The record is bereft of credible evidence suggesting that he harbored a motive or bias to fabricate his version of the relevant facts. Indeed, appellant described that he had a good relationship with Schifano. Plainly, on balance, appellant has the greatest stake in the outcome of this matter since it involves his discipline. Succinctly stated, a canvas of the totality of the evidence casts doubt on the accuracy, reliability and believability of appellant's version of events. The undersigned found appellant's rendition to be improbable and not "hanging together" with, and discredited and overborne by, the credible testimony of Schifano.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

During Schifano's telephone conversation with appellant on June 28, 2010, he ordered appellant to submit a report regarding an eight-week period and the attendance sheets of security guards under appellant's supervision. Appellant refused to write the report as ordered and advised that he was stressed and was going home sick. Appellant spoke in a loud voice to Schifano and hung up on him. Schifano did not receive the requested report from appellant.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

In this matter, the HCSD bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for, among other causes, insubordination. N.J.A.C. 4A:2-2.3(a)(2). Insubordination encompasses an employee's failure or refusal to follow a directive, order or instruction of a supervisor. See Eaddy v. Dep't of Transp., 208 N.J. Super. 156 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986); City of Newark v. Massey, 93 N.J. Super. 317, 322 (App. Div. 1967). "It is a fundamental principle of the workplace, especially in a paramilitary organization, that when an employee is given an order by a superior . . . the order will be followed." Osle v. Mid-State Corr. Facility, CSV 6289-01, Merit System Board (April 1, 2003), <http://njlaw.rutgers.edu/collections/oal/>. An order need not be in written form to be valid. See Hale v. Dep't of Transp., CSV 6778-02 and

CSV 510-03, Initial Decision (October 9, 2003), adopted, Merit System Board (November 24, 2003), <http://njlaw.rutgers.edu/collections/oal/> (employee's refusal to comply with supervisor's verbal direction to turn music down amounted to insubordination). Further, whether a supervisor identified his/her direction as an "order" is irrelevant, and a subordinate's failure to comply with a supervisor's direction constitutes insubordination. See Osle, CSV 6289-01, Merit System Board (April 1, 2003), <http://njlaw.rutgers.edu/collections/oal/>. And, "[i]t is not for a public employee to second guess a superior's order and refuse to obey that order because it would result in . . . a result which the subordinate does not concur in." Headen v. E. Jersey State Prison, 94 N.J.A.R.2d (CSV) 623, 627. Rather, "[a] public employee who intentionally disobeys a proper order does so at his or her own risk." Ibid.

Based upon the aforesaid Findings of Fact, I **CONCLUDE** that the HCSD has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant's actions amount to insubordination. In short, appellant was given a direct order by a superior officer and appellant refused to, and failed to, comply with that order. He further spoke in a disrespectful and insubordinate tone and hung up on his superior. Our courts have recognized that a law-enforcement officer is held to a high standard of conduct. See In re Phillips, 117 N.J. 567, 576 (1990); Moorestown Township v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Equally recognized is the importance of maintaining strict discipline in paramilitary settings such as police departments and correctional facilities. See Henry, 81 N.J. at 579; Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); Massey, 93 N.J. Super. 317. In this type of setting, the "[r]efusal to obey orders . . . cannot be tolerated." Rivell, 115 N.J. Super. at 72. Given his lengthy career with the HCSD, appellant should be cognizant of the high standard of conduct expected and the strict rules that must be followed.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, 38 N.J. at 522. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct can

be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, 38 N.J. at 522–23. The seriousness of appellant's infraction must also be balanced in the equation of whether a thirty-day suspension or something less is appropriate under the circumstances. See Henry, 81 N.J. at 580.

The parties have stipulated that appellant has no prior disciplinary record to be considered. (J-1.) In other words, appellant's current infraction is an aberration in an otherwise unblemished career. Based upon the totality of the circumstances, I am not persuaded that a thirty-day suspension, as previously imposed, is warranted. I **CONCLUDE** that a ten-day suspension is reasonable and appropriate under the circumstances presented, and that such discipline is consistent with progressive discipline.

ORDER

I **ORDER** that the charge of insubordination be and hereby is **SUSTAINED**. I further **ORDER** that a ten-day suspension is imposed. I further **ORDER** that, inasmuch as appellant had not served the previously imposed suspension prior to his retirement, no back pay or other benefits as may be dictated by N.J.A.C. 4A:2-2.10 are warranted.

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

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

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

January 31, 2018
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: January 31, 2018

Lisa James-Beavers, Dep. Director & ALJ

Date Mailed to Parties:

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

List of Witnesses

For Appellant:

Sean McGovern

For Respondent:

Patrick Schifano

List of Exhibits in Evidence

Joint:

J-1 Stipulation

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated June 28, 2010

R-2 Memorandum from Undersheriff Frank Schillari to Captain Patrick Schifano

R-3 Memorandum from Captain Patrick Schifano to Undersheriff Frank Schillari dated June 28, 2010

R-4 Final Notice of Disciplinary Action dated July 10, 2012

4-18-18

A-7

STATE OF NEW JERSEY

In the Matter of Tahron Miles City of Newark, Police Department	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NOs. 2015-244 & 2015-816 OAL DKT. NO. CSV 09487-14 & OAL DKT. NO. CSR 13040-14 (CONSOLIDATED)	:	

ISSUED: APRIL 20, 2018 BW

The appeals of Tahron Miles, Police Officer, City of Newark, Police Department, indefinite suspension effective June 6, 2014 and removal effective September 15, 2014, on charges, were heard by Administrative Law Judge Evelyn J. Morose, who rendered her initial decision on February 28, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. Additionally, the Commission notes that the Administrative Law Judge did not rendered a determination regarding the indefinite suspension. However, since the record reflects that the standard to impose such a suspension under *N.J.A.C.* 4:2-2.7 were met, the Commission also upholds that action.

ORDER

The Civil Service Commission finds that the action of the appointing authority in indefinitely suspending and removing the appellant was justified. The Commission therefore affirms those actions and dismisses the appeals of Tahron Miles.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

TAHRON MILES,
Petitioner,
v.
CITY OF NEWARK POLICE DEPARTMENT,
Respondent.

OAL DKT. NO. CSV 09487-14
AGENCY DKT. NO. 2015-244

IN THE MATTER OF TAHRON MILES,
CITY OF NEWARK POLICE DEPARTMENT.

OAL DKT. NO. CSR 13040-14
AGENCY DKT. NO. N/A
2015-814

Anthony Fusco, Jr., Esq., for appellant, Tahron Miles (Fusco & Macaluso, attorneys)

Kimberly Holmes, Esq., for respondent, The City of Newark (Kenyatta Stewart, Acting Corporate Counsel)

Record Closed: February 16, 2018 Decided: February 28, 2018

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 5, 2014, the City of Newark, Police Department (Newark Police) served Tahron Miles (Miles) with a Preliminary Notice of Disciplinary Action (PNDA) indefinitely

suspending Miles effective June 6, 2014. (R-3.) Miles requested a Departmental Hearing, which was held on July 2, 2014, and resulted in a Final Notice of Disciplinary Action (FNDA), wherein Miles was disciplined by means of a suspension from June 6, 2014, to July 8, 2014. The following charges were sustained:

OAL Docket No. CSV 09487-14

Charge 1: Violation of Newark Police Department Rules and Regulations Chapter 6:29.1, OFFICIAL INEFFICIENCY OR INCOMPETENCY. Department members whose performance is demonstrably inadequate or fails to meet, obtain or produce the effects or results mandated by the Department orders and procedures, shall be deemed in violation of Department Rules and Regulations and shall be charged accordingly.

Charge IB: Violation of Civil Service Rule 4A:2-2.3(a)(1). INCOMPETENCY, INEFFICIENCY, FAILURE TO PERFORM DUTIES.

Charge IC: Violation of Civil Service Rules 4A:2-2.3(a)(3). INABILITY TO PERFORM DUTIES.

Specification: On April 30, 2014, Miles did violate the above Rules when information was received from Camden County Superior Court-Domestic Violence Unit that he was the subject of provisions from possessing any and all firearms. Miles was the subject of provisions of the Domestic Violence Order stemming from an incident which occurred on June 3, 2012. Since June 3, 2012, Miles has been prohibited from possessing any firearms. In fact, his personal firearms were also seized by the Camden County Superior Court. Miles also failed to disclose his inability to possess a firearm and/or the fact that the Camden County Superior Court seized his personal weapons as a result of Domestic Violence.

Charge II: Violation of Newark Police Department Rules and Regulations Chapter 18:22-1. FALSE STATEMENTS. Police Officers who deliberately depart from

the truth by omitting, misrepresenting, or distorting any fact on any form, questionnaire, or report shall be charged with having made a false statement. (2 Counts.)

Charge III: Violation of Newark Police Department Rules and Regulations Chapter 18:22-2. PRE-EMPLOYMENT STATEMENTS. Police officers shall be held to have violated this Rule, retroactively, who had false statements during their investigation from candidacy to the Police Department. (2 Counts.)

Specification I: On October 28, 2013, Miles did submit a Pre-Employment Background Investigation Questionnaire to the Newark Police with intent to deceive, in that he deliberately omitted pertinent information relative to Camden County Prosecutor's Office-Domestic Violence Unit prohibiting him from possessing any firearms.

Specification II: On October 28, 2013, Miles did submit a Pre-Employment Background Investigation Questionnaire to the Newark Police with intent to deceive, in that he deliberately omitted pertinent information relative to the Camden County Prosecutor's Office-Domestic Violence Unit seizing his personal firearms and his Camden Police issued firearms, as a result of a Domestic Violence where he was the subject. The action of prohibiting Miles from possessing or carrying any firearms would have disqualified him from employment as a Newark Police Officer.

Charge IV: Violation of Newark Police Department Rules and Regulations Chapter 4:4.6. SUBPOENAING OR SUMMONING. Whenever Department members are summoned or subpoenaed to appear before:

(a) A legally constituted investigative body with subpoena power,

(b) A judicial tribunal with subpoena powers, or comparable agencies,

(c) A legally constituted hearing board for the purpose of inquiring into the activities or operations of Individual Department police officers or of the Department itself.

They shall appear before, cooperate with and render every aid and assistance to such body, tribunal or agency and prior to such appearance notify their commanding officer by submitting a duplicate report, the original of which shall be forwarded through channels to the Office of the Police Director. (3 Counts.)

Charge V: Violation of Newark Police Department Rules and Regulations Chapter 3:2.3. RESPONSIBILITY FOR OWN ACTIONS. A police officer is responsible for his own actions or omissions. He may not submit as an excuse or justification for an action or for an omission to a Rule and Regulation, to an Order, or to a Directive, that his action or inaction resulted from the advice or suggestion of another person. This Rule hold whether this person is connected with the Department or not. On the other hand, this Rule does not apply when he acts to carry out the Order of an Officer of higher rank in which case the responsibility for issuing Orders or Directives shall be assessed against the officer of higher rank. (3 Counts.)

Specification I: On January 28, 2014, Miles did violate the above rule when he responded to Camden County Superior Court-Family Part relative to Case No. FO 04 000134 13 C and failed to notify his commanding officer and the Police Director in writing prior to appearance.

Specification II: On February 20, 2014, Miles did violate the above rule when he responded to Camden County Superior Court-Family Part relative to Case FO 04 000134 13 C and failed to notify his commanding officer and the Police Director in writing prior to appearance.

Specification III: On June 3, 2014, Miles did violate the above rule when he responded to Camden County Superior Court-Family relative to Case FO 04 000134 13 C and failed to notify his commanding officer and the Police Director prior to appearance.

Charge VI: Violation of Newark Police Department Rules and Regulations, Chapter 3:2.7. KNOWLEDGE OF LAWS AND REGULATIONS. Police Officers shall equip themselves with knowledge found in the (2 Counts):

(a) New Jersey Laws,

(b) Newark City Ordinances,

(c) New Jersey Court Rules, and

(d) The Newark Police Department Manual of Rules and Regulations.

Specification I: Prior to April 30, 2014, Miles did violate the above rule when he accepted and possess a Newark Police Department issued firearm, knowing he was prohibited from possessing any firearm by the Camden County Prosecutor's Office-Domestic Violence Unit.

Specification II: On June 3, 2014, Police Officer Miles did violate the above rules when booked off sick with a cold and failed to notify his command that he was no longer at his place of confinement.

Charge VII: Violation of Newark Police Department Rules and Regulations Chapter 18:6. NEGLECT OF DUTY. Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty. (3 Counts.)

Charges VIIB: Violation of Civil Service Rule: 4A2:2-3(a)(7). An employee may be subject to discipline for NEGLECT OF DUTY.

Specification I: Miles, assigned to Fifth District-Patrol, did neglect his duty when he failed to inform the Newark Police Department that he was prohibited from possessing any firearm by the Camden County Prosecutor's Office-Domestic Violence Unit.

Specification II: On June 3, 2014, Police Officer Miles did violate the above rules when he booked off sick with a cold and failed to notify his command that he was no longer at his place of confinement.

Specification III: On June 3, 2014, Police Officer Miles did violate the above rule when he responded to Camden County Superior Court-Family Part relative to Case

FO 04 000134 13 C and failed to notify his commanding officer and the Police Director in writing prior to appearance. (R-4.)

On July 14, 2014, Miles appealed the sustained charges. Tahron Miles v. City of Newark, Police Department, Docket No. CSV 09487-14 was transmitted, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL) on July 25, 2014, where it was filed.

On July 3, 2014, Newark served Miles with a PNDA seeking termination. (R-2.) Miles requested a Departmental Hearing, which was held on September 2, 2014. At the hearing, Miles entered a non-guilty plea. However, a finding of guilt was entered by the Board and in accordance with a FNDA, Miles was terminated from his position, effective September 15, 2014. The following charges were sustained:

OAL Docket No. CSR 13040-14

Charge I: Violation of Newark Police Department Rules and Regulations Chapter 6:29.1, OFFICIAL INEFFICIENCY OR INCOMPETENCY. Department members whose performance is demonstrably inadequate or fails to meet, obtain or produce the effects or results mandated by the Department orders and procedures, shall be deemed in violation of Department Rules and Regulations and shall be charged accordingly.

Charge IB: Violation of Civil Service Rule 4A:2-2.3(a)(1). INCOMPETENCY, INEFFICIENCY, FAILURE TO PERFORM DUTIES.

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which occurred on June 3, 2012. Since June 3, 2012, Miles has been prohibited from possessing any firearms. In fact, his personal firearms were also seized by the Camden County Superior Court. Miles also failed to disclose his inability to possess a firearm and/or the fact that the Camden County Superior Court seized his personal weapons as a result of Domestic Violence.

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(f) A legally constituted hearing board for the purpose of inquiring into the activities or operations of Individual Department police officers or of the Department itself.

They shall appear before, cooperate with and render every aid and assistance to such body, tribunal or agency and prior to such appearance, notify their commanding officer by submitting a duplicate report, the original of which shall be forwarded through channels to the Office of the Police Director. (3 Counts.)

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Specification I: On January 28, 2014, Miles did violate the above rule when he responded to Camden County Superior Court-Family Part relative to Case No. FO 04 000134 13 C and failed to notify his commanding officer and the Police Director in writing prior to appearance.

Specification II: On February 20, 2014 Miles, did violate the above rule when he responded to Camden County Superior Court-Family Part relative to Case FO 04 000134 13 C and failed to notify his commanding officer and the Police Director in writing prior to appearance.

Specification III: On June 3, 2014, Miles did violate the above rule when he responded to Camden County Superior Court-Family Part relative to Case FO 04 000134 13 C and failed to notify his commanding officer and the Police Director prior to appearance.

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(e) New Jersey Laws,
(f) Newark City Ordinances,
(g) New Jersey Court Rules, and
(h) The Newark Police Department Manual of Rules and Regulations.

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Specification II: On June 3, 2014, Miles did violate the above rules when he booked off sick with a cold and failed to notify his command that he was no longer at his place of confinement.

Specification III: On June 3, 2014, Miles did violate the above rule when he responded to Camden County Superior Court-Family Part relative to Case FO 04 000134 13 C and failed to notify his commanding officer and the Police Director in writing prior to appearance. (R-1.)

Miles appealed the charges. In the Matter of Tahron Miles, City of Newark (Police Department), Docket No. CSR 13040-14 was transmitted, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), on September 22, 2014, where it was filed.

On November 14, 2014, a Consent Order Consolidating the two Cases was entered by the Honorable James A. Geraghty, Jr., ALJ. Orders of Inactivity were entered, at the request of the parties, on November 19, 2014, May 20, 2015, September 23, 2015, March 8, 2016, June 17, 2016, September 12, 2016, and March 28, 2017, pending a decision in a related New Jersey Appellate Division case, which the parties advised might resolve the two matters. Several documents were executed related to Miles's waiver of back pay.

At the conclusion of the Appellate case, hearings were held on October 16, 2017, and January 12, 2018. The record closed on February 16, 2018, upon the submission of post hearing briefs.

FACTUAL DISCUSSION AND FINDINGS

Six witnesses testified in this matter. Miles testified on his own behalf and called as a witness Sergeant Andy Rivera of the Newark Police. Director Sheilah A. Coley,

Lieutenant Christine Locke, Sergeant Eric Wren, and Assistant Prosecutor Matthew Spence testified on behalf of the Newark Police. Based upon a review of the totality of the pertinent evidence, and having had the opportunity to assess the demeanor and credibility of the witnesses and review the documents admitted into evidence, I **FIND** the following pertinent facts:

1.) Miles was employed as a police officer for the Camden City Police Department (Camden Police) from January 2010 to April 2013.

2.) Milles was involved in a domestic incident on June 3, 2012. A Temporary Restraining Order (TRO) was entered on June 4, 2012. The TRO was dismissed on June 14, 2012. (R-8.)

3.) Pursuant to the Office of the Attorney General Guidelines, the Camden County Prosecutor's Office (Camden Prosecutor's) seized the weapons (personal and duty weapons) and Fire Arms Purchaser Identification Card (FPIC) of Miles, on June 4, 2012.

4.) Miles was set to be re-armed by the Camden Prosecutor's once he completed counseling and was re-evaluated by a Department physician. Miles completed those terms and a decision was made by the Camden Prosecutor's on November 9, 2012, to re-arm Miles.

5.) Before Miles was re-armed and returned his FPIC, he was involved in an incident at a "local club" on November 11, 2012, where the Cherry Hill Police Department was summoned. (R-9.)

6.) Based upon the second incident, the Camden Prosecutor's reversed its Initial Decision to re-arm Miles. Miles was prohibited from carrying any weapon based on the domestic violence of June 3, 2012, and the "local club" incident on November 11, 2012. (R-19 to R-21.)

7.) Miles received a ninety-day suspension from the Camden Police for failing to inform his superior officers of the November 11, 2012, incident. Miles only served thirteen days of his ninety-day suspension because the Camden Police ceased to exist on March 31, 2013.

8.) On October 16, 2017, when Miles applied to be a police officer in Newark, he did not inform the Newark Police that his weapons and FPIC were seized as of June 4, 2012. (R-17.)

9.) Miles completed a background investigation for his Newark Police job application. The first page of the applicant's questionnaire contained a warning provision that "any misstatement of fact, omission or attempt to mislead this agency, its investigators or the appointing authority, deliberate or in error, may lead to your disqualification." Applicants were instructed to initial the bottom of every page as they completed each page, a direction with which Miles complied. (R-6, R-22.)

10.) On October 24, 2013, Miles acknowledged on the questionnaire, that a TRO was issued against him in Camden County and later dismissed. (R-22.)

11.) Miles testified that, at the time that he applied for employment as a Newark Police Officer, he did not advise Newark that his weapons were seized by the Camden Prosecutor's, as was his FPIC.

12.) Sergeant Rivera of the Newark Police Department had difficulty obtaining information regarding Miles's employment as a police officer in Camden. In recommending that Newark continue the hiring process for Miles, he relied upon the truthfulness of the information provided by Miles in his pre-employment interview and questionnaire.

13.) On November 25, 2013, Miles was employed as police officer in the City of Newark.

14.) Lieutenant Locke testified that Miles failed to disclose on his Newark questionnaire that he was prohibited from carrying a weapon. She testified that Miles would not have been accepted had he revealed on his questionnaire that he was prohibited from carrying a weapon.

15.) Miles testified that he did not advise the Newark Police, either before his employment or while he working as a Newark Police Officer and carrying a weapon in Newark, that his weapons were seized by the Camden Prosecutor's, as was his FPIC.

16.) Miles appeared in Camden County Superior Court on January 28, 2014, February 20, 2014, and June 3, 2014. Miles testified that he did not notify his supervisor in the Newark Police Department that he was summoned and did appear in Court in Camden County Superior Court, Family Part on those three days. He acknowledged that he told his supervisor that he was sick on at least one of the days that he was in Court. (R-12, R-15.)

17.) On April 30, 2014, Sergeant Wren was directed by Assistant Prosecutor Spence of the Camden County Prosecutor's Office to contact the Newark Police Department since Miles had stated in Court that he was a police officer for Newark even though he did not have a legal right to possess a weapon nor FPIC since 2012. Sergeant Wren advised staff of the Newark Police Department that the department weapon issued by the Camden Police Department, the personal weapons of Miles, and Miles's FPIC were all seized on June 4, 2012. (R-5.)

18.) Miles did not receive the return of his personal weapons and his FPIC until an Order was entered by the Honorable Richard F. Wells, J.S.C. of the Superior Court, Camden County, Chancery Division-Family Part, on June 7, 2017.

I **FIND** no merit in Miles's argument that he did nothing that should be found to rise to the level of intentional dishonesty or untruthfulness, sufficient to support removal, since the TRO and charges related to the "local club" incident concluded in dismissal, and his personal firearms and FPIC were eventually returned. The sustained charges at issue relate not to the eventual dismissal of the entered TRO and "local club" charges nor to the eventual return of his weapons and FPIC, but rather to Miles's failure to truthfully and completely inform Newark of the "local club" incident and that he did not have a legal right to possess and carry a weapon.

A careful analysis of credibility is necessary in order to make critical findings of fact. For testimony to be believed, it must not only come from the mouth of a credible

witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interests, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). A fact finder "is free to weigh the evidence and to reject the testimony of a witness when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 522, 521-22 (1950). The choice of rejecting the testimony of a witness, in whole or in part, rests with trier of and finder of fact and must simply be a reasonable one. Renan Realty Corp. v. Community Affairs Dep't, 182 N.J. Super. 415, 41 (App Div. 1981). A fact finder "is free to weigh the evidence and to reject the testimony of a witness when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. Perrone, 5 N.J. at 521-22 (1950). The choice of rejecting the testimony of a witness, in whole or in part, rests with trier of and finder of fact and must simply be a reasonable one. Renan Realty, 182 N.J. Super. at 41.

I **FIND** Miles's argument that he was reasonably confused about the status of his right to carry a firearm to be incredible. In testimony, Miles acknowledged his obligation as a police officer (as detailed in the sustained charges) to know New Jersey Laws, Newark City Ordinances, New Jersey Court Rules, and The Newark Police Department Manual of Rules and Regulations, which include laws relating to seizure of weapons after a domestic violence incident. Further, he was fully aware that his personal firearms and FPIC, seized in June 2012, were not returned to him after the TRO and "local club" incident charges were dismissed, nor by the time he applied to the Newark Police Department, nor during the time he was working as a Police Officer in Newark

and carrying a firearm issued by Newark. Since Miles never informed Newark that the weapon issued to him by the Camden Police Department, his personal firearms and FPIC were seized and returned, he certainly cannot reasonably argue Newark's hiring him without this knowledge supports his argument that he was confused about his "right to carry a weapon."

I **FIND** Miles's argument that the City of Newark "closed its eyes" to details of Miles' application to have no merit. If anything, Newark did not "close its eyes," rather Miles "held his hands over Newark's eyes'" when, during his interview and on his employment questionnaire, he failed to reveal the seizure of his weapons and FPIC card.

I **FIND** Miles is not justified to claim he is being unjustly disciplined by termination when he was advised on the pre-employment questionnaire that he failed to accurately fill out that "any misstatement of fact, omission or attempt to mislead this agency, its investigators or the appointing authority, deliberate or in error, may lead to your disqualification." (Emphasis added.)

I **FIND** Miles's argument that he might have been hired by Newark on an interim basis until the return of his weapons and FPIC to be inappropriate speculation since Miles admitted in his testimony that he never informed Newark of the seizure prior to his employment nor was there any testimony that interim positions for police officers "unable to carry" exist.

Based upon the foregoing facts, I **FIND** that the Newark Police Department has proven by a preponderance of the competent, relevant, and credible evidence that Miles is guilty of the sustained charges detailed above and in the FNDAs at issue in Docket No. CSV 09487-14 and Docket No. CSR 13040-14.

LEGAL ANALYSIS, CONCLUSIONS AND PENALTY

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A

civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The burden of persuasion is on the agency in enforcement proceedings to prove violation(s) of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The appointing agency must prove its case by the preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses. State v. Lewis, 67 N.J. 47 (1975). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions, evaluated by progressively increasing penalties. W. New York v. Bock, 38 N.J. 500, 523 (1962). However, the principle of incremental, or progressive, discipline does not need to be applied in every disciplinary setting, particularly when the misconduct "is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Herrmann, 192 N.J. 19, 33 (2007). New Jersey courts have repeatedly concluded that, even in the absence of a prior disciplinary record, removal may be imposed if the charges are serious enough in nature. Ibid.; Henry v. Rahway State Prison, 81 N.J. 571 (1980).

Moreover, the test for reviewing an administrative sanction is "whether such punishment is so disproportionate to the offense, in the light of all the circumstances, so as to be shocking to one's sense of fairness. In re Polk, 90 N.J. 550, 578 (1982). Further, courts should take care not to substitute their own views of whether a particular penalty is correct for those of the body charged with making that decision. In re Carter, 191 N.J. 474,486 (2007).

Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A law enforcement officer is held to a higher standard of conduct than other employees and, more than other employees, is expected to act in a responsible manner, honestly, with integrity, fidelity and good faith. In re Phillips, 117 N.J. 567, 576 (1990); Reinhardt v. E. Jersey State Prison, 97 N.J.A.R.2d (CSV) 166. Where the "desired goal of upholding the morale and discipline of the force, as well as maintaining public respect for its officers would be undermined, removal is justified" as it is when there is a "violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Asbury Park v. Dep't of Civil Serv., 17 N.J. 419 (1955).

As detailed more above, Miles's weapons and FPIC were seized as a result of two separate incidents—a domestic violence incident and a "local club" incident. Miles failed to inform his then employee, the Camden County Police Department, of the "local club incident." As a result, he was suspended for ninety days.[1] Since the Camden County Police dissolved, Miles sought employment from the City of Newark. During his pre-employment interview and in his pre-employment questionnaire, Miles failed to inform Newark of the seizure of his service weapon, his personal weapons and his FPIC. During his employment, he failed to inform his supervisor, as required, when he was summoned and did appear in the Superior Court, Camden County Chancery Division-Family Part on three separate occasions. In fact, on at least one occasion, he expressly lied to his supervisor by advising him that he was home sick rather than in Court on a domestic matter. During his employment he accepted and carried a weapon issued to him by Newark with knowledge that his seized personal weapons and FPIC were never returned to him. Miles could not have reasonably been confused as of "right to carry." With consideration of the factual basis for the charges at issue and the standard to which a police officer is held, I **CONCLUDE** that the sustained charges should be affirmed and that removal is merited.

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[1] Miles did not actually serve all the days of his suspension from the Camden County Police Department solely because this police force dissolved. However, the discipline remains on his record.

ORDER

It is **ORDERED** that the charges of Official Inefficiency or in Incompetency, Failure to Perform Duties, pursuant to Chapter 6:29.1 and 4A:2.2.3(a)(1), are **AFFIRMED**.

It is **ORDERED** that the Charge of Inability to Perform Duties, pursuant to 4A:2-2.3(a)(3) is **AFFIRMED**.

It is **ORDERED** that the Charge of False Statements, pursuant to Chapter 18:22.1 is **AFFIRMED**.

It is **ORDERED** that the Charge of Pre-Employment Statements, Chapter 18:22.2 is **AFFIRMED**.

It is **ORDERED** that the Charge of Subpoenaing or Summoning, pursuant to Chapter 4:4.6 is **AFFIRMED**.

It is **ORDERED** that the Charge of Responsibility for Own Actions, pursuant to Chapter 3:2.3 is **AFFIRMED**.

It is **ORDERED** that the Charge of Knowledge of Laws and Regulations, pursuant to Chapter 3:2.7 is **AFFIRMED**.

It is **ORDERED** that the Charges of Neglect of Duty, pursuant to Chapter 18:6 and 4A:2-2.3(a)(7), are **AFFIRMED**.

It is further **ORDERED** that the penalty of removal imposed by the appointing authority is **AFFIRMED**.

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

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

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

February 28, 2018

DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: 2/28/18

Date Mailed to Parties: MAR 2 2018

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Appellant:

Andy Rivera, Sergeant

Tahron Miles

For Respondent:

Sheilah A. Coley, Director

Eric Wren, Sergeant

Christine Locke, Lieutenant

Matthew Spence, Assistant Prosecutor

EXHIBITS

For Appellant:

P-1 Order of the Superior Court, Chancery Division-Family Part, Camden County, Criminal Action, the Honorable Richard F. Wells, J.S.C., dated June 7, 2017

P-2 Police Department, Administrative Submission, Background Investigation, dated November 15, 2013

P-3 Identical to P-1

For Respondent:

R-1 Binder Tab A, Final Notice of Disciplinary Action, dated September 2, 2014

R-2 Binder Tab B, Preliminary Notice of Disciplinary Action of Removal, dated July 3, 2014

R-3 Binder Tab C, Preliminary Notice of Disciplinary Action of Indefinite Suspension, dated June 5, 2014

R-4 Binder Tab D, Final Notice of Disciplinary Action of Suspension, dated June 6, 2014

R-5 Binder Tab E, Police Department, Administrative Submission, dated June 5, 2014, Investigation of Personnel, Allegation: Neglect of Duty, redacted

R-6 Binder Tab F, Police Department, Administrative Submission, dated June 5, 2014, Investigation of Personnel, Allegation: Neglect of Duty, redacted

R-7 Binder Tab G, Police Department, Administrative Submission, dated June 5, 2014, Investigation of Personnel, Allegation: Neglect of Duty, redacted

R-8 Binder Tab H, Temporary Restraining Order, Superior Court, Chancery Division-Family Part, Camden County, the Honorable Edward J. McBride, J.S.C., dated June 14, 2012

R-9 Binder Tab I, Cherry Hill Police Department, Officer Report for Incident at Taylor's Grill and Bar Restaurant, dated November 11, 2012

R-10 Binder Tab J, Withdrawn

R-11 Binder Tab K, Withdrawn

R-12 Binder Tab L, Newark Police Department Complaint Against Personnel, date of incident—April 30, 2014

R-13 Binder Tab M, Affidavit of Miles, In Support of Order to Show Cause, dated October 4, 2013

R-14 Binder Tab N, Police Department, Administrative Submission, dated April 30, 2014, Statement as to Possession and Registration of Firearms

R-15 Binder Tab O, Police Department, Administrative Submission, dated June 4, 2014, by Captain Eugene Venable, as to Miles responding to Superior Court for a personal matter without notifying the Newark Police Department

R-16 Binder Tab P, Letter from Sergeant Locke to Laurie A. Corson, Assistant Prosecutor and Eric Wren, Sergeant, dated May 5, 2014

R-17 Binder Tab Q, Letter from Laurie A. Corson, Assistant Prosecutor, to Detective Julio Rios, Camden, dated June 4, 2012

R-18 Binder Tab R, Letter from Laurie A. Corson, Assistant Prosecutor, to Howard L. Goldberg, Esq., First Assistant County Counsel, Camden County, dated June 20, 2013

R-19 Binder Tab S, Letter from Gail R. Gallagher, DAG to Eugene Venable, Newark Police Director, dated July 7, 2014

R-20 Binder Tab T, Amended Order of the Superior Court, Chancery Division-Family Part, Camden County, Honorable Richard F. Wells, J.S.C., regarding seizure and forfeiture of Miles's weapons, dated June 30, 2014

R-21 Binder Tab U, Decision of the Superior Court, Chancery Division-Family Part, Camden County, by the Honorable Richard F. Wells, J.S.C., dated June 26, 2014, affirming the retention of Miles' weapons

R-22 Binder Tab V, Police Department, Background Investigation Questionnaire, dated October 24, 2013

R-23 CD of October 16, 2017, Hearing

R-24 CD of January 12, 2018, Hearing

4-18-18

A-8

STATE OF NEW JERSEY

In the Matter of Amy J. Robitaille
Gloucester County, Department of
Emergency Response

CSC DKT. NO. 2016-3057
OAL DKT. NO. CSV 4056-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 20, 2018 BW

The appeal of Amy J. Robitaille, Emergency Medical Technician, Gloucester County, Department of Emergency Response, removal effective February 22, 2016, on charges, was heard by Acting Director and Chief Administrative Law Judge Lisa James-Beavers, who rendered her initial decision on March 19, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Amy J. Robitaille.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 4056-16
AGENCY DKT. NO. 2016-3057

IN THE MATTER OF
AMY J. ROBITAILLE,
GLOUCESTER COUNTY, DEPARTMENT
OF EMERGENCY RESPONSE

Jason L. Jones, Esq., and **Charlette Matts-Brown**, Esq., for appellant (Weissman and Mintz, LLC, attorneys)

Eric D. Milavsky, Esq., for respondent (Brown and Connery, LLP, attorneys)

Record Closed: March 21, 2017 Decided: March 19, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

Appellant Amy Robitaille (Ms. Robitaille), an Emergency Medical Technician, appeals her removal on charges of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming; and N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. Appellant denies that she violated any of the provisions of the administrative code when she, along with her partner, failed to respond to a call.

PROCEDURAL HISTORY

On January 25, 2016, the respondent Gloucester County Department of Emergency Response (Department) issued a Preliminary Notice of Disciplinary Action to appellant for the above charges and suspended her without pay pending a disciplinary hearing. (A-1.) After the hearing on February 8, 2016, the Department served appellant with a Final Notice of Disciplinary Action (FNDA) sustaining the charges and removing her effective February 22, 2016. (R-1.) Appellant appealed the FNDA to the Civil Service Commission (CSC). The CSC transmitted the case to the Office of Administrative Law (OAL) where it was filed on March 15, 2016. I scheduled the hearing for August 16 and 17, 2016. Appellant requested an adjournment due to her retaining counsel. Since the case was a removal, respondent would not consent unless appellant waived back pay until the next hearing date. Appellant waived back pay until the next scheduled hearing date, October 19 and 20, 2016. Those dates were adjourned and the hearing was rescheduled for October 31, and November 17, 2016. The parties adjourned those dates due to the unavailability of witnesses on those scheduled dates. The hearing was then rescheduled for January 23 and 25, 2017. On those dates, I heard the case and kept the record open for written submissions. The record closed upon receipt of those submissions on March 21, 2017.

FACTUAL DISCUSSION

The following facts are not in dispute and therefore I **FIND** them as **FACT**.

Amy Robitaille was an Emergency Medical Technician (EMT) with the Department. She began as a part-time EMT in October 2007 and then became a full-time EMT in November 2007. She has certification with the State of New Jersey as an EMT and a firefighter. Her job is to answer 9-1-1 calls, provide basic treatment and intervention services for medical trauma and transport patients to the hospital and other appropriate facilities.

Ms. Robitaille was working the 6:00 p.m. to 6:00 a.m. shift that went from December 30, 2016 to December 31, 2016. EMTs work in teams as required by the State of New Jersey. The Department is a twenty-four hour per day operation. EMTs work twelve-hour shifts and must be ready to respond. At the time of the incident in question, Ms. Robitaille was working with her partner, Dan Hauss, who was a part-time or per diem employee. They were assigned to Gloucester County Emergency Medical Services (GCEMS) crew 82-75. At about 1:36 a.m., their unit was dispatched for a cardiac arrest in Glassboro, New Jersey. The dispatch was later updated to a gunshot wound. Due to the severity of the call, another crew BLS 82-85 was also dispatched and responded to assist. Ms. Robitaille's unit never responded nor arrived at the location. Ms. Robitaille's partner, Mr. Hauss, received a written warning for missing the call. Ms. Robitaille was suspended without pay, and then removed after her hearing.

The parties stipulated that there is a pager charger and radio charger that are secured in place in the computer room. The telephone charger was not secured in the computer room.

TESTIMONY

Andrew Lovell

Andrew Lovell testified that he is Chief of Emergency Medical Services (EMS) for GCDER. He previously served as Chief for the Township of Logan. When Gloucester County established its first county life support system in 2007, he was chosen to lead it. The function of the GCDER is to respond rapidly to all 9-1-1 calls from the public for traumatic or medical emergencies.

Chief Lovell explained that, during a typical night shift, a team may receive between three to seven calls. A member of the public dials 9-1-1 and the public safety telecommunicator determines the nature of the emergency and dispatches an EMS crew. Typically crews of two are in stations awaiting the calls. Policy 2012-26 sets forth that the GCEMS expects that "all emergency staff will arrive at work with sufficient rest

to be able to remain awake and perform all functions fully alert and safely." (R-1.) The policy also sets forth that the on-duty crew must be available for immediate response to any emergency dispatch. It prohibits sleeping while on duty and sets forth that "Failure to be ready to respond to an emergency dispatch or call will result in disciplinary action up to and including termination." (R-1.)

Chief Lovell testified to the six methods of dispatch. There are three voice or audible and three digital methods that are used concurrently. They are: 1) audio message over VHF paging system; 2) audio message over UHF paging system; 3) two-way radio system; 4) digital text message to crew cell phone; 5) digital email message to computer; and 6) Active 9-1-1 Phone App. The redundancy is used so that the crews cannot miss a call. Sometimes one method may fail, although that is very infrequently, but all six will not fail at the same time. The failure of all has never happened because each method is independent of the other. Chief Lovell explained a video of the station showing the crew area, the kitchen area and the small computer room, all of which are in close proximity.

On December 31, 2015, a call went out at 1:36 a.m. that a person was lying in the driveway in front of a residence. Another crew arrived on the scene, treated and transported the patient to the hospital where the patient was pronounced dead in the Emergency Room. Chief Lovell testified that he knows that the call went out over all six methods because he heard the audio notice. The County keeps recorded messages as they are subject to Open Public Records Act (OPRA) requests. He played the recording of the dispatch, which lasted approximately three minutes and forty-one seconds. (R-5.) He noted that the synthesized voice saying what time it is while the recording plays is only on the recording and not heard in real time. The paramedics and the fire department were concurrently dispatched. Two minutes after the call, Ms. Robitaille's crew still had not responded.

Chief Lovell testified that the call went to the radio, the crew's digital phone by text and by pager. An audit of the Roam Alert Secure Network (RSAN) indicated that the text page was sent electronically. The cell phone carrier confirms that it transmitted

the page. (R-6.) He also retrieved the confirmation of the email that was sent. (R-7.) When he interviewed Ms. Robitaille, she said that she had the 9-1-1 Phone App and the call was transmitted. Chief Lovell also showed that the crew responded to three calls before the 1:36 a.m. call and responded to one call after that call. (R-8.) The last call they responded to before the 1:36 call was at 9:59 p.m. Ms. Robitaille's crew reported no issue with the pagers or radio prior to the 1:36 a.m. call. He testified to Police Policy 2012-13 that requires crews to respond and be in route to a call within two minutes of the initial dispatch. (R-9.) He noted that Ms. Robitaille did not fill out a special report, which can be used if something goes wrong, for example, if a pager does not trip. (R-11.) Ms. Robitaille received the Uniform and Appearance policy (R-17) and the Rested and Fit for Duty Policy (R-1.)

Chief Lovell requested that Human Resources discipline Ms. Robitaille for the failure to respond to the call. He recommended termination because she had a pattern of failure to carry out the duties of an EMT and that failure put the public at risk. (R-10.) No other employees missed the call in question. It is the crew's responsibility to make sure that all methods of communication are on and working. The GCEMS will have answered 200,000 calls this year.

On cross-examination, Chief Lovell noted that electronic devices can fail; however, there has been no reported failure of the radio system, Active 9-1-1, text pages or email that is used by all agencies. He has no knowledge of whether Ms. Robitaille had the email open on the computer. The alert tones are only sent once, so if they are sent more than once, it means that the crew did not respond to the call. He agreed that employees have to pay for the Active 9-1-1 App themselves, so the GCEMS does not require it. The County issued new pagers, but it was due to the new radio system and had nothing to do with this incident. The time between the dispatch and the time the paramedic unit responded was three minutes and thirty-four seconds. Ms. Robitaille reported that her pager did not trip.

Christopher Mellish

Christopher Mellish testified that he is the supervising EMT who works from 7:00 p.m. to 7:00 a.m. Part of his job is to make sure that crews respond to calls. He found out about Ms. Robitaille's missed call because another unit went to the call, loaded the patient into the ambulance and went to the hospital. On the way to the hospital, the crew called him and asked the status of the other ambulance because that crew, 82-75, never arrived on the scene. After he learned 82-75 did not respond to the call, he called the alarm room supervisor in charge of dispatching, William Ross, and confirmed that Ms. Robitaille's crew, 82-75 did not respond to the call. He then dialed Ms. Robitaille's cell phone. When she answered, she sounded groggy. He asked her if she knew that she had missed an assignment and she said she did not. He asked if it had come up on her Active 911 phone app and she said that it was there. She then called her partner's name three times in an escalating voice, "Dan, Dan, Dan," as if trying to wake him. He did not call Mr. Hauss directly because he generally communicates with the full-time employees and Mr. Hauss is a part-time employee who works twelve to twenty-four hours per week.

Later, at approximately 3:20 a.m., Ms. Robitaille's unit was dispatched to the same address to console the family members who were distraught about what had happened. Mr. Mellish asked her later if the pagers had gone off that time. She said that they had. He filed a report to Chief Lovell and sent it to him by email later that morning.

The call in question was dispatched as a cardiac arrest, which is an involved call that requires multiple people so the second ambulance is sent to assist knowing that Ms. Robitaille and Mr. Hauss would probably need a hand. Mr. Mellish heard the second ambulance sign on to the radio approximately two minutes after the dispatch. When he was first advised of the incident, he was at the Mullica Hill station. Ms. Robitaille said that the pagers did not trip for that 1:36 a.m. call. There were no other EMTs to ask about the status of the pagers. The other unit, 82-85, received the dispatch because they answered the call, if not by pager, by cell phones, if not by cell

phones, then the radio, if not the radio, the Active 911 app., if not the app, the dinging of the emails on their computer. There was no previously reported problem with pagers that night. When he asked why she did not answer the cell phone call, Ms. Robitaille said that her cell phone was on silent.

Mr. Mellish denied ever giving EMTs under his supervision a directive that they are not permitted to take duty cell phone chargers in to the crew room. If he issues a verbal directive, he follows it up with a department-wide email. If he issued any directive about chargers, it was not to charge your personal cell phones using department chargers.

Christopher Rosser

Christopher Rosser testified that he is a lieutenant with the Gloucester County EMS. He was on vacation when the incident occurred but was advised of it when he returned, approximately January 4, 2016, according to the documentation. Chief Lovell asked him to investigate the incident. To do so, he spoke with the crew, checked the notification equipment and spoke with the crews in the area to see if they had an issue with any of the equipment.

When Lt. Rosser interviewed Dan Hauss, he was very apologetic and contrite about missing the call. He said, "he may or may not have been sleeping." He described Ms. Robitaille as the opposite in her interview. She answered almost every question with one word and she was not apologetic. She said that the notification equipment was not working. Ms. Robitaille said the radio was in the computer room, but it should have been on her person as it is supposed to be all the time. The duty phone should also be on an EMTs person at all times. He looked specifically at the pagers that were in use at Ms. Robitaille's station. There are three pagers at the Station 82-7. Each pager has a repeat function so he was able to go back many calls to prove that the pager was not having any issues receiving any messages. He was not able to go all the way back to the night in question, but he was able to confirm that the pager was in good working order. Last, he interviewed some other crews and they did

not report any issues with any of the notification equipment. He summarized his investigation and gave it to Chief Lovell. Lt. Rosser received one report that one of the three pagers did not activate on January 10, 2016. He does not recall the EMT who made that report.

Although discipline was one of his responsibilities, he was not responsible for recommending any discipline for Ms. Robitaille. He does not know who made that recommendation. He did not recall issuing a memorandum to Mr. Hauss about the incident, but after being shown it, he identified it as the disciplinary memorandum he wrote. (A-1.) Mr. Hauss received a written warning.

Caroline Pope

Caroline Pope testified that she is an EMT with Gloucester County EMS. She will be beginning her third year in March 2017 she worked the hours of 6:00 a.m. to 6:00 p.m. on December 31, 2015 at station 82–7 in Pitman. Ms. Robitaille and Mr. Hauss preceded her shift. She had worked at station 82–7 approximately eight times before December 31, 2015. She never had any problems with any of the dispatch notification equipment prior to that date. She keeps all the notification equipment in the room where she is located either on her person, sitting next to her or on the coffee table in front of her. It is her responsibility to see that the equipment is charged and the volume is turned up.

Ms. Pope typically has an exchange with the outgoing shift that tells whether there are any problems with the ambulance or the paging system or if hospitals were on divert. The outgoing crew did not mention any problems with any of the notification equipment that she recalls. She recalls a conversation of a shooting that had taken place and that another crew had taken the call.

She identified a pager, and EMS radio, and the duty cell phone as being the type of those items that were present in the station on December 31, 2015, but not necessarily the actual ones that were there that night. During her shift on December

31, 2015, she received approximately three dispatches and did not have any problems with the notification equipment at the station. To this day, she has not had any problems with any of the notification equipment at station 82-7 and the testimony was taken January 25, 2017. Compared to the other places that she has worked as an EMT, the other organizations do not have as many alerting devices as Gloucester County has.

On December 31, 2015, Ms. Pope was a per diem EMT for the county permitted to work up to twenty-four hours per week. She recalled the conversation about the shooting because it is not something that happens every day so it sticks out in her mind. She agrees that she does not have personal knowledge of any problems that Ms. Robitaille could have encountered with equipment prior to her shift. When she demonstrated how the reset button works on the pager, the reset button did not work on the device that had been brought to court. She uses the reset button to make sure that the volume is high enough for her to hear the dispatch.

Amy Robitaille

Amy Robitaille testified that she started working for the Department in October 2007 as a part time EMT. She is certified professionally as an emergency medical technician and a firefighter for the state of New Jersey. Sh e currently works full-time at Lourdes EMS and Gloucester Township EMS part-time or per diem. She began working for Lourdes part-time or per diem in 2014.

Ms. Robitaille's main responsibility for the Department was to answer 9-1-1 trauma calls and then transport patients to the hospital. On occasion, she would answer public assist type calls. She was hired by the Department initially as a part-time EMT, but shortly after being hired she applied for full-time position and was made full time before the end of 2007.

On December 30, 2015, she was assigned to Pitman 82–7 working the 6:00 p.m. to 6:00 a.m. shift. She was assigned with Danny Hauss. Upon arriving for work, she

and Mr. Hauss did the rig check to make sure all the equipment was on the ambulance and that they were adequately stocked for the night. The rig check also entails checking for oxygen, oxygen equipment, gas, fuel, radios, lights and everything to ensure they are in working order. They then proceeded to do the station chores.

At some point she received a call from Mr. Mellish. When she received the call from Mr. Mellish, she was watching television sitting on the couch in the crew room. She received a call on her personal cell phone that was set on vibrate at the time. He asked her if she realized that they had missed a call. She responded that of course she did not. He asked if her pager went off and she told him that neither her pager nor Mr. Hauss's had gone off. Ms. Robitaille testified that her voice probably did sound groggy as he said because she hadn't talked for almost 3 hours by the time she had that conversation with him on the telephone. The nature of the call that she had missed was a gunshot. Her pager had not tripped for the call. She recalled that at the Pitman station there were two pagers at the Station. It was not the first time that her pager did not trip or activate. It happens on a regular basis approximately once every couple of months. She reported that to her direct supervisor Mr. Mellish verbally. Mr. Mellish called her on the phone to say the county was getting ready to re-tone them.

Ms. Robitaille testified that her duty phone was in the office charging where the power strips are. She wanted to make sure it was charged to go on a call. There are no chargers for the duty phone in the crew room. There was only one duty phone present in that station during her shift. She was never advised that she was prohibited from charging the duty phone during her shift. She did not see an email prompt because the computer was in the office, not the crew room. Generally, the email does not even stay open. She does not recall hearing a ding from the email. She was never advised that email had to be kept open during the shift. She denied falling asleep at any point during her shift. When Mr. Mellish called again, he told her to be ready to be dispatched to the location of the gun shot. When she and Mr. Hauss went to the location, they were then told that the patient had already been transported by personal vehicle to the hospital so their services were not needed. There was a radio present at the station during the shift, but Mr. Hauss had it. She recalled the conversation

between her and Mr. Hauss and the incoming team. She told them about the shooting and the fact that the pagers had not tripped for that call. She is absolutely certain she told Ms. Pope that the pagers did not trip. She had the active 9-1-1 app on her phone at the time of the call at issue. Her phone was set on vibrate at the time. It would have made one short buzzing sound, which she does not recall hearing during her shift.

Two weeks prior to testifying, she had just bought a new iPhone 7 to replace her iPhone 6. The active 9-1-1 app did not change though. She received notification through the app anytime from two to seven times per shift. The vibration did not change from one phone to another.

Ms. Robitaille found out she was being removed from her position by a letter that said she was being suspended pending a hearing. After her departmental hearing she received a notice indicating she's been removed from her position. She has nine and a half years in her pension, most of which was in Gloucester County. She needs ten years to vest. In addition, she wants to return to her job because she loves the familiarity and the job.

Ms. Robitaille and Mr. Hauss had responded to three calls prior to the call at issue. She did not report any problems regarding the notification systems to her supervisors about the notification systems after the gunshot. She received no notice through any means of the call at 1:36 a.m. on December 31, 2015. She heard the audio recording of the call and understands that the other ambulance crew heard the call as did another local fire department. She did not know about the call because the pagers did not trip, the phone was in her front pocket of her sweatshirt on vibrate for her active 9-1-1 so she did not feel it, the duty cell phone was charging in the office and her email was not opened. The computer was in the office and not in the crew room in any event. Mr. Mellish told her not to move the chargers for the duty cell phones. There was an electrical outlet in the crew room where the duty phone could have been charged. Also, if it were charging in the other room, the volume could have been turned up loud enough and the volume low enough for her to hear it. He was on another couch approximately four feet from her. She testified that there is nothing saying that

the radios have to be turned on. She thinks the radio was in Mr. Hauss's radio strap. She checks the pagers at the beginning of her shift by pushing the reset button to make sure that it is operating. According to her, email was not to be used as a notification system. She did not put in an incident report the fact that the pagers did not function. She had no recollection of having reviewed policy R-17.

FINDINGS OF FACT

In order to make findings of fact in the present case where the evidence is disputed, the court must make credibility determinations. Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

Robitaille's testimony is essentially that she did not answer the 9-1-1 call because, although there were two pagers, neither pager was working; the duty cell phone was in the computer room charging; the email application on the computer was not left open and it was also in the computer room in any event; there was only one radio and it was with Mr. Hauss; and she had the Active 9-1-1 application on her personal cell phone, but it was set to vibrate. Thus, according to her testimony, only the pagers not working were out of her control. All of the other notification systems worked fine, but she did not follow procedures designed to ensure that she would not miss a call.

Regarding the pager, Ms. Robitaille is correct that no one who testified for the Department was present with her at the time at issue to say for sure that the pager was working. There is only the circumstantial evidence that Ms. Pope, who was very credible, does not recall Ms. Robitaille telling her the pager not working at the start of Ms. Pope's shift. The pager information is not as significant as the fact that there was a shooting during the shift before, but it is significant enough that she probably would have remembered. The other evidence the Department presented is that Ms. Robitaille

received three pages without incident before the 1:36 a.m. call and another page after the 1:36 a.m. call. Ms. Robitaille asks that the court draw an adverse inference from the fact that the Department did not call Mr. Hauss who was the only person with Ms. Robitaille at the time at issue. I decline to do so. If Mr. Hauss could support Ms. Robitaille's testimony that neither of their pagers were working, she also could have called him as a witness. As it stands, her testimony that Mr. Hauss said his pager was not working is only hearsay and is rebutted by his apology to Mr. Mellish. The mutual failure of both parties to call him as a witness cancel each other out. Apparently neither party felt that they needed Mr. Hauss in order to support their case. Because her testimony that her pager failed was undisputed, I **FIND** that her pager failed. I **DO NOT FIND** that Mr. Hauss's pager also failed, however.

I **FIND** that the redundancy of the notification system should have ensured that Ms. Robitaille did not miss the call. I **FIND** that it was Ms. Robitaille's responsibility to ensure that the duty cell phone was in a place where she could hear it. If it was in the computer room charging then she could have been in the computer room for the length of time it would have taken to charge it. Similarly, although no policy says the email application on the computer has to be left open and the email was in the computer room, she could have been in the computer room to ensure that she did not miss a call or an email. I **FIND** also that if there was only one radio and it was with Mr. Hauss, she had the responsibility to make sure that his radio was loud enough for her to hear it. The testimony of Ms. Pope that there were two radios is more believable than that of Ms. Robitaille in any event. Ms. Robitaille's testimony that she was under no obligation to have the radio turned on was reprehensible in light of it being one of the many notification systems to keep her from missing a call. Last, although Ms. Robitaille was not mandated to have the active 9-1-1 application on her personal cell phone, she did have it. Therefore, I **FIND** it was her responsibility to ensure that she could feel or hear it. Apparently she could not do that with the phone set on vibrate. She cannot blame anyone else for her failure to feel the vibration of her phone.

CONCLUSIONS OF LAW

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. In an appeal from such discipline, the appointing authority bears the burden of proving the charges by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). In re Polk License Revocation, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). The Department has charged Ms. Robitaille with N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming; and N.J.A.C. 4A:2-2.3(a)(7), neglect of duty in connection with missing the call in question.

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007). In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). The Department produced policies showing that Ms. Robitaille was required to be fully alert and call-ready. Although the Department could not prove that she was asleep, it certainly proved that she failed to perform the most essential duty of her job, which is to answer emergency calls from dispatch. The Department also produced evidence that it is essential to the EMT position that they not miss a call. Ms. Robitaille put herself in a position that allowed her to miss a call by not having the duty cell phone on or near her as required by the policy R-17. I therefore **CONCLUDE** that the Department met its burden to prove by a preponderance of the credible evidence that Ms. Robitaille exhibited inefficiency and failure to perform her duties in violation of N.J.A.C. 4A:2-2.3(a)(1).

The next charge, "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6) is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public

respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Ms. Robitaille argues that the Department failed to prove that its notification devices sufficiently notified her team of the call at issue and therefore, the Department failed to establish conduct unbecoming a public employee. The Department proved by a preponderance of the evidence that Ms. Robitaille's team had a radio that she did not bother to see if it was set loud enough to hear a call because nothing said that she was required to have it on. The Department proved that, even though it did not provide Ms. Robitaille with the Active 9-1-1 application on her cell phone, she had it and the call went through to it and she did not respond to it. The Department also proved that Ms. Robitaille had a functioning duty cell phone in addition to her personal cell phone, but instead of the phone being on her or Mr. Hauss's person as required by number ten of the Uniforms and Appearance policy, she had it charging in the computer room. Taken in its totality, the Department proved its devices were sufficient to notify her of the call and her failure to answer the call certainly has a tendency to destroy public respect in the delivery of governmental services. Therefore, I **CONCLUDE** that Ms. Robitaille exhibited conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6).

The last charge against Ms. Robitaille is N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. Ms. Robitaille emphasizes that there was no witness had personal knowledge that she was sleeping and this is true. It is also true that Mr. Mellish could have asked her whether she was sleeping either when he called or when he conducted his investigation. In the alternative, he could have asked Mr. Hauss whether Ms. Robitaille had been sleeping. The fact that the investigation could have been more thorough does not obfuscate the fact that Ms. Robitaille was the cause of her not answering the radio, duty phone or Active 9-1-1 application. What Mr. Mellish knew was that when Ms. Robitaille answered the phone after missing the call, she sounded groggy. He also knew that she had trouble getting the attention of Mr. Hauss and had to call his name three times. In addition, Mr. Mellish knew the most important fact, that in a position in

which the most important duty is to answer calls within two minutes, Ms. Robitaille missed a call.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). Ms. Robitaille requests that a negative inference be drawn from the fact that the Department did not present a witness from Human Resources to testify as to why the penalty of removal was chosen. I decline to do so in this instance. This is a hearing de novo so it is the obligation of the factfinder to determine penalty, which the Civil Service Commission can then accept, reject or modify. It is not necessary to have the witness who recommended the penalty testify when the nature of the offense and the prior record of the appellant are the main factors in the penalty determination.

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. W.N.Y. v. Bock, supra, 38 N.J. at 523–24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

Ms. Robitaille has had two prior charges of neglect of duty and failure to perform duties for which she has received major discipline. She received a suspension of fourteen twelve-hour shifts for her neglect of duty in September 2012 and a suspension of thirty shifts for neglect of duty in November 2013. In addition, she was also charged with conduct unbecoming a public employee in connection with the fourteen shift suspension. These prior disciplinary actions are not ancient history, but fairly close in time to the conduct at issue in the present case, which took place in December 2015. In addition, she had two minor suspensions and a reprimand.

Ms. Robitaille has charged the Department with imposing disparate treatment because Mr. Hauss received only a written warning. This argument would have merit if she did not have two major suspensions in her disciplinary history. Ms. Robitaille's first offense was a verbal warning or reprimand for failing to follow job procedures; Mr. Hauss received similar discipline. There is certainly an argument to be made that Mr. Hauss received too light a penalty, but based on the record before me, I cannot conclude that Ms. Robitaille's penalty was too harsh. Based on the severity of the offense and Ms. Robitaille's prior disciplinary history, I **CONCLUDE** that the penalty of removal was appropriate.

ORDER

I **ORDER** that the action of the respondent Gloucester County Department of Emergency Response removing Ms. Robitaille from her position as EMT for N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming; and N.J.A.C. 4A:2-2.3(a)(7), neglect of duty is hereby **AFFIRMED**.

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

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

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

March 19, 2018
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: March 19, 2018

Date Mailed to Parties: March 20, 2018

/caa

APPENDIX

WITNESSES

For Appellant:

Andrew Lovell
Christopher Mellish
Christopher Rosser
Caroline Pope

For Respondent:

Amy Robitaille

EXHIBITS

For Appellant:

A-1 Disciplinary Memorandum from Chris Rosser to Dan Hauss
A-2 Preliminary Notice of Disciplinary Action
A-3 Final Notice of Disciplinary Action

For Respondent:

R-1 Rested and Fit for Duty Policy
R-2 Graphic Representation of Dispatches
R-3 CD with Video Depiction of Station
R-4 Pictures A-D of EMS Station 82-7
R-5 Recording of Initial Dispatches
R-6 RSAN Audit of Original Dispatch Info
R-7 Confirmation of Email Notification
R-8 Dispatch Records December 30, 2015 to January 2, 2016
R-9 Readiness and Response Policy

R-10 Record of Disciplinary Actions

R-11 Special Reports

R-12 Lt. Mellish's December 31, 2105 Email Report

R-13 Summary of Lt. Rossner's Investigation

R-14 Pager

R-15 Radio

R-16 Duty cell phone with charger

R-17 Policy No. 2012-12 Uniforms and Appearance

R-18 Electronic sign-off sheet

4-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Anthony Rogers
City of East Orange Police Department

CSC DKT. NO. 2017-2584
OAL DKT. NO. CSV 04022-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 18, 2018 BW

The Civil Service Commission, at its meeting of April 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04022-17

AGENCY DKT. NO. CSC #2017-2584

IN THE MATTER OF ANTHONY ROGERS,
CITY OF EAST ORANGE POLICE DEPARTMENT,

Joshua Forsman., Esq. for appellant (Caruso Smith Picini, P.C., attorneys)

Mark A. Dipisa, Esq., for respondent (Roth D'Aquanni, LLC))

Record Closed: March 22, 2018 Decided: March 23, 2018

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on March 22, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Telephone prehearing conferences were conducted on June 2, 2017 and July 6, 2017 wherein the parties agreed on a hearing date of March 22, 2018. At the hearing the parties submitted the fully executed settlement agreement which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 23, 2018
DATE

DANIELLE PASQUALE, ALJ

3-28-18

Date Received at Agency:

Date Mailed to Parties:
lr
attachment

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LOCAL

OAL DKT. NO. CSV 04022-17
AGENCY DKT. NO. 2017-2584

SETTLEMENT AGREEMENT

IN THE MATTER OF

Rogers, Anthony

AND

City of East Orange Police Department

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/23/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	3:5.9 - operation of motor vehicles	total day suspension = 11	
2.	3:5.1 - responsibility for use and care		
3.	3:1.9 - neglect of duty		
4.		dates effective: 4/8/2017 →	
5.			4/18/2017

B. The Appellant Anthony Rogers withdraws his/her appeal and request for a hearing, and the Respondent appointing authority City of East Orange Police Department agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	3:5.9 - operation of motor vehicles		4 days
2.	Not to be used for progressive discipline;		
3.	parties to be responsible for their own attorney's fees.		
4.	0 charges have been sustained for 3:5.9 only.		
5.			

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 11 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 7.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

~~D.~~ _____ (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority _____ will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, ~~including any award of back pay~~, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of breach of this agreement disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, City of East Orange, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/22/18
DATE

Appellant

DATE

Respondent

3/27/18
DATE

ON BEHALF OF Appellant

3/22/18
DATE

ON BEHALF OF
Respondent
Mark A. DiPisa, Esq.

CERTIFICATION

I, Anthony Rogers, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/22/18
DATE

NAME

4-18-18

A-009

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Eric Warren,
Burlington County

CSC Docket No. 2018-1234
OAL Docket No. CSR 16796-17

ISSUED: May 4, 2018 (SLD)

The appeal of Eric Warren, a County Correction Officer with Burlington County, of his removal effective October 16, 2017, on charges, was before Administrative Law Judge Joseph A. Ascione (ALJ), who rendered his initial decision on February 28, 2018. Exceptions were filed on behalf of the appellant and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 18, 2018 ordered that this matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA), dated October 19, 2017 which charged him with incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty; conduct unbecoming a public employee; and other sufficient cause and removed him from employment, effective October 16, 2017. Specifically, the appointing authority asserted that on July 2 and 3, 2017, the appellant neglected to conduct required security tours. It also asserted that the appellant had entered false and misleading entries into the official logbook by documenting 10 security tours that he did not actually conduct. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as contested case.

In his initial decision, the ALJ found that the appellant did not dispute that he violated departmental policies. The ALJ noted that although the appellant did not testify, one witness confirmed that a County Correction Sergeant "may have acted similarly" in misreporting security checks, but had not been disciplined. Specifically, the appointing authority indicated that it was too late to discipline that County Correction Sergeant, but that six individuals, including the appellant, had been identified as having committed similar violations. The appointing authority further noted that none of the six identified employees were currently employed by the appointing authority. As the appellant essentially admitted to the infractions, the ALJ upheld the charges.

With regard to the issue of the penalty, the ALJ noted that the appellant's disciplinary history was not made part of the record, as "such history reflected attendance or lateness issues, which would be of slight values to either positively or negatively affect the determination of the issue of penalty" in the instant matter. The ALJ found that the appellant had failed to establish that the charges against him were the result of disparate treatment, as the exercise of some selectivity in enforcement is not an issue unless it was based on an improper reason. The ALJ found that the appellant's failure to perform security checks and his falsification of records was egregious misconduct and warranted removal.

In his exceptions, the appellant argues that the Supreme Court and Appellate Court's decisions in *In the Matter of John E. Warren and Gerald Sowa*, 117 *N.J.* 295 (1989), *In the Matter of Nolan Cox,* Docket No. A-2471-14T4 (App. Div. Dec. 7, 2016) and *In the Matter of Ramona Carter,* Docket No. A-3105-14T4 (App. Div. March 7, 2017) establish that the removal is an excessive penalty for the charges alleged. In this regard, he maintains that although his conduct was negligent, it did not warrant removal.

In its reply to the exceptions, the appointing authority argues that the appellant's actions were particularly egregious as he knew he was required to perform a security check every 30 minutes, he failed to perform 10 of those required checks and that 10 of his 15 logbook entries corresponding to the security checks were knowingly false. Moreover, it argues that the decisions cited by the appellant do not support his assertion that removal is not an appropriate penalty. Furthermore, it notes that the appellant was a sworn law enforcement officer that knowingly and willfully made false entries into an official logbook to cover up his misconduct in not completing the required security tours.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's findings to uphold the charges. However, with regard to the issue of the penalty, the Commission finds it necessary to remand this matter to the OAL. In this regard, the Commission notes that although the ALJ references a disciplinary history, he decided not to admit that history into the record. However, the

Commission notes that even when there is no dispute as to the charges, and an ALJ has determined that the claimed behavior was egregious, the disciplinary history must be admitted into the record to allow the Commission to have a complete record so that it may make its decision. In this regard, it cannot be assumed that the Commission, which has *de novo* review of both the underlying charges and the penalty imposed, will automatically agree with an ALJ's conclusions as to the severity of the misconduct or the penalty determination. Thus, an appellant's prior disciplinary history may provide the Commission with a more complete record for it to determine the appropriate penalty. Further, while the ALJ noted that the appellant's prior disciplinary history was apparently for dissimilar conduct, that, in and of itself, does not mean that such a history cannot be considered in determining the proper penalty.[1] The Commission notes that the inclusion of an appellant's disciplinary history is **essential**, even in matters where the Commission ultimately agrees with an ALJ's assessment of the severity of the misconduct or determines that the alleged misconduct is so egregious that the penalty imposed is appropriate even without regard for that history. This is the case, since, if the Commission does not agree, it is left without a critical piece of information in the record which will hamper its ability to impose a proper penalty. Moreover, notwithstanding the appellant's admission of the conduct, one witness did give testimony. However, the ALJ failed to summarize that witness' testimony. Therefore, the Commission remands the matter to the OAL so that the appellant's disciplinary record may be entered into the record, the witness' testimony may be summarized and a new initial decision may be issued.

ORDER

The Commission orders that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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[1] Of course, the Commission agrees with the ALJ that any disciplinary history may be ignored when the misconduct is of such an egregious nature that removal may be imposed regardless of an employee's history. However, it does not agree that the history should, therefore, not be included as part of the underlying record.

Inquiries
and
Correspondence

Christopher Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 16796-17
AGENCY REF. NO.
2018-1234

IN THE MATTER OF ERIC WARREN,
BURLINGTON COUNTY JAIL.

Daniel M. Rosenberg, Esq., for appellant Eric Warren (Daniel M. Rosenberg & Associates, LLC, attorneys)

Andrew C. Rimol, Esq., for respondent Burlington County Jail (Capehart Scatchard, P.A., attorneys)

Record Closed: January 31, 2018 Decided: February 28, 2018

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Eric Warren (appellant) appeals from the decision of the Burlington County Jail (BCJ) to remove him from his position as a correction officer at the BCJ on charges of violation of N.J.A.C. 4A:2-2.3(a)(1), (3), (6), (7), and (12), incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, relating to the failure to conduct ten required general security checks during his shift commencing at 18:00 hours on July 2, 2017, and terminating at 06:00 hours on July 3, 2017, and the improper entry in the

logbook of ten security tours during that shift. Additional charges include violation of Policy & Procedure Manual Sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, and 1250. Appellant does not deny the charges. Appellant asserts that removal is not the appropriate sanction.

On September 7, 2017, a Preliminary Notice of Disciplinary Action was filed seeking appellant's removal. The appellant requested a departmental hearing, which was held on September 21, 2017. On October 19, 2017, a Final Notice of Disciplinary Action was issued, sustaining the disciplinary charges and removing appellant from his position with the BCJ effective October 16, 2017. Appellant appealed that removal action under cover letter dated October 31, 2017. The matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), where it was stamped received on November 2, 2017, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November 30, 2017, the matter was assigned to me. On December 6, 2017, I convened a telephonic case-management conference to discuss discovery requirements and schedule the evidentiary hearing. The hearing was scheduled for January 26 and January 31, 2018. Appellant requested an adjournment of the January 26, 2018, hearing date. On January 31, 2018, the hearing was held. At the hearing, appellant waived his right to reinstitute pay under N.J.S.A. 40A:14-201 et seq., until April 2, 2018. A separate Order regarding salary is being issued simultaneously with this Initial Decision. At the close of the plenary hearing, counsel for both sides presented written closing statements and briefs. The record closed on January 31, 2018.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Up until his removal on these disciplinary charges, appellant had been a correction officer with the BCJ for seven to eight years. At the time of the incident he worked I-Wing, shift Squad B. Inmates of I-Wing could be pre-detention inmates with unknown emotional or health issues.

Due to an outside prosecutorial investigation, the BCJ became aware of improprieties in the conduct of security checks.

The BCJ charged and proved violations of N.J.A.C. 4A:2-2.3(a)(1), (3), (6), (7), and (12).

The BCJ charged and proved violations of Policies and Procedures Sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, and 1250.

The more serious violations appear at 1172, 1190, 1250(A)(15), 1065, and 1066. These regulations address the general security checks; the timing of the checks, that is, at some time during every thirty-minute period; and the purposes of the checks as both security and head count. Policies and Procedures Section 1172(A)(4) advises the employee that violations are subject to disciplinary action and/or criminal charges.

"Security" means not only the physical security of the facility, but the safety and welfare of the inmates. (See J-6 1007(3).)

Appellant knew of the policies. (See J-12.)

Appellant does not dispute that the policies were violated.

Appellant did not testify at the hearing. Rather, by cross-examination of the administrative personnel of the BCJ, appellant confirmed that one sergeant may have acted similarly in misreporting security checks, but had not been disciplined.

The BCJ responded that the forty-five-day period for taking action against the sergeant referred to by appellant had expired.[1] Six individuals had been identified, including appellant herein, as having committed similar violations; none of them are presently employed with the BCJ. Some of those individuals took a resignation in good standing, and two were removed pursuant to the disciplinary process.

The BCJ did not conduct an extensive review of every wing's security footage against log entries. The BCJ explained the process and time involved to conduct such an extensive review. Conducting such an extensive review is not reasonable.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex DOC Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory, and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State

[1] While the forty-five-day rule may prevent a civil service proceeding against this sergeant, if there is proof of the violation either the BCJ or appellant can inform the county prosecutor of the factual circumstances discovered. This tribunal does not have sufficient information regarding the sergeant's activities to determine whether he committed a violation.

Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

It is well recognized that correctional facilities operate through a rigidly hierarchical, almost "paramilitary," structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). At the BCJ, the appellant's duties included maintaining discipline and order while providing supervision of inmates for their safety and welfare in a County correctional facility. The precise requirements of such a position are not mere technicalities, but are established and must be adhered to in order to ensure the utmost security of the facility.

The appellant is charged with violating N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, as well as violations of Policy and Procedure Manual Sections 1007 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190 and 1250. The appellant does not contest the charges. I **CONCLUDE** that the preponderance of the competent and credible evidence supports the charges against appellant. The only issue to be decided is the appropriate penalty.

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. The concept of progressive discipline is related to an employee's "past record," which has been held to encompass "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee." Bock, 38 N.J. at 523–24. The use of progressive discipline benefits employees and is strongly encouraged. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, or suspension or fine for more than five working days, but not to exceed six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007); see also In re Herrmann, 192 N.J. 19, 33 (2007):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property.

Appellant's disciplinary history was not made part of the record, as such history reflected attendance or lateness issues, which would be of slight value to either positively or negatively affect the determination of the issue of penalty in a failure-to-perform and falsification-of-performance penalty consideration.

Appellant relies on three cases for the reduction of his penalty from removal, In re Cox, No. A-2471-14T4 (App. Div. Dec. 7, 2016), https://njlaw.rutgers.edu/collections/courts/; In re Warren, 117 N.J. 295 (1989); and In re Carter, Dkt. No. A-3105-14T4 (App. Div. March 7, 2017), https://njlaw.rutgers.edu/collections/courts/, arguing that, in each case, a correction officer falsified records and was not terminated.

All three cases are distinguished from the present case.

In Cox, a Mercer County correction officer failed to perform the majority of his routine security checks during his overnight shift. Like appellant, Officer Cox was

assigned a pod and was mandated to conduct a security check every thirty minutes. During the security check, Cox was required to walk the unit, make visual checks to assure the safety and security of the inmates, and note the completion of these tours in his logbook. Similar to appellant, video footage revealed that Cox had only performed three of the required fifteen security checks, but wrote "all secure" for all fifteen entries in the logbook. Notably, in the Initial Decision, the administrative law judge (ALJ), in reducing the proposed penalty, noted that the correction officer believed he did not make a false record. Unlike the current matter, the appointing authority there sought a forty-five-day suspension, which the Commission and Appellate Division upheld.

Appellant argues that in Cox, not only was the correction officer not removed for infractions similar to those of appellant, but the Commission had the ability and authority to increase a penalty to 180 days, and elected not to exceed the forty-five-day suspension imposed by the Mercer County Jail. However, while the Commission did not impose the maximum penalty, the Commission's decision to defer to the appointing authority in no way proves that falsifying official government records is not egregious misconduct warranting removal. In fact, the Commission expressly stated, a "County Correction Officer is a law enforcement officer who, by the very nature of his or her job duties, is held to a higher standard of conduct than other public employees." In re Cox, OAL Dkt. No. CSV 9963-12, Final Decision (Dec. 17, 2004) (citing Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965)). Further, "the potential public safety implications that could result from the failure to adequately conduct security checks is significant." Ibid.

Further, I note that even if the Commission believed that Cox's misconduct warranted removal, it was prohibited from upgrading the penalty to removal pursuant to N.J.S.A. 11A:2-19 ("[t]he Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty."). Therefore, in relation to the current case, Cox only reveals that the appointing authority has the discretion to impose a penalty to which the Commission may defer.

In In re Warren, 117 N.J. 295 (1989), the Court held that a suspension, and not removal, was the appropriate penalty for a prison guard whose neglect of duty in conducting prisoner counts resulted in the escape of four prisoners under his supervision. As the Court explained,

> the allegations embraced the fact that Warren had at first misrepresented what he observed in the hours before the break and that he had called in to report falsely that he had made a required 10:00 p.m. prisoner count. As to the first count, Warren said that he must have been mistaken about what he had seen, and, as concerning the second count, that he intended immediately to complete the 10:00 p.m. check. But, as noted, Warren's unit had never been informed that at 9:18 p.m. a "Code 99" report of an escape had been sounded in other units of the prison complex.
>
> [Warren, 117 N.J. at 298.]

The facts in Warren do not support a finding that the guard intentionally falsified a report, but the Court noted that "[i]n the clearer context of a corrections officer's trial for intentional falsification of a report, there can be no doubt that [such] an offense strik[es] at the heart of discipline within the corrections system," and indicated that, under such circumstances, removal would be appropriate. Id. at 299. Thus, the Court emphasized the seriousness of falsifying a report or failing to conduct proper security checks in the prison context.

In In re Carter, No. A-3105-14T4 (App. Div. March 7, 2017), https://njlaw.rutgers.edu/collections/courts/, a Mercer County correction officer failed to relieve another officer and reported to her post late. The officer was ordered to write a report explaining her failure to relieve her fellow officer, and the report contained factually incorrect statements. The factually correct statement did not involve the conducting of security checks, but rather the excuse for the failure to relieve. The appointing authority employed a progressive-discipline method and sought a twenty-five-day suspension. Ibid. The Commission also utilized a progressive-discipline model. It considered the facts of the matter and the officer's prior disciplinary history, which included three written reprimands, two fines, and two suspensions, and reduced

the twenty-five-day suspension to fifteen days. Ibid. The Appellate Division upheld the decision.

Appellant also argues that he was charged due to disparate treatment. He gave no testimony, but pointed to other officers at the BCJ who may not have been penalized as severely for similar violations.

"Discriminatory enforcement of an otherwise impartial law by state and local officials is unconstitutional. Cox v. Louisiana, 379 U.S. 536, 538–541, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Yick Wo v. Hopkins, 118 U.S. 356, 373–4, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1986) (holding that law is unconstitutionally enforced 'if it is applied and administered by public authority with an evil eye and an unequal hand')." Twp. of Pennsauken v. Schad, 160 N.J. 156, 183 (1999). In order to establish unconstitutional enforcement of a regulation, "both a discriminatory effect and a motivating discriminatory purpose" must be shown. Id. at 183 (citing Wayte v. United States, 470 U.S. 598, 607 (1985)). The mere assertion that others were not sanctioned is not sufficient to withstand a claim for disparate treatment. "The conscious exercise of some selectivity in enforcement is not a constitutional violation unless the decision to prosecute is based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Ibid. (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).

Appellant has failed to present sufficient evidence that his charges were the result of an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore, appellant has not established a claim for disparate treatment.

The cases surveyed establish that failure to perform security checks and intentionally falsifying records affirming that security checks were performed is egregious misconduct. Although the officers were not terminated in every case, the case law consistently held, whether in holding or dicta, that intentionally falsifying an official government document is a serious offense and is unbecoming of a law-enforcement officer. The misconduct in this case—the repeated failure to conduct security checks and the repeated lies about those failures—is egregious behavior that calls for removal.

The absence of termination in every case does not lead to the conclusion that termination is not the appropriate discipline for this conduct in general, and, specifically, here. Each case is reviewed on the facts presented, not just by this tribunal, but by the appointing authority, and the Civil Service Commission. Notably, in the three cases cited and distinguished, either the County did not seek termination, the Civil Service Commission did not increase the penalty to the maximum it could have under N.J.S.A. 11:2-19, or the facts were not the serious failure to perform security checks.

Public policy must also be considered here. The appellant knew or should have known of the seriousness of properly performing the multi-purpose security checks, especially in pre-detention pods. The inmate's welfare is an important purpose of the security checks. The execution of those security checks may save a life. The failure to perform those checks may expose the County to liability for failure to perform those checks. The failure of a correction officer to properly check each cell is a serious dereliction of duty, which, compounded by the falsification of the log book, warrants appellant's removal. The falsification is a self-serving progression of the failure to perform the security check, and constitutes intentional misfeasance.

Although there may be circumstances that lead to an excusable failure to perform the required number of security checks, the amount of checks not performed should not rise to five or six out of the required fifteen or sixteen. When the security check is not performed, the failure to perform duties should not be compounded by falsely representing that the duty was performed as required.

On balance, and based upon this record, I **CONCLUDE** that removal is the appropriate discipline for the charges of failure to conduct the security checks and the falsification on the log records that those checks were performed.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action against appellant Eric Warren is hereby **AFFIRMED**.

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

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

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

February 28, 2018

DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 2/28/18

Mailed to Parties: 2/28/18

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

Administrative Captain Matthew Leith

LIST OF EXHIBITS IN EVIDENCE

Joint:

- J-1 Preliminary Notice of Disciplinary Action, dated August 4, 2017
- J-2 Amended PNDA, dated September 9, 2017
- J-3 Final Notice of Disciplinary Action, dated October 19, 2017
- J-4 Memo Incident Report, dated July 3, 2017
- J-5 Post Log Book I-Wing 7/2–7/3, 2017
- J-6 Policies and Procedures Section 1007
- J-7 Policies and Procedures Section 1012-1074
- J-8 Policies and Procedures Section 1172
- J-9 Policies and Procedures Section 1190
- J-10 Policies and Procedures Section 1250
- J-11 Video I-Wing 7/2–7/3, 2017
- J-12 Warren acknowledgement of receipt of Standard Operating Policies and Procedures 9/27/12
- J-13 Employee Discipline History (Not Admitted)

For Appellant:

- A-1 Preliminary Notice of Disciplinary Action, Anthony Cesaretti
- A-2 Final Notice of Disciplinary Action, Anthony Cesaretti
- A-3 BCDC Policies and Procedures Section 1005
- A-4 BCDC Policies and Procedures Section 1006

A-5 Transcript of CSR 15059-17 & 15060-17

For Respondent:

None

4-18-18

A-10

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Shandor Wine,
Jersey City Public Library

CSC Docket No. 2016-4015
OAL Docket No. CSV 07699-16

ISSUED: MAY 4, 2018 (EG)

The appeal of Shandor Wine, a Building Maintenance Worker with the Jersey City Public Library, of his removal effective April 28, 2016, on charges, was heard by Administrative Law Judge Margaret M. Monaco (ALJ), who rendered her initial decision on February 1, 2018. No exceptions were filed by the parties.

Having considered the record and the attached ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 18, 2018, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a 45 working day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee Specifically, the appointing authority asserted that the appellant pushed and elbowed a co-worker causing her to seek medical attention. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

The ALJ set forth in her initial decision that on April 11, 2016, the appellant was working as a Building Maintenance Worker at the West Bergen Branch of the Jersey City Public Library. On that date, a co-worker of the appellant, Beata Rogowska, a Building Maintenance Worker, alleged that the appellant had assaulted her. She testified that as she was exiting the outside door of the library to purchase a cup of coffee, the appellant, who had been outside, forcibly walked in

the door that she had opened and struck her right lower breast area with his elbow. Rogowska stated that the appellant struck her chest with his elbow in a jab-like fashion and with such force that she was almost out of breath. Rogowska testified that she immediately informed Library Assistant Mary Bonner that the appellant had assaulted her. Bonner's testimony corroborated Rogowska's assertions. Rogowska also indicated that she called Building Maintenance Supervisor Teresa Fairley and informed her of the incident. Rogowski testified that the next morning a large bruise appeared where the appellant had struck her. She then went to her personal physician for an examination. She also returned to the library to show Fairley the bruise.

The appellant testified that he had no contact with Rogowski before or during the alleged incident. He denied encountering Rogowski at the library door and that anything occurred. Additionally, the appellant testified that in the past, Rogowski harassed him about his work and took pictures of his work.

The ALJ found the testimony of Rogowska, Fairley and Bonner to be forthright and found them to be credible witnesses. She found that Rogowska's testimony was consistent with the report of the incident she had authored. In addition, the visible bruise also supported Rogowska's testimony about the incident. Further, the ALJ found the appellant's testimony to be inherently improbable and not "hanging together" with, and discredited by, other credible evidence in the record. Based on the foregoing, the ALJ concluded that the appointing authority had sustained its burden of proving by a preponderance of the evidence that the appellant's conduct was unbecoming a public employee. With regard to the penalty, the ALJ found that although the appellant's only prior discipline consisted of a verbal warning, the appellant's action was egregious enough to warrant removal.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's recommendation to uphold the removal. Rather, the Commission modifies the removal to a 45 working day suspension.

In determining the proper penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v.*

Bordentown, 191 *N.J.* 474 (2007). In the instant matter, the appellant had no prior disciplinary actions since his employment began in August 2015.[1] Moreover, given the actual incident in question, the Commission does not find removal to be appropriate under these circumstances. In this regard, while it is clear the appellant's actions were improper, other than the victim's belief, there is nothing in the record to support any sort of malicious or nefarious intent on the appellant's part. Accordingly, the Commission imposes a 45 working day suspension, which will serve as an indication that any further infractions committed by the appellant will potentially subject him to removal from employment.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the 45 working day suspension up to his date of reinstatement. With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. *See N.J.A.C.* 4A:2-2.12. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert* Dean (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, charges were upheld and major discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the removal to a 45 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 45 working day suspension through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing

[1] A verbal warning does not constitute discipline under Civil Service law and rules.

authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdrè L. Webster Cobb

Deirdrè L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries and Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07699-16
AGENCY DKT. NO. 2016-4015

IN THE MATTER OF SHANDOR WINE,
JERSEY CITY PUBLIC LIBRARY.

Shandor Wine, appellant, pro se

Ronald C. Hunt, Esq., for respondent Jersey City Public Library (Hunt, Hamlin & Ridley, attorneys)

Record Closed: January 29, 2018 Decided: February 1, 2018

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Appellant Shandor Wine appeals his removal from employment as a building maintenance worker with respondent, the Jersey City Public Library (the Library). The Library took this action based upon the charge of conduct unbecoming a public employee stemming from an alleged incident that occurred on April 11, 2016, involving appellant and a coworker.

PROCEDURAL HISTORY

The Library issued a Preliminary Notice of Disciplinary Action (PNDA) dated April 13, 2016, informing appellant of the charge of conduct unbecoming a public employee issued against him. The PNDA alleged that on April 11, 2016, appellant physically elbowed Beata Rogowska at the Library's West Bergen Branch, which caused a visible bruise on her upper body. Following a departmental hearing, the Library issued a Final Notice of Disciplinary Action (FNDA) dated April 28, 2016, memorializing the determination that the charge was sustained and providing for appellant's removal from employment effective April 28, 2016. Appellant filed an appeal, and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on September 29, 2016, October 27, 2016, and May 11, 2017. After the conclusion of the testimony, the record remained open for the receipt of transcripts of the hearing and post-hearing submissions. The Library filed a brief dated December 28, 2017, in support of its position. No brief was submitted by appellant by the required deadline, on which date the record closed.

FACTUAL DISCUSSION

At the hearing, the Library presented four witnesses: Larry Ross, Teresa Fairley, Mary Bronner, and Beata Rogowska. Appellant testified on his own behalf. Certain facts surrounding this matter are largely undisputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following **FACTS**.

Teresa Fairley is employed as the building maintenance superintendent, a position that she has held for eighteen years. In this capacity, she is responsible for supervising all maintenance workers at the Library's nine branches.

Appellant was a maintenance worker under Fairley's supervision. He was employed by the Library from August 31, 2015, until his termination on April 28, 2016.

(R-11.) Appellant initially worked at the Main Library Branch until that the branch was closed to the public for renovations. He later worked at various branches, including the West Bergen Branch.

Betea Rogowska was also a maintenance worker under Fairley's supervision. She has been employed by the Library for approximately nine years and worked at the West Bergen Branch at the time of the alleged incident.

Mary Bronner is a library assistant and has worked for the Library for fifteen years. She was working at the West Bergen Branch at the time of the alleged incident.

Larry Ross has been employed by the Library for five years as its personnel technician. He is in charge of the Personnel Office and oversees the day-to-day operations of personnel including, among other duties, disciplinary actions and management of health benefits.

The alleged incident occurred on April 11, 2016, at the West Bergen Branch. On that date, Fairley received a telephone call from Rogowska, who was crying and informed Fairley that she had been assaulted by appellant. Rogowska relayed that as she was going out of the library door to go to the store, appellant was coming in the door, and appellant elbowed her. After receiving the call, Fairley immediately went to the West Bergen Branch, where she spoke to both appellant and Rogowska regarding what happened. After this discussion, Fairley informed appellant that she was sending him to another branch for the remainder of his shift. Appellant elected instead to take the rest of the day off. Rogowska completed her shift. Fairley also spoke to Bronner, who relayed that she did not witness the incident but that Rogowska had told her that appellant elbowed her.

On April 12, 2016, Rogowska did not report to work and went to her personal physician, Dr. Majchrzak, who issued a Health Certificate requesting that Rogowska be excused from work from April 12 to April 19, 2016. (R-13.) The Health Certificate memorialized Rogowska's advice that she was "assaulted at work by coworker."

Rogowska brought this documentation to her employer and completed an Employer's First Report of Injury form on April 12, 2016. (R-6.) In the form, Rogowska described her injuries as a "bruised, sore breast" and "pain in the chest." With regard to how the injury occurred, Rogowska reported that, "[a]s [she] was walking out thru [the] doorway, [appellant] walked in directly at [her], pushing his way thru and struck [her] with [his] elbow in [her] breast."

On April 12, 2016, Rogowska was also examined by the Library's workers' compensation physician with CarePoint Health Medical Group (CarePoint). CarePoint generated a report of her examination dated April 12, 2016, which is signed by a physician and was faxed to Ross's office. (R-8.) That form states that Rogowska recounted that she was "assaulted by coworker" and refers to "his elbow into her [right] breast." The doctor recorded on the form that Rogowska had a right "breast bruise" and the doctor's diagnoses included a right breast "contusion."

On April 12, 2016, Rogowska called Fairley and relayed that she was at the doctor's office and had a bruise. Rogowska sent Fairley pictures of the bruise on her telephone, and Fairley requested that Rogowska come to the library so that she could physically see the bruise. Rogowska went to the library and showed the Library director and Fairley a bruise on her right breast. The bruise Fairley observed that day, which is where Rogowska said appellant had elbowed her, appeared like the bruise depicted in the photographs introduced as R-9 and R-10. Those photographs show a large black-and-blue bruise on Rogowska's breast.

Rogowska authored and submitted an Incident Report, dated April 12, 2016, in which she reported that on April 11, 2016, she was "assaulted" by appellant "as [she] was walking out from [the] library." (R-5.) In this regard, Rogowska stated that appellant "in [the] last moment walked directly at [her] in the doorway, pushing [her] out of his way and struck [her] in [her] breast with his elbow." She further reported that the incident "[l]eft [her] in shock, as [she] simply wasn't expecting it to happen"; appellant "then kept on walking, didn't apologize"; and "[f]ollowing that day [a] bruise appeared on [her] right breast" and the "[w]hole area is sore and painful."

On April 12, 2016, Fairley completed an Employer's First Report of Injury form in which she reported that, according to what was told to her, the "injury happened because a male employee pushed" Rogowska. (R-7.)

On April 18, 2016, Rogowska had a second appointment with Dr. Majchrzak, who issued a Health Certificate requesting that Rogowska be excused from work from April 18 to April 30, 2016. (R-12.) The Health Certificate memorialized Rogowska's advice regarding an "assault at work." Rogowska was on sick leave for two to three weeks, commencing from the day after the incident.

After Ross received Rogowska's Incident Report, he drafted the PNDA dated April 13, 2016, charging appellant with conduct unbecoming a public employee. (R-1.) Following a departmental hearing on April 20 and 25, 2016, an FNDA was issued memorializing the determination that the charge was sustained and providing for appellant's removal effective April 28, 2016. (R-2; see R-3; R-4.)

In addition to the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

The Testimony

Teresa Fairley

Fairley testified that when she spoke to Rogowska at the library on April 11, 2016, Rogowska relayed that as she was going out the door of the library, appellant was coming in the door, and appellant elbowed her. She described that Rogowska was upset, nervous, and shaking. When Fairley spoke to appellant, he denied that he elbowed Rogowska. Fairley testified that she first saw Rogowska's injury the next day, April 12, 2016.

Fairley described that, prior to the April 11, 2016, incident, Rogowska and appellant complained about each other off and on, and there was "a little bickering between them." Rogowska would complain that appellant was not performing his work.

Fairley articulated her instruction to maintenance workers regarding such complaints; namely, the worker should take a picture with a cell phone so that Fairley could see and have proof that the worker did not do what they were supposed to do. Fairley had seen picture(s) of appellant's work taken by Rogowska. Appellant never showed Fairley any photographs of a lack of work by Rogowska. Prior to the incident, Fairley was not aware of anything physical between appellant and Rogowska, and Fairley had never received a complaint of them arguing.

Fairley testified that she never had any problems with Rogowska as an employee and never received any complaints about Rogowska from other employees. Fairley described that she started having a problem with appellant after the closure of the Main Library Branch and his assignment to the smaller branches. Prior to the incident involving Rogowska, Fairley had received complaints of appellant and a female employee arguing at the Lafayette Branch, and she physically had to go to that branch on two occasions. She described that appellant and that employee both complained about the other; the female employee complained about appellant not doing his work; and Fairley believed that they got into shouting matches. Fairley went to the Lafayette Branch on one occasion, which she believed concerned the employee's complaint of appellant not doing his work. On the second occasion, the library's branch head contacted Fairley concerning a problem between appellant and the same employee, and Fairley and the Library director went to the branch. Both appellant and the other employee were given verbal warnings. Fairley did not remember appellant ever calling her to come to the Lafayette Branch or appellant calling to complain about the employee at the Lafayette Branch, but noted that they both complained once she arrived.

Mary Bronner

Bronner testified that on April 11, 2016, Rogowska informed her that she was going to the store to get coffee. Appellant was then outside in front of the library cleaning. Bronner described that within minutes of Rogowska's advice, Rogowska ran back in the library and said, "Mary, he hit me, he hit me." Bronner ask "Who?" and Rogowska replied "Shawn." Rogowska relayed that she was coming in the door and appellant elbowed her in the chest. Rogowska demonstrated that appellant extended

his right elbow in a jerking fashion similar to a jab. Bronner described that Rogowska appeared upset. Rogowska then ran into the kitchen and made a telephone call. When appellant came in the library, Bonner asked appellant whether he did it and appellant replied "no." Bonner testified that, prior to the incident, Rogowska and appellant both complained to her about the other's work patterns. Rogowska would complain about appellant not doing his work, and appellant would complain about Rogowska complaining about him not doing his work properly.

Betea Rogowska

Rogowska testified with the assistance of an interpreter and described the incident that occurred on April 11, 2016. Rogowska testified that she arrived at work at 7 a.m. and appellant arrived late at approximately 7:20 a.m. At approximately 9 a.m., Rogowska was going out of the library to purchase a cup of coffee. Appellant was then outside the library holding a broom and a pan in his hands. Rogowska described that the main entrance of the library has two sets of doors and a small hallway between them. The door closer to the inside of the library is kept open and the door leading out to the street is closed. Rogowska testified that she entered the area between the two sets of doors and opened the door to exit the library. Appellant, who could see Rogowska through the glass portion of the door, quickly approached the door. As Rogowska was exiting, appellant forcibly walked in the door that Rogowska had opened, and appellant pushed Rogowska and struck Rogowska's right lower breast area with his elbow. Rogowska described that appellant struck her chest with his elbow in a jab-like fashion and with such force that she was almost out of breath. Rogowska testified that she said to appellant, "What are you doing, are you crazy?" and appellant laughed and kept on walking. Rogowska described that, after the incident, she told Bronner that appellant had attacked her in the doorway, and she also called Fairley, during which she relayed similar advice and was crying. Fairley arrived at the branch and Rogowska spoke to her about what happened. Rogowska testified that physically she was feeling "horrific" and was "in shock" and, although Rogowska was not feeling well, "she tried to hang on" and continued to work until the end of her shift at 3:00 p.m.

Rogowska testified that a bruise on her right breast started coming out toward the morning of the next day, April 12, 2016, and R-9 is a photograph of the bruise that she took that day. She went to her family doctor on April 12, 2016, who examined her and prescribed medication. She also saw the Library's physician that day and came to the library, where she showed the bruise to Fairley and the Library director. Rogowska stated that the bruise became larger and darker with time, and R-10 is a photograph of the bruise that she took approximately two days after the incident. She testified that the bruise is where appellant struck her with his elbow; nothing else occurred that could have caused the bruise; and the visible injury to her chest lasted for almost three weeks.

Rogowska testified that she has not had any discipline problems during the nine years that she worked at the Library. She described having disputes or problems with appellant about work prior to the incident, such as appellant coming in late and failing to complete his work. She also described Fairley's instruction to take a photograph to demonstrate that appellant was not doing his work and to send the photograph to Fairley, which Rogowska did. She did not know if appellant knew that she was taking pictures of him.

Shandor Wine

Appellant testified that he arrived at work at 7 a.m. on April 11, 2016, and undertook his usual duties. He saw Rogowska that morning at about 7 a.m. and did not speak to her. Appellant described that he was outside sweeping the front of the library at approximately 8:30 a.m. and, after he finished sweeping, appellant went back inside the library and cleaned the bathroom and dusted. Rogowska was then inside the library. According to appellant, he had no contact with Rogowska and he did not say anything to her. Appellant testified that it was "a usual day" and he did not learn of the incident until Fairley and the union vice president (Theresa Smith) arrived on April 11, 2016. He described that he was "surprised and shocked" and thought, "what are they trying to pull now?" Appellant testified that when Ms. Smith asked appellant what happened involving Rogowska, he replied "nothing," and said, "I never came in contact with her. Not that I recall." According to appellant, Ms. Smith went to see if Rogowska

had any type of markings or bruising, and she told appellant that there were none when she returned. Appellant also spoke with Fairley on April 11, 2016, about the incident. Appellant testified that Fairley asked, "did I bump her or was I going out the door," and he responded, "No. Not that I recall. I didn't. I didn't go through the door at the same time at all. It never happened." At the hearing, appellant denied encountering Rogowska at the library door and stated that there was never an occasion when they were both at the library door as described by Rogowska. Appellant testified that he had no physical contact with Rogowska that day; her testimony about him hitting her in the chest with his elbow was false; and the information in the documentation indicating that Rogowska was assaulted by a coworker and describing the incident (e.g., R-5; R-6; R-8) is also untrue. According to appellant, Fairley also looked at Rogowska's chest area on April 11, 2016, and her testimony that she did not see the area until April 12, 2016, was not true. Appellant testified that after leaving work on April 11, 2016, he attempted to obtain a restraining order against Rogowska, but he could not obtain it because the court was out on April 11 and 12, 2016. (See A-1.) He described speaking to an officer at the "municipal courthouse" and, according to appellant's handwritten note on A-1, appellant was told that he "could not put in TRO," and the officer "sent [him] to West District station." Appellant did not later return to obtain a restraining order.

Appellant testified that he had prior incidents with Rogowska. According to appellant, during his first week at work in August 2015 Rogowska confronted him about using her trash bags, and she physically took the bags out of his hands; appellant reported the incident to the director, who "dismissed it" and "laughed it off." He also described Rogowska taking pictures of his work on April 4, 2016, and appellant making a report to the branch manager on April 6, 2016, that Rogowska was "harassing" him and had thrown his work gloves in the toilet. He disputed that Fairley had come to the Lafayette Branch on two occasions regarding appellant and the employee at that branch. Appellant further testified that the reason Fairley and the Library director had to come to that branch on March 1, 2016, was because he had called to complain about a labor dispute that he was having with the other worker. According to appellant, he informed them of the dispute when they arrived at the branch; he complained about the worker standing and drinking coffee; and the worker did not complain about him. Appellant testified that he also advised them that it was a hostile work environment; they

"dismissed" it and told him to just stay away from the employee; and the Library management subsequently started retaliating against him for complaining about the labor dispute.

Analysis and Additional Findings of Fact

In this matter, the Library bears the burden of proving the disciplinary charge against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna & W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

In undertaking this evaluation, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as

"inherently incredible" and when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

In judging the strength of the evidence and evaluating the demeanor and credibility of the witnesses, I found Rogowska, Fairley, and Bronner to be forthright and credible witnesses. They presented persuasive and substantially consistent testimony as to the pertinent facts. Rogowska's testimony was also consistent with the report that she authored, and the advice that she relayed, shortly after the incident. The record is bereft of credible evidence suggesting that Fairley or Bronner harbored a motive or bias to fabricate their version of the relevant facts. Plainly, on balance, appellant has the greater stake in the outcome of this proceeding since it involves the propriety of his removal from employment. Although it was apparent that appellant and Rogowska had prior disagreements about work, I found Rogowska's testimony concerning the events that occurred to be credible and probable. The credible evidence reveals that Rogowska reported the incident to Bronner and Fairley shortly after Rogowska alleged it occurred. And, Fairley and Bronner credibly described that Rogowska was visibly upset, crying and shaking. The accuracy of Rogowska's report is further corroborated by the visible bruise in the area where she claimed that appellant had struck her, which is depicted in the photographs, referred to in the doctor's report, and supported by Fairley's testimony recounting her personal observation of the bruise.

Succinctly stated, I found appellant's testimony regarding the events that transpired on April 11, 2016, to be inherently improbable and not "hanging together" with, and discredited by, other evidence in the record. A canvas of the totality of the

evidence casts substantial doubt on the accuracy, reliability, and believability of appellant's version that he had no contact with Rogowska at the doorway, which is irreconcilable with the injury sustained by Rogowska. Simply put, I afford more weight to Rogowska's testimony recounting what occurred, and Fairley's testimony describing problems she experienced with appellant at the Lafayette Branch, than to the account offered by appellant.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

When Rogowska was exiting the door of the library, appellant walked in the door and physically pushed Rogowska and jabbed her chest with his elbow. Appellant took this action with such force that it resulted in a large bruise or contusion on Rogowska's breast, which required medical attention and resulted in Rogowska being out of work for two to three weeks.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether appellant is guilty of the charge brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

An appointing authority may discipline an employee for conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). Although the term "conduct unbecoming a public employee" is not defined in the New Jersey Administrative Code, it has been described as an "elastic" phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public

respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Unbecoming conduct need not be predicated upon a violation of the employer's rules or policies and may be based merely upon a violation of the implicit standard of good behavior. See City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

I **CONCLUDE** that the Library has shouldered its burden of proving, by a preponderance of the credible, competent evidence, that appellant's conduct was unprofessional and unbecoming a public employee. Appellant's actions fall significantly short of the type of conduct that the public has the right to expect from a public employee. Clearly, appellant knew that it is unacceptable and unbecoming conduct to engage in aggressive physical contact with a coworker, and his conduct was unwarranted, unjustified, and unreasonable. By engaging in the conduct he did, appellant failed to exercise good judgment and to act in a responsible manner with due regard to the safety of others. He failed to exercise tact and restraint during his encounter with Rogowska. Appellant engaged in conduct that has the likelihood of eroding the public's perception, respect, confidence, and trust in a public employee, and adversely impacts the environment and the proper operation of the Library. Significantly, appellant's actions placed Rogowska at risk of harm and resulted in injurious consequences.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, 38 N.J. at 522. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. See Henry, 81 N.J. at 580. The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate

notwithstanding a largely unblemished prior record." Carter, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, 192 N.J. at 33. In this regard, "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when . . . the misconduct causes risk of harm to persons or property." Ibid.; see, e.g., Henry, 81 N.J. at 580; Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The courts have also upheld the dismissal of employees for engaging in conduct unbecoming to their position without regard to whether or not the employee had a substantial past disciplinary record. Herrmann, 192 N.J. at 34; see Div. of State Police v. Jiras, 305 N.J. Super. 476 (App. Div. 1997). Public-safety concerns may also bear upon the propriety of an employee's removal from employment. See Carter, 191 N.J. at 485.

The evidence demonstrates that during his approximate eight months of employment, appellant had received at least one verbal warning stemming from his interactions with the employee at the Lafayette Branch. Although appellant's disciplinary record in and of itself would not warrant a severe penalty, the seriousness of appellant's infraction is a critical consideration in this case. While the incident involved a short duration of time, this does not mitigate the gravity of appellant's dereliction. Appellant's actions were highly inappropriate and inexcusable, and violated the standards of proper conduct expected of a public employee. Appellant's irresponsible conduct resulted in injurious consequences to Rogowska and cannot be countenanced. His unauthorized actions were antithetical to the proper functioning of the Library, violated his basic obligations as a public employee, and demonstrate appellant's unfitness to perform his duties. Appellant's failure to acknowledge or appreciate the inappropriateness and severity of his misconduct serves as further support for the conclusion that appellant is unsuitable for continuation in his position. Based upon the totality of the circumstances, I **CONCLUDE** that appellant's unbecoming conduct is of a sufficiently egregious nature to warrant his termination.

ORDER

I **ORDER** that the charge of conduct unbecoming a public employee be and hereby is **SUSTAINED**. I further **ORDER** that, based upon the aforesaid sustained charge, appellant be and hereby is removed from his employment with the Jersey City Public Library effective April 28, 2016.

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

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

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

February 1, 2018
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: February 1, 2018

FEB 2 2018
Date Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

List of Witnesses

For Appellant:

Shandor Wine

For Respondent:

Larry Ross

Teresa Fairley

Mary Bronner

Beata Rogowska

List of Exhibits in Evidence

For Appellant:

A-1 Memorandum to Municipal Court from Deidra Carvin dated April 7, 2016

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated April 13, 2016

R-2 Final Notice of Disciplinary Action dated April 28, 2016

R-3 Memorandum from Larry Ross to appellant dated April 28, 2016

R-4 Memorandum from Larry Ross to Edwin Perez dated April 28, 2016

R-5 Incident Report dated April 12, 2016

R-6 Employer's First Report of Injury dated April 12, 2016

R-7 Employer's First Report of Injury dated April 12, 2016

R-8 Workers' Compensation First Assessment report

R-9 Photograph

R-10 Photograph

R-11 Employment History

R-12 Health Certificate dated April 18, 2016

R-13 Health Certificate dated April 12, 2016

4-1018

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
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DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

August 28, 2018

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1125 Pacific Avenue
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Aaron J. Creuz, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *Richard Dentroux v. Department of Environmental Protection* (CSC Docket No. 2018-430; OAL Docket No. CSV 11975-17)

Dear Mr. Barbone and DAG Creuz:

The appeal of Richard Dentroux, a Forest Fire Equipment Maintenance Specialist 1 with the Department of Environmental Protection, of his resignation not in good standing, effective February 27, 2017, on charges, was before Administrative Law Judge Judith Lieberman (ALJ), who rendered her initial decision on April 20, 2018, recommending modifying the resignation not in good standing to a resignation in good standing. Exceptions to the initial decision were filed on behalf of the appellant and exceptions and a reply to exceptions were filed on behalf of the appointing authority.

The Civil Service Commission (Commission) received this matter on April 23, 2018 and prior to the expiration of the initial 45 days permitted to make a final decision, it received one 45-day extension of time, as well as an additional 45-day extension with the consent of the parties, as required, to make its final decision no later than September 5, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Since one of the Commission members must continue to be recused from this matter, leaving no quorum to vote, it requested consent of the parties for an additional extension. However, the appointing authority did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective September 6, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Judith Lieberman, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11975-2017
AGENCY DKT. NO. 2018-430

IN THE MATTER OF RICHARD DENTROUX, DEPARTMENT OF ENVIRONMENTAL PROTECTION.

Louis M. Barbone, Esq., for appellant, Richard Dentroux (Jacobs & Barbone, P.A.)

Aaron J. Creuz, Esq., Deputy Attorney General, for respondent, Department of Environmental Protection (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 6, 2018 Decided: April 20, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

The appellant, Richard Dentroux, appeals the determination by the respondent, Department of Environmental Protection (Appointing Authority or Department), that he abandoned his position and, thus, resigned not in good standing. The appellant also appeals the respondent's determination that he violated departmental rules, regulations, policies and procedures.

PROCEDURAL HISTORY

On March 15, 2017, the respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against appellant. After a departmental hearing, which was held on May 25, 2017, the respondent issued a Final Notice of Disciplinary Action (FNDA) on June 19, 2017, sustaining the charges in the PDNA and finding the appellant resigned not in good standing, effective February 24, 2017, and violated departmental rules, regulations, policies and procedures. The appellant filed a timely appeal and the matter was transmitted to the Office of Administrative Law on August 18, 2017, for hearing as a contested case. The case was heard on February 7, 2018. The record remained open for the receipt of written summations by the parties. On March 6, 2018, all summations were received, and the record closed.

FACTUAL DISCUSSION

Joint stipulations were agreed to by the parties, and as such, I FIND the following joint stipulations as FACT:

1. Richard A. Dentroux commenced employment with the Department, specifically Division of Parks and Forestry as a Maintenance Specialist 1 on September 7, 2013.

2. On February 22, 2017, Richard Dentroux emailed Lori Worth at the Department requesting a six-month leave of absence to begin that Saturday, February 25, 2017. He stated that Freehold Township was ordering him to resume his employment there on February 27, 2017, by direction of the Police and Fireman's Retirement System. His email included a letter from Freehold Township, dated February 15, 2017.

3. On February 24, 2017, Dentroux was advised, via email from Carla Hunt, that his request was denied as it constituted a request to engage in other employment.

Hunt asked Dentroux to submit his letter of resignation no later than February 27, 2017.

4. On February 28, 2017, Dentroux emailed Hunt stating that he was not pursuing other employment, that he was retired from injury, he was receiving a pension, and he was ordered back to duty the [sic] Police Department. He again requested a six-month leave of absence, and stated that his supervisor had approved it.

5. On February 28, 2017, Hunt again replied that the leave request was denied. She advised that his failure to submit a letter of resignation by February 27, 2017, would result in job abandonment and that the department would seek his removal as a resignation not in good standing.

6. On March 15, 2017, the Department filed a PNDA alleging absence from duty for five or more consecutive days without approval of his supervisor.

7. A hearing was conducted on May 25, 2017.

8. On June 15, 2017, a FNDA was entered against Dentroux sustaining the charge of N.J.A.C. 4A:2-6.2(b), Absence from Duty for five or more consecutive business days without the approval of his superior which is considered as job abandonment and resignation not in good standing. Also sustained was Other Sufficient Cause pursuant to N.J.A.C. 4A:2-2.3(a), a violation of the Department's leave policy.

Testimony

For respondent:

Human Resources Manager, **Carla Hunt** testified about the respondent's policy governing special leaves of absence. The policy applies to all employees, who must refer to it when requesting leave. It enumerates the permissible reasons for leaves of absence and does not permit leaves of absence intended to enable an employee to pursue other employment or collect a payment from another employer. The respondent and Civil

Service Commission[1] must approve all leave requests. (R-3.) The appellant's immediate supervisors were not authorized to approve his leave request.

The policy requires an employee who seeks approval for a leave of absence to submit a Request for Leave or Voluntary Furlough (Form ADM-137A) and appropriate documents as required in Section V[2] to his immediate supervisor. (R-3 at sec. VI.) The supervisor must review the submitted documents, complete Part F of Form ADM-137A, and forward the materials to the Leave Management Unit through program Director/Administrator. Ibid. The policy further provides that the Leave Management Unit, within the Division of Human Resources, must "[r]eview employee request and supporting documents, supporting documentation and recommendation from the employee's program management for allowability within state and federal regulations as well as consistency with this policy. Provide recommendation to the Manager, Human Resources Services." Ibid.

Leaves of absence could be permitted for "exceptional circumstances." Part V.A.2. of the policy governing special leaves of absence, provides that a leave, with or without pay for a maximum period of one year, may be granted for a career employee when "exceptional situations" are present. Such leave may be granted "[w]here it is in the public interest[.]" (R-3 DEP31.) For provisional employees or employees who have not completed their probationary ("working test") period, leaves of absence without pay "shall be restricted to exceptional situations, and shall not exceed six (6) biweekly pay periods or the equivalent, nor continue beyond the termination of appointment." Ibid.

On February 22, 2017, the appellant sent an email to Lori Worth, in which he requested a leave of absence[3]. (R-5 DEP1.) He wrote:

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[1] The policy references "Department of Personnel"; however, approval authority rests with the Civil Service Commission.

[2] Section V provides, "All leaves of absence must be approved by the Department of Environmental Protection and the Department of Personnel. Employees must submit written applications for a leave of absence with or without pay setting forth the reasons for the requested leave. Employees requesting leaves of absence should follow the procedure outlined in Section VII, below." Ibid. at sec. 5.

[3] The appellant copied Karen Funari, a representative of the assistant commissioner, and Steve Holmes on the email.

> Please find the letter from Freehold Township. I sent the letter from PFRS in the previous email. I am requesting a 6 month leave of absence until I am able to figure out what is going on. I am requesting the leave to start this Saturday 2/25/2017. I am sorry for the short notice but PFRS pension board has tied my hands. Freehold Township has taken me back on the 27th because they were advised by PFRS that my benefits will terminate on that day if I do not return. I am also taking Thursday and Friday off because I need to get copies of college transcripts and motor vehicle abstracts and other paperwork that is due on Monday. Please let me know if you have any questions I will do my best to answer them. My cell number is ____.
> (R-5. DEP1.)

The letter from the Township of Freehold, dated February 15, 2017, directed the petitioner to report for limited duty on February 27, 2017. (R-5, DEP2.) It referenced a February 10, 2017, letter from the Police and Firemen's Retirement System (PFRS) to the appellant and the Township. Ibid.

Worth forwarded the petitioner's email to Hunt, on February 24, 2017. Hunt responded to the petitioner on February 24, 2017, at 3:05 p.m.:

> Your email (see below) whereby you requested a 6 month leave of absence from the DEP, was forwarded to me for response. Please be advised that it is not the department's practice to grant a leave of absence to employees to engage in other employment. As such, your request is denied. Therefore, please forward a letter of resignation to my attention no later than Monday, February 27, 2017 COB, to separate you from the department. If in the future you wish to return to the DEP, you may contact our office regarding regular re-employment options.
> (R-5 DEP1.)

The appellant sent another email to Hunt and other DEP employees on February 24, 2017. Hunt did not receive the email, as her email address was incorrect. The appellant wrote:

> I was contacted this afternoon by Mike Ackey [sic] in reguards [sic] to my request for a leave of absence. I was told yesterday by Mike Ackey that my leave was approved for 6 months and

> I would receive a [sic] email stating that. Today I was told that the leave was not approved.
>
> I don't understand what is happening from yesterday to today. I was also told I have to resign or be terminated. I have a lot going on in my life right now I really don't need this added stress.
>
> According to Article 27 of the contract I can apply for up to 1 year leave of absence. I have been put in a very stressful situation and I don't want to be left unemployed to further add to my stress. I again am requesting clarification on my request, I don't think my request is unreasonable. As a father of 4 I don't want to be without a job.
> (R-5 DEP 5.)

The appellant's email was forwarded to Hunt, who replied on February 27, 2017:

> Your latest email (see below) was forwarded to me for response as I did not receive it. ("nj" was omitted in the email address to me).
>
> Be advised that the departments' [sic] decision in my email to you dated Friday, February 24, 2017 remains unchanged. Please note that all leaves of absence are subject to final approval by the Division of Human Resources.
>
> As such please follow the directions of my previous email with regards to your letter of resignation and possible future re-employment opportunities.
> (R-5 DEP 4,5.)

The appellant's leave request was denied because employees are not permitted to work elsewhere while remaining on staff, and the respondent would not be able to fill the appellant's position while he was away. It was, therefore, not in the Department's best interest to grant his leave request.

Hunt acknowledged that she understood that the appellant sought a leave of absence without pay and that request was associated with his prior employment as a police officer. She did not believe the appellant had an "ulterior motive" for his leave request. She had not previously encountered a leave request involving facts like those

presented by the appellant. Given the unusual nature of his request, she consulted with her assistant director, who agreed that the leave request should be denied.

On February 28, 2017, the appellant sent another email to Hunt:

> My leave of absence was not requested to pursue other means of employment as you stated. I was retired due to an injury and was receiving a pension and health benefits from my last employment. I am trying to get answers as to what happened and why I was not given the opportunity to appeal the decision. I was told if I did not report for work all benefits would be terminated. The pension board will not give me answers so I had to hire an attorney. I am trying to sort this out.
>
> My request was made so I don't wind up being unemployed, not to persue [sic] other means of employment. I again am making the request for a 6 months leave of absents, [sic] which my supervisor Mike Achey said had been granted. If the leave is not granted I will be grieving this. This is an extraordinary situation which the PFRS pension board has created and such leave has been granted in the past.
> (R-5 DEP4.)

Hunt replied to the petitioner on February 28, 2017, by way of email:

> Please consider this email as final correspondence to you regarding your request for a 6 month leave of absence. As indicated in my previous emails, your leave is not approved. You were offered the opportunity to use benefit time for the remainder of this week in order to complete your working test period ending March 1, 2017 with the understanding that you would submit your resignation letter to HR by February 27, 2017, COB. Please be advised that if we do not receive your letter of resignation by COB today, we will seek a resignation not in good standing for job abandonment.
> (R-5 DEP 4.)

Hunt acknowledged that she did not call the appellant to discuss his request. She also did not discuss the request with the appellant's immediate supervisors or the personnel whose approval was required. In reviewing the appellant's leave request, she did not evaluate the impact his absence would have had on his work unit; rather, she applied the department's general policy against holding positions open for employee while

they pursue employment elsewhere. Lower level supervisors' views are not controlling when the Division of Human Resources has determined that a leave request should be denied.

Hunt noted that one week is typically the amount of time required to review and approve a leave request. She received the appellant's request the day before his leave of absence was to begin. She could not have expedited the processing of the request, if she had believed it was meritorious, because the appellant and his supervisors were required to complete and sign the form. They had not done so.

The appellant did not contact Hunt at any time to speak about the matter. He did not report to work for five consecutive days. (R-4, DEP 7-10.) If the appellant had submitted a letter of resignation by February 27, 2017, he would not have been deemed to have abandoned his job. He would have been able to apply and be considered for future employment with the Department. However, he did not resign and respondent determined he abandoned his position.

Michael Achey, Jr. was the Division B Forest Fire Warden, for the New Jersey Forest Fire Service. On April 24, 2017, the appellant returned to work at the Appointing Authority's New Lisbon work site. Edwin Jones, who since passed away, wrote a report concerning the appellant's return to work that day. Jones had been previously advised that the appellant was no longer employed by the State of New Jersey. When the appellant reported to work that morning, Jones instructed him to report to Division B Headquarters to speak with Division Fire Warden Michael Achey to determine the status of his employment. The appellant did not report to Achey. Instead, he left the work site in a vehicle with Fire Observer Ralph Whalen. Jones reported this to Achey. (R-6 DEP15.)

Upon learning the appellant left the worksite in a vehicle with Whelan, Achey contacted Assistant Fire Warden Reith, asked him to locate the appellant and return him to the New Lisbon worksite. Achey attempted to locate authority for the appellant to be at the worksite, and asked Holmes for this information, but was unable to find such information.

For appellant:

Richard Dentroux was a police officer for the Township of Freehold for approximately seven years, until he became disabled in the course of duty. He retired from the police department, with an accidental disability pension, effective May 1, 2011. He was hired by the respondent in September 2013, where he worked at its New Lisbon facility as an equipment specialist. He was promoted to a permanent position, with a four-month working test period, in November 2016.

On February 10, 2017, the appellant received a phone call from the Freehold Township Police Department Chief and a township administrator, who advised him that the PFRS determined he could be reinstated to the police department. The department had received a letter from PFRS concerning this.[4] The chief and administrator asked if the appellant had initiated this; he replied he had not. The appellant was surprised by their call, as he had been fully retired from the police department since 2011.

On February 21 or 22, 2017, the appellant received a February 15, 2017, letter from the Freehold Township Police Chief who wrote, "As per the letter from the Police and Firemen's Retirement System (PFRS), dated February 10, 2017, that we both received you will report for *Limited Duty* on Monday, February 27, 2017 at 08:30 hours. (emphasis in original)(R-5 DEP2.)

On February 21, 2017, the appellant was at work, in a meeting with Edwin Jones, his direct supervisor, Mike Achey, Steve Holmes, Assistant State Forest Fire Warden, and the State Fire Warden,[5] when he received a phone call from a lieutenant with the Freehold Township Police Department. The lieutenant told him that he was required to return to the police department on February 27, 2017. The appellant told Jones about the substance of the call. Jones said he would need to speak with Achey. Achey had not heard of an issue like this before and wanted to discuss it with Holmes.

[4] The appellant testified he received the letter from PFRS a "couple of days" after he spoke with the chief. The letter from PFRS was not produced during the hearing.

[5] The appellant could not recall the name of the State Fire Warden, who is now retired.

The appellant was told to request a leave of absence and Holmes told him to email the police chief's letter to Karen Furnari. The appellant did not know who Furnari was; Homes provided her email address. The appellant recalled that he emailed the letter to Furnari that same day. Holmes said he would contact, "Trenton," although he did not know who Holmes intended to contact.

Appellant's supervisors knew about the injury he sustained while a police officer and that he was retired from the police department with a disability pension. His supervisors did not tell him that he should complete a leave of absence request form and they did not discuss the respondent's leave policy with him. The appellant assumed the form would be provided to him or he would be told where he could locate it. Although he knew the respondent's human resources department had a website, he did not know that a leave request form could be found there and he did not consult the site.

The appellant believed that, once he reported to the police department, he would be evaluated and not approved for duty. Although he did not know how long the process would take, he expected it would require a few weeks. He requested a six-month leave of absence "to be safe."

On February 22, 2017, the appellant sent an email to Jones and Achey in which he explained his need for a leave of absence:

> As you [sic] aware of my situation with Freehold Township as my previous employer I have been ordered to return to work for them on Monday 2/27/2017. I have attached the letter I received yesterday 2/21/2017. Due to the decision of the NJ PFRS I am forced to notify you on such short notice.
>
> I am requesting a 6 month leave of absence until I can resolve this situation.
>
> I am requesting the leave to start 2/25/2017 and continue for 6 months.
>
> I am also requesting to use 2 benefit days for Thursday and Friday 2/23 and 2/24 due to requirements I have to complete before Friday.

> Again I apologize for the short notice but it is beyond my control.
> (A-14.)

Appellant sent this email because Jones and Achey were his "first level chain of command." He did not receive a response to this email.

On February 22, 2017, Jones and Achey told the appellant that his leave request had been approved, effective February 23, 2017, and he would receive an email concerning this. They told him to turn in his phone, tools, key and work vehicle. The appellant did so and Jones and Achey drove him home. He did not receive an email concerning this approval.

The appellant first learned that his request had not been approved when he received Hunt's February 24, 2017, 3:05 p.m., email. (R-5 DEP1.) He did not call Hunt to discuss her email. That same day, at 3:53 p.m., Holmes sent the appellant an email in which he wrote that he wanted the appellant to become a permanent employee before he was to "separate." To do so, the appellant could "use benefit time (vacation or XP) through Friday March 3rd to finish out the pay period." (A-2 DEP3.) The appellant did not call Holmes, Achey or Jones after he received the emails from Hunt and Holmes.

The appellant believed his immediate supervisors were authorized to approve his leave of absence and he reported to the Freehold Township Police Department as required. He received a salary while there.

On March 15, 2017, the appellant received a PDNA for a resignation not in good standing, because he was Absent from Duty for five or more consecutive business days without the approval of his supervisor, and for Other Sufficient Cause, violation of the rules, regulations, policies or procedures of the respondent. (A-4.) The appellant requested a departmental hearing on the charges.

On April 21, 2017, the Township of Freehold Police Department determined the appellant was unfit to serve as a police officer, and terminated him from its employ, based on the 2011 injury that caused him to retire.

The appellant reported back to work the following Monday, April 24, 2017. The PDNA did not indicate he was suspended and he had not received materials indicating he had been terminated, so he considered his return to be appropriate. John Reith told the appellant that he could not return to work, as he had been terminated, and directed him to leave the worksite. He called John Strapp, (Strapp) of the Office of Labor Relations, to ask why he was prohibited from working, as a final disciplinary action had not been issued. Strapp replied that the appellant, "just can't" work.

On May 9, 2017, the appellant wrote to Strapp. He wrote that, upon reporting to work on April 24, 2017, his supervisor, Jones, directed him to accompany Forest Fire Observer Ralph Whalen to the Lakehurst Naval Base. Once there, Whalen received "several calls" directing him to return the appellant to the New Lisbon Office of the Appointing Authority. After Whalen advised that he was unable to do so, Reith reported to the Naval Base, told the appellant he, "could not be there" and was required to bring him back to New Lisbon. He was ultimately told to leave the office. (A-8.)

ADDITIONAL FINDINGS

The appellant testified that his immediate supervisors approved his leave of absence. However, he offered nothing more than hearsay to support this. He acknowledged that none of his supervisors replied to his February 22, 2017, email request for a leave of absence. He also did not question supervisor Achey about the alleged approval during Achey's testimony.

Hearsay evidence is admissible in the trial of contested cases, and shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). However, while hearsay evidence is admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added

probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971).

Here, the appellant provided no additional evidence to support his assertion that his supervisors approved his request. Further, although the appellant testified that his supervisors verbally approved his request on February 22, 2017, he sent an email to Carla Hunt and other Department personnel on February 24, 2017, in which he wrote that Achey approved his leave "yesterday," February 23, 2017. (R-5 DEP5.) These statements are inconsistent. As such, given the absence of competent evidence supporting the appellant's claim, I **FIND** his supervisors did not approve his request for a leave of absence.

Moreover, the appellant testified that, when he returned to work April 24, 2017, Jones directed him to perform a work assignment. Jones' report, written that same day, indicated that he did not issue a work assignment to the appellant. Rather, Jones instructed the appellant to report to Division B headquarters to speak with Achey about the status of his employment. (R-6 DEP15.) It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp, 53 N.J. Super. 282, 287 (App. Div. 1958). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). The contemporaneously created record of the events on April 24, 2017, an admissible business record[6], contradicts the appellant's testimony. I, therefore, **FIND** that

[6] Jones' report is admissible pursuant to N.J.R.E. 803(c)(6):

A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

Jones did not direct the appellant to perform a work assignment on April 24, 2017. I also **FIND** the appellant disregarded Jones' directive to speak with Achey about the status of his employment.

Therefore, after having the opportunity to review the evidence and consider the testimony, I **FIND** the following additional **FACTS**:

1. The Appointing Authority's policy concerning special leaves of absence ("leave policy") permits personal leaves of absence without pay under certain circumstances.

2. The leave policy does not explicitly authorize a leave of absence to enable an employee to pursue employment or perform work for another employer.

3. The leave policy permits leaves of absence for "exceptional situations" when such a leave "is in the public interest."

4. A leave of absence form must be submitted by the requesting employee to his immediate supervisor, who must complete the form and forward it through a program director or administrator to the Leave Management Unit. The Division of Human Resources must issue the final approval.

5. On February 10, 2017, the appellant was advised verbally that he was required to return to the Freehold Township Police Department for an evaluation concerning whether he could be reinstated as a police officer with that department. This was mandated by the Police and Firemen's Retirement System (PFRS). The appellant received written correspondence from PFRS concerning this approximately two days later.

6. On February 21, 2017, the appellant received a phone call from a Freehold Township Police Department lieutenant who advised that he was required to report to the police department on February2017. On February 21 or 22, 2017, the appellant received

written correspondence from the police chief, dated February 15, 2017, confirming this and indicating that he was to report for limited duty.

7. The appellant advised his supervisor, Edwin Jones, of the phone call from the lieutenant the same day he received the call. Jones spoke with Michael Achey, who in turn spoke with Steve Holmes.

8. The appellant was told to request a leave of absence and to email the letter from the police chief to Karen Furnari.

9. The appellant knew the appointing authority's Human Resources' division had a website and did not consult the site.

10. The appellant believed he would not be approved to return to the police department, given his prior injury. He expected the police department's review of his eligibility to serve as a police officer would last a few weeks. He requested a six-month leave of absence without pay to permit sufficient time for this review.

11. On February 22, 2017, the appellant sent an email to Jones and Achey, in which he explained his need for a leave of absence. The appellant did not receive a response to the email.

12. The respondent did not approve the appellant's request for a leave of absence.

13. The appellant was advised he should submit his resignation to avoid disciplinary action.

14. The appellant did not submit a letter of resignation.

15. The appellant did not report to work for the respondent for more than five consecutive days and did not further communicate with the respondent concerning his absences.

16. The appellant reported to the Freehold Township Police Department on February 27, 2017, and was discharged by the Police Department on April 21, 2017. He was paid a salary during that time.

CONCLUSIONS OF LAW

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A :1-1 et seq. ; N.J.A.C. 4A :1-1.1 et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3.

The respondent contends that the appellant was absent from duty for five or more consecutive business days without approval. This is considered abandonment of his position and is recorded as a resignation not in good standing, pursuant to N.J.A.C. 4A:2-6.2(b). The respondent also contends it had Other Sufficient Cause, pursuant to N.J.A.C. 4A:2-2.3(a)(12), to discipline the appellant. This is based on an allegation of violation of a rule, regulation, policy, procedure, order or administrative decision.

The respondent has the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Here, the appellant knew that his request for a leave of absence had not been granted. He also knew that he was required to submit his resignation or report to work to prevent disciplinary action. The appellant did neither. Instead, he did not report to work and did not communicate further with his employer about his absences or employment status. This persisted for more than five consecutive days. According, I **CONCLUDE** the respondent has demonstrated, by a preponderance of credible evidence, that appellant's

conduct constitutes abandonment of his position in violation of N.J.A.C. 4A:2-6.2(b) and that such charge must be **SUSTAINED**.

With respect to the imposition of discipline for Other Sufficient Cause, the respondent's policy required compliance with the procedures for requesting leaves of absence. Here, the record reflects that the appellant failed to satisfy his clearly stated obligation. Accordingly, I **CONCLUDE** respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)(12) and that such charge must be **SUSTAINED**.

In his post-hearing brief, the appellant contended, for the first time, that the respondent violated the procedural requirements of the governing regulation. N.J.A.C. 4A:2-6.2(d) provides, with respect to an employee who is resigned not in good standing, that "[s]hould an employee seek to return to employment pending the departmental decision, a review under N.J.A.C. 4A:2-2.5(b) shall be conducted prior to continuation of the unpaid status." N.J.A.C. 4A:2-2.5(b) provides:

> Where suspension is immediate under (a)1 and 2 above, and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority.

The appellant did not raise this issue during the hearing and did not present evidence suggesting that he addressed it when he reported to work April 24, 2017, or at any time after then. Regardless, "[g]enerally, an appellant in a Civil Service case who has filed an appeal from a determination of guilt and who is seeking dismissal of charges based on procedural irregularities occurring prior to or at the department-level hearing must fail." In re Bayard, OAL Dkt. No. CSR 3546-12, 2013 N.J. AGEN LEXIS 11, 19, Initial Decision (January 17, 2013). That is, because "procedural irregularities at the

departmental level are considered 'cured' by a subsequent plenary hearing at the agency level." Ensslin v. Township of North Bergen, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995) (citing In re Darcy, 114 N.J. Super. 454 (App. Div. 1971)). Accordingly, I **CONCLUDE** that appellant's contention concerning violation of N.J.A.C. 4A:2-2.5(b) should be **DENIED.**

PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, where appropriate, and the employee's prior record. West New York v. Bock, 38 N.J. 500 (1962), George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. The determination of whether a specific act supports removal requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976).

N.J.A.C. 4A:2-6.2(f) provides that a resignation not in good standing may be modified to a resignation in good standing. In IMO Karla Jackson, 2009 N.J. AGEN LEXIS 790, OAL Dkt. No. CSV 10620-08, Final Decision (August 5, 2009), the Civil Service Commission addressed the penalty to be imposed upon a finding that an employee abandoned his position. It wrote:

> [T]he Commission has, under certain circumstances, modified a removal or resignation not in good standing to a resignation in good standing. The common factor in those decisions is that the employee, through no misconduct or fault of his or her own, could not perform his or her duties. These cases most often present fact patterns indicating that an employee is

> unable, due to a physical or psychological condition, to continue performing his or her job. Another commonality in these matters is the substantiation of the employee's disability. In such cases, the Commission has found good cause to modify a removal or resignation not in good standing to a resignation in good standing. *See e.g., Eugene Verdell v. New Jersey State Department of Military and Veterans' Affairs,* Docket No. A-0497-04T5 (App. Div. February 16, 2006). Conversely, where the above factors are not present, the Commission will not modify a resignation not in good standing to a resignation in good standing. *See e.g., In the Matter of Jerome Holland* (MSB, decided April 9, 2008).
>
> Ibid.

In IMO Denise Cannuli, 2008 N.J. AGEN LEXIS 1059, OAL Dkt. No. CSV 4533-07 Final Decision (September 10, 2008), the Commission agreed with the ALJ's finding that the appellant violated N.J.A.C. 4A:2-6.2(c) when she failed to return to work for five or more consecutive days after an approved leave of absence. However, the Commission modified the penalty from resignation not in good standing to a fifteen-day suspension. The Commission noted that there was a "complete breakdown of communication between the appellant and the appointing authority" as both the appointing authority and the appellant failed to communicate about the appellant's employment status. Also, although the appellant failed to communicate with the respondent, the "record clearly demonstrates that the appellant did not intend to abandon her position." Consequently, the Commission found that "certain mitigating circumstances exist which warrant a lesser penalty than a resignation not in good standing. These include the appointing authority's lack of effort contacting the appellant, including failing to return her telephone calls or advising her that she could be subject to discipline or a resignation not in good standing for her failure to report to work." Ibid.

Here, while the appellant failed to comply with the respondent's policy governing applications for leaves of absence, he was forthcoming about the reasons why he needed a temporary leave of absence. He explained, and the respondent has not contested, that he was obligated to tend to a matter associated with his PFRS pension. Although he was paid for his time with the Freehold Township Police Department, the appellant did not seek to be reemployed there. Rather, he complied with a requirement imposed upon him by the police department and PFRS.

This is akin to IMO Karla Jackson, supra, in which the Commission acknowledged that resignation in good standing could be an appropriate remedy when "the employee, through no misconduct or fault of his or her own, could not perform his or her duties." Here, the appellant did not create the circumstances that required him to take a temporary leave of absence. Further, it is uncontested that the appellant intended to return to the employ of the respondent and believed that he would be able to do so. This is analogous to IMO Denise Cannuli, supra, in which, although the appellant failed to thoroughly communicate with her employer, the record was clear that she did not intend to abandon her position.

However, the other mitigating factors that militated in favor of the Commission imposing only a fifteen-day suspension for Cannuli are not present here. These included the appointing authority's failure to communicate with the appellant concerning his status and the consequences for failing to report to work. Here, the respondent communicated clearly with the appellant concerning his obligations and the consequences for his failure to report to work. Nonetheless, the respondent was on notice of the unusual circumstances that compelled the appellant's actions and the appellant's desire and expectation that he would be able to return to work. The uncontested evidence demonstrated this. I, therefore, **CONCLUDE** that the appellant's violation warrants a penalty of resignation in good standing.

ORDER

I hereby order that the charges are **SUSTAINED**. I order that the penalty imposed by the Appointing Authority shall be **MODIFIED**, and the appellant shall be deemed to have resigned in good standing.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

April 20, 2018 — Judith Lieberman
DATE — **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: 4/20/18

Date Mailed to Parties: 4/20/18

/vj

APPENDIX

LIST OF WITNESSES

For appellant:

Louis M. Barbone, Esq. (Jacobs & Barbone, P.C.)

For respondent:

Aaron J. Creuz, Esq. Deputy Attorney General (Gurbir S. Grewal, Attorney General)

LIST OF EXHIBITS

For appellant:

A-2 February 24, 2017, email Holmes to appellant, cc: Achey, Edwards

A-4 PDNA, March 15, 2017, letter Strapp to appellant

A-5 Freehold Township Police Department PDNA, FNDA, Hearing Record

A-8 May 9, 2017, letter appellant to Strapp

A-9 May 25, 2017, Disciplinary Appeal Proceeding Report

A-14 February 22, 2017, email appellant to Jones, Achey

For respondent:

R-1 FDNA

R-2 PDNA

R-3 Special Leaves of Absence Policy

R-4 Time sheets

R-5 Email correspondence

R-6 DPF-039 (excluding last page)

5-2-18

A-2

STATE OF NEW JERSEY

In the Matter of Bernacine Barnes

CSC Docket Nos. 2017-1610
and 2017-1812

OAL Docket Nos. CSV 18070-16
and CSV 00015-17
(consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 24, 2018 (JET)

The appeals of Bernacine Barnes, a Senior Receptionist with Monmouth County, Department of Human Services, of her 20 working day and three working day suspensions, on charges, were heard by Administrative Law Judge Kathleen M Calemmo (ALJ), who rendered her initial decision on March 22, 2018. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 2, 2018, accepted and adopted the Findings of Facts and Conclusions as contained in the ALJ's initial decision. The Commission also adopted the ALJ's recommendation to reverse the three working day suspension. However, the Commission did not adopt the ALJ's recommendation to uphold the 20 working day suspension. Rather, the Commission modified the 20 working day suspension to a 10 working day suspension.

DISCUSSION

The appellant was charged with insubordination, conduct unbecoming a public employee, neglect of duty, misuse of public property, and other sufficient cause. Specifically, the appointing authority alleged in a Preliminary Notice of Disciplinary Action (PNDA) issued on September 14, 2016 that the appellant removed confidential information from her work site without authorization, delivered a packet of confidential information to an unidentified person at the Office

of Professional Standards (OPS), and misused County property. A Final Notice of Disciplinary Action (FNDA) was issued on November 9, 2016 which upheld the 20 working day suspension. Thereafter, a Notice of Minor Disciplinary Action seeking a three working day suspension was issued alleging that the appellant left a meeting and wore sneakers to work without approval, which was upheld on November 24, 2016. Upon the appellant's appeals, both matters were transmitted to the Office of Administrative Law (OAL) as contested cases.

In her consolidated initial decision, the ALJ found that on August 24, 2016, the appellant delivered a complaint containing personal and confidential client information without authorization in a packet regarding her alleged unfair treatment in the workplace. The ALJ found that the appellant complained that her supervisors subjected her to disparate treatment, and in support of her complaint, she submitted documentation from a client's file to show that she was unfairly accused of disparate treatment in the workplace. The ALJ found that the appellant utilized County property, a work computer, to write her complaint, and she removed County property, a client's file, that contained privileged and confidential information from the workplace without authorization. The ALJ found that confidential documentation including the case name, financial information, and social security number in the client's file was not redacted. Further, the ALJ found that the appellant hand delivered the complaint and placed it on the secretary's desk at OPS, which was received on August 25, 2016 by Gwendolyn Thomas. The ALJ found that the appellant's complaint was addressed to individuals including the Monmouth County Freeholders, Steven Kleinman, Special County Counsel, Teri O'Connor, a County Administrator, and Gwendolyn Thomas, an Assistant Nursing Home Administrator and the OPS investigator. The ALJ indicated that the appellant did not dispute that she did not have authorization to include the confidential information in support of her complaint.

Additionally, the ALJ found that, on September 21, 2016, the appellant was questioned in a series of three meetings by her supervisors with respect to her wearing sneakers at work. At the first meeting, the appellant's supervisor, Diane Prochnow, a Human Services Specialist 4, questioned the appellant about her authorization to wear sneakers in the workplace. The ALJ found that, during the second meeting, Amy Klinghoffer, a Personnel Assistant, stated that she could not locate the appellant's medical records that should have been maintained by the appointing authority's Human Resources Office supporting the appellant's accommodation to wear sneakers, and the appellant stated she would not provide new medical documentation in support of the accommodation.[1] Additionally, the ALJ found that the appellant was summoned to a third meeting on September 21, 2016 with Prochnow, Klinghoffer, and Robert Jaichner, an Assistant Administrative Supervisor, Income Maintenance. The appellant stated to the supervisors that she wanted to tape record the third meeting which was not permitted by Klinghoffer.

[1] Prochnow was also at the second meeting.

The ALJ found that, upon receiving such information, the appellant stated the meeting was not going to happen and she abruptly left the meeting. The ALJ found that Prochnow, Klinghoffer, and Jaichner viewed the appellant's conduct as inappropriate, as she disregarded their instructions by leaving the meeting and slamming the door shut. Moreover, the ALJ found that the appellant continued to wear sneakers at work after the September 21, 2016 incident and she had been doing so since November 2014 as a result of an accommodation. The ALJ found that the appellant submitted a doctor's note dated November 1, 2014 that Human Resources date stamped November 5, 2014, a request for an accommodation form under the Americans with Disabilities Act (ADA) dated November 24, 2014, and a disability certificate dated November 24, 2014 indicating that the appellant needed to wear sneakers at all times.[2] As a result, the appointing authority issued a specialized chair to the appellant and authorized her to wear sneakers at work.

Regarding the 20 working day suspension, the ALJ concluded that the appellant's action of delivering the complaint did not constitute insubordination, and there was no issue pertaining to the appellant's right as an aggrieved employee to file a disparate treatment complaint. The ALJ also concluded that the appellant did not disseminate confidential information, violate the appointing authority's computer and e-mail usage policy, or act disrespectfully toward her supervisors. As such, the ALJ did not uphold the charges of insubordination and conduct unbecoming a public employee. Nevertheless, the ALJ concluded that the appellant's removing of a client's confidential record from the workplace without authorization and her computer use after hours was not permitted. As such, the ALJ upheld the charges of neglect of duty, misuse of public property, and other sufficient cause. The ALJ also concluded that the appellant violated several of the appointing authority's policies.

With respect to the appellant's disciplinary history, the ALJ concluded that other than a notice of counseling[3] for an incident that occurred in September 2016, the appellant's personnel record did not contain any major disciplinary history in her over 27 years of service. As to the penalty, the ALJ recommended that, based on the sustained disciplinary charges, and considering the facts of the case, the 20 working day suspension was warranted.

Regarding the three working day suspension, the ALJ concluded that the appellant had been authorized and continued to wear sneakers for two years without incident pursuant to a 2014 ADA accommodation. Additionally, the ALJ concluded that the appellant's testimony with respect to the September 21, 2016 incident was credible, as the three meetings were excessive and the appellant appeared to be intimidated at the time, and there was no substantive evidence to

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[2] The appellant testified that she submitted such documentation to Granvelle LeMeune, an Assistant Chief of Administrative Services, and the documentation was date stamped November 2014.

[3] Counseling is not considered a formal disciplinary action under Civil Service rules.

show that the appellant was disrespectful toward her supervisors. As such, the ALJ recommended reversing the three working day suspension.

In its exceptions, the appointing authority asserts that the ALJ's recommendation to dismiss the three day suspension pertaining to the September 21, 2016 incident is contrary to the testimony presented at the hearing and applicable case law. The appointing authority contends that the ALJ's findings do not correctly set forth the facts pertaining to the actions it took with respect to the events that took place on September 9, 2016. The appointing authority states that its witnesses presented unrebutted testimony to establish that the dress code policy is enforced with respect to the appellant and every other employee at the agency. It adds that the purpose of the September 21, 2016 meeting was to discuss concerns that the appellant was ignoring the dress code policy as a result of her continued practice of wearing sneakers to work, and to determine if the appellant had been approved for an ADA accommodation to wear sneakers. Further, the witnesses testified that they made a good faith effort at the time of the incident to discuss the matter with the appellant, as the appellant's medical documentation with respect to her sneakers could not be located. The appointing authority explains that, although the appellant submitted medical documentation at the hearing indicating that she requested to wear sneakers, she did not present any evidence to show that such an accommodation was granted. The appointing authority states that it has the discretion to determine the proper accommodation under the ADA. As such, the witnesses were not precluded from making such inquiries of the appellant at the time of the meetings. The appointing authority adds that its witnesses did not act in such a manner that would have warranted the appellant's inappropriate behavior at the time, *i.e.,* stating that she wanted to record the meeting and, upon learning that she was not permitted to do so, abruptly leaving and slamming the door. The appointing authority states that it was unnecessary to conduct further investigation into the appellant's actions at it would have been a waste of taxpayer money and three witnesses confirmed her inappropriate behavior. The appointing authority adds that there was no evidence that the appellant was intimidated by anyone at the meetings.

Additionally, the appointing authority argues that the appellant's behavior is nearly identical to the facts that occurred in *In the Matter of Yvonne Ellis* (CSC, deemed adopted February 26, 2018). In that case, the ALJ found that there was no dispute that the appellant's actions in that matter constituted insubordination as clear directive was disregarded by not attending a meeting and leaving the school. Therefore, the appointing authority argues that, with respect to the September 21, 2016 incident, the appellant's actions clearly constitute insubordination. The appointing authority adds that the appellant's behavior also constitutes conduct unbecoming a public employee, as the appointing authority's request to discuss the appellant's ongoing practice of wearing sneakers was reasonable. Moreover, the appointing authority maintains that dismissing the three working day suspension

will set precedent allowing employees to disregard their supervisors in the future. Finally, the appointing authority maintains that none of the charges from the August 2016 incident should be dismissed, as the appointing authority provides sufficient evidence at the hearing to sustain the charges.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. In its exceptions, the appointing authority challenges the credibility determinations of the ALJ. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.A.C.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon review, the Commission finds that the ALJ's determinations in this respect are proper and that this strict standard has not been met.

With respect to the appointing authority's other arguments, it has presented no substantive information that would somehow convince the Commission that the ALJ's findings were arbitrary, unreasonable or not based on the credible evidence in the record. In this matter, the Commission agrees that the ALJ correctly determined that the appellant was not insubordinate or disrespectful at the time of the three meetings on September 21, 2016. Rather, the credible evidence shows that the appellant appeared to have been intimidated at the time. The appellant testified and the witnesses acknowledged that the appellant specifically asked to tape record the third meeting, which is an indication of her unease in that situation. In this regard, the Commission cannot fathom why it would have been necessary to waste time questioning the appellant over the course of three meetings to ascertain if she was authorized to wear sneakers if such medical documentation could have been obtained from the Human Resources Office. As noted by the ALJ, the appointing authority could have allotted more time to find the appellant's medical documentation beyond the September 21, 2016 date, especially since the witnesses acknowledged that the medical documentation had been moved to a new location. The appellant continuously wore sneakers to work since August 2014 and there is no substantive evidence to show that the appointing authority was concerned about the appellant wearing sneakers at any time prior to the September 21, 2016 meetings.

Additionally, the facts in *Ellis* are distinguishable from this case and, as such, the appointing authority's arguments in that regard are misplaced. In that matter, the appellant, who was later charged with chronic and excessive lateness and absenteeism, did not appear at a meeting with the student attendance supervisor for Jersey City School District regarding her attendance for the coming school year, left the building, and was later observed on that same day in the union office by the student attendance supervisor. As such, the ALJ concluded the appellant's behavior in that matter was insubordinate. In contrast, the appellant in this matter actually appeared at all three meetings on September 21, 2016, and when she asked to tape record the third meeting, she was told that she could not do so. As noted above, the appellant appeared to have been intimidated as she asked to tape record the meeting, and since she could not tape record it, she left the meeting. Given the particular circumstances of this matter, the Commission cannot reasonably find that the appellant's behavior constituted insubordination or that the facts of her case are similar to those presented in *Ellis, supra.* Moreover, the ALJ found that the appellant was credible as no one else in the workplace heard her slam the door or reported that she was disrespectful toward anyone. Additionally, the dismissal of the three working day suspension will not set precedent allowing other employees to disregard their supervisors. Rather, the Commission reviews disciplinary matters on a case by case basis, and it has the final authority to uphold, modify or dismiss an employee's disciplinary sanction in such matters. In this case, the Commission has determined for the aforementioned reasons that the three working day suspension should be reversed.

With respect to the charges of insubordination and conduct unbecoming a public employee pertaining to the 20 working day suspension, the Commission agrees with the ALJ's findings that those charges should be dismissed. Although the appellant's actions of disclosing confidential information was inappropriate, given the context of her disclosure, her actions did not constitute conduct unbecoming a public an employee or insubordination at the time of the incident. Nonetheless, the appellant's actions clearly had the potential to result in much more serious consequences and warranted a finding of neglect of duty, misuse of public property, other sufficient cause and violation of the appointing authority's rules and regulations.

In determining the proper penalty, the Commission's review is *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center,* 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including

removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In the instant matter, the Commission notes that the appellant is a long term employee as she has been employed at the appointing authority for over 27 years, and her disciplinary record does not reflect any disciplinary history until the incidents that are the subject of this matter. Therefore, in light of these circumstances, the Commission finds the imposition of a 20 working day suspension unduly harsh. Accordingly, it modifies the 20 working day suspension to a 10 working day suspension. However, the Commission emphasizes that it does not condone the appellant's misconduct since, as stated above, the appellant's actions could have resulted in extremely serious consequences.

ORDER

The Civil Service Commission finds that the appointing authority's action of imposing a 20 working day suspension was not justified under the circumstances and modifies that action to a 10 working day suspension. Further, the Commission dismisses the three working day suspension. The Commission further orders that the appellant be granted 13 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2nd DAY OF MAY, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher Myers
Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOs. CSV 18070-16
and CSV 00015-17
AGENCY DKT. NOs. 2017-1610
and 2017-1812
(CONSOLIDATED)

IN THE MATTER OF BERNACINE M. BARNES, MONMOUTH COUNTY DEPARTMENT OF HUMAN SERVICES.

Bernacine M. Barnes, petitioner, pro se

Steven W. Kleinman, Special County Counsel, Monmouth County, for respondent

Record Closed: February 5, 2018 Decided: March 22, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Appellant, Bernacine M. Barnes (Barnes), a Senior Receptionist employed by Monmouth County (County) at its Division of Social Services (DSS), appeals a twenty-day suspension she received as major discipline for delivering a packet of information to the Office of Professional Standards (OPS) that contained personal, privileged,

protected, and confidential client information of a DSS client. Additionally, Barnes was charged with utilizing county property to generate these documents, with removing confidential client information from her work site without authorization, and with leaving said packet with an unidentified person in the OPS office. The County sustained the following charges: Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); Neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); Misuse of public property, including motor vehicles, N.J.A.C. 4A:2-2.3(a)(8); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 104, Business ethics and conduct; County Policy 181, Confidentiality; County Policy 516, Computer and email usage; and County Policy 701, Employee conduct and work rules. Barnes admitted distributing confidential client information but maintained that the packet of information was intended to show disparate treatment by her supervisor against her in support of her longstanding grievance of unfair treatment. She claimed that her state of mind caused by the stress of working in a hostile work environment attributed to her failure to redact the confidential identifying information before disseminating it.

Barnes also appeals a three-day suspension she received as minor discipline pursuant to N.J.A.C. 4A:2-2.9(b) that allows for hearings when an employee received a prior suspension of fifteen days or more in the same calendar year. After receiving a twenty-day suspension, Barnes received a three-day suspension for displaying unacceptable workplace conduct and etiquette toward her superiors due to an incident that occurred after Barnes was questioned about wearing sneakers in contravention of proper workplace attire. The County sustained the following charges: Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 722, Workplace etiquette; and County Policy 701, Employee conduct and work rules. Barnes maintained that she had an Americans with Disability Act (ADA) accommodation to wear sneakers. Moreover, she had been wearing sneakers to work every day since November 2014 without incident.

PROCEDURAL HISTORY

On September 14, 2016, the County issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against Barnes. (R-2.) Following the departmental hearing held on October 4, 2016, the County issued a Final Notice of Disciplinary Action (FNDA) on November 9, 2016, sustaining the charges in the PNDA and suspending Barnes from employment for twenty working days. (R-1.) Appellant filed a timely appeal and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on December 1, 2016 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13.

On October 11, 2016, the County issued a Minor Disciplinary Action Notice setting forth the charges and specifications made against Barnes. (R-4.) Following the departmental hearing held on November 3, 2016, the County issued a Minor Disciplinary Action on November 23, 2016, resulting in a three-day suspension from employment. (R-3.) Appellant filed a timely appeal and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on December 30, 2016 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

I entered an Order of Consolidation on October 11, 2017, consolidating both matters for hearing pursuant to N.J.A.C. 1:1-17.3(a), because the two matters involved identical parties and witnesses, and contained common questions of fact and law resulting in a savings in time, expense, duplication and inconsistency.

I heard the matters on October 16, 2017. The record remained open to allow the parties to submit post-hearing submissions. On December 1, 2017, the County filed a motion to strike the post-hearing submission submitted by Barnes. I conducted a telephone conference on January 24, 2018 that resolved the issues in the County's motion to strike and allowed the County to submit additional documentation. The record closed on February 5, 2018.

FACTUAL DISCUSSIONS AND FINDINGS

The following facts are not disputed. Barnes has worked for the County for over twenty-seven years. She worked in the customer care center of DSS assisting county residents with their requests for cash assistance, food stamps, emergency shelter, housing, and medical benefits from various county programs. As part of her regular duties, Barnes is privy to confidential information, including social security numbers, addresses, telephone numbers, and financial information of county residents seeking assistance.

On August 23, 2016, Barnes prepared a typewritten complaint addressed to Freeholders, S. Kleinman, T. O'Connors, and Gwendolyn Thompson.[1] (R-10.) In the body of the letter, Barnes complained of disparate treatment from her supervisors. She submitted papers from a client's file to show how she was allegedly being singled out and unfairly accused of doing something wrong. The papers contained confidential information that Barnes did not redact; including case name; social security number; customer's address; customer's date of birth; and financial information. (R-11.[2]) On August 24, 2016, Barnes hand-delivered the packet to OPS. Because the OPS office had recently moved, a building security guard escorted Barnes to the new office. The office was locked and believed to be unattended; however, the door was opened by an unidentified male and Barnes instructed him to place the packet on the secretary's desk. It was later learned that the man who opened the door was in the office to repair the copier. The following day, Ms. Thomas opened the packet left in her office at OPS and started an investigation as to how the packet came to be in her office and whether there were any authorizations for the release of the confidential information contained therein. Barnes does not dispute that she unintentionally included confidential records in the packets. Barnes did not have authorization to take this information from her work space or release this information to third parties. On September 14, 2016, the Director of OPS, on behalf of the County, sent the PNDA to Barnes and advised her of her right to

[1] The recipients of the letter were the Freeholders of Monmouth County; Special County Counsel, Steven Kleinman; County Administrator, Teri O'Connor; and OPS investigator, Gwen Thomas.

[2] Exhibit R-11 contains redacted call center logs. These are the same call center logs, but without the redactions, that were included within the packet submitted by Barnes with the cover letter dated August 23, 2016.

a hearing to defend the charges. (R-2.) On November 9, 2016, the County upheld the charges and issued a FNDA. (R-1.)

On the morning of September 21, 2016, Barnes had a meeting with her supervisor, Diane Prochnow (Prochnow), about wearing sneakers in the workplace. Barnes had a second meeting that day with Prochnow and Amy Klinghoffer (Klinghoffer), Personnel Assistant in the Human Resources Department of DSS, about whether Barnes had an ADA accommodation to wear sneakers. Klinghoffer offered to look for the required paperwork in Barnes' personnel and medical files. Barnes was called into a third meeting that day in Prochnow's office with Prochnow, Klinghoffer, and Robert Jaichner (Jaichner), Assistant Administrative Supervisor in attendance. Barnes entered the office and advised the supervisors that she intended to tape record the meeting on her phone. Klinghoffer informed her that taping conversations was not permitted. Upon receiving that information, Barnes left the meeting. Barnes continued to wear sneakers. She had been wearing sneakers every day to work since November of 2014. On October 11, 2016, the County informed Barnes that a disciplinary hearing was scheduled to answer the charges relating to the meeting involving her wearing sneakers in the workplace. (R-4.) On November 23, 2016, the County notified Barnes that the charges in the minor disciplinary action were upheld. (R-3.)

These essential facts are undisputed and found as **FACT**.

TESTIMONY

Lorraine Scheibener (Scheibener) is the current Director of DSS. At the time that the two disciplinary actions were administered she was an Executive Consultant to DSS. She testified as to the importance of safeguarding confidential information expected of all DSS employees and noted that confidentiality and compliance with the Health Insurance Portability and Accountability Act (HIPAA) were prominently displayed on the County's website. (R-5.) Scheibener stated that she was personally familiar with Barnes. She also reported that Barnes, as a customer service agent, had access to confidential information as part of her duties and received training in the proper handling of confidential information. (R-13, 14, and 15.)

As part of Scheibener's duties as an Executive Consultant, she was made aware of certain complaints made by Barnes about incidents within her department. She was copied on a letter dated May 11, 2016 from the Director of the Department of Human Resources that described concerns about Barnes' use of county property and concerns about the tone of Barnes' emails. (R-7.) According to Scheibener, the County did not take any disciplinary action at that time.

Enforcing the dress code was also part of Scheibener's duties. She asked Klinghoffer, Personnel Assistant for Human Resources, to question any employee who was not adhering to the dress code. Scheibener stated that she was aware of a discussion that Barnes was wearing sneakers in the workplace. She also knew that Klinghoffer was looking for paperwork that Barnes stated she gave to Mr. LeMeune, the former director of Human Resources, who had retired.

On cross-examination, Scheibener stated that Klinghoffer reported to her that when Barnes was called into a meeting to discuss the missing paperwork, Barnes wanted to record the conversation. Klinghoffer told her that recording was not permitted, causing Barnes to abruptly leave the meeting and slam the door behind her. Scheibener stated that she spoke to the three supervisors about that meeting but never spoke to Barnes about her side of the story. Scheibener also acknowledged that she personally never found Barnes to be disrespectful.

Qwendolyn Thomas (Thomas) is the Investigator for OPS. She was the intended recipient of the packet delivered by Barnes to her office but left with the copier repair man. She noted that the packet contained a letter of complaint by Barnes for being singled out and disrespected by her supervisors, purportedly supported by pages of information from a customer's file with identifying confidential information. Thomas immediately called Scheibener to see if the release of this information had been authorized. She was also concerned about how the packet got to her office which is secured. She obtained a written statement from the security guard and the copier repair person and put her findings in a written memorandum. (R-8 and R-9.) Thomas expressed her grave concern about the breach of confidentiality caused by the inclusion

of the unredacted statements in the packet. She was tasked with investigating the breach of confidentiality charge against Barnes.

On cross-examination, Thomas stated that she had two or three unrelated meetings with Barnes regarding Barnes' concerns about her treatment in the workplace. She stated that Barnes had never been disrespectful during those meetings.

Diane Prochnow (Prochnow) is a Human Services Specialist IV with DSS and Barnes' direct supervisor. She testified that on August 23, 2016, the records indicated that Barnes logged off her assigned computer at 5:26 p.m. Barnes' work hours are from 8:30 a.m. until 4:30 p.m. County policy only allows access after those hours with supervisor's authorization, which had not been granted.

Prochnow testified that she has a challenging working relationship with Barnes. On the morning of September 21, 2016, Prochnow had a meeting with Barnes wherein she questioned whether Barnes had proper documentation that allowed her to wear sneakers in the workplace. She stated that based on her conversation with Barnes she understood that Barnes had given a doctor's note to Ann Sayer about six months ago. Ann Sayer was not identified. After that initial meeting, there was another meeting and Klinghoffer also attended. At that meeting, Barnes stated that she was not going to get another note because her doctor would charge her for it and questioned why it was necessary when she had previously given all her information to Bucky LeMeune, the former head of human resources. Klinghoffer stated that she would look for the paperwork in Barnes' medical records. Later that afternoon, Prochnow stated that Klinghoffer came to her office while she was meeting with Robert Jaichner, Assistant Administrative Supervisor. Klinghoffer informed them that she could not find any supporting documents for Barnes. According to Prochnow, Klinghoffer asked her to call Barnes into the office and she asked Jaichner to stay. Prochnow stated that Barnes entered the office and immediately informed them of her intention to record the meeting on her phone. She heard Klinghoffer tell Barnes that recording a meeting was not permitted to which Barnes replied that the meeting was over. Barnes then left the meeting, pulled the door behind her causing it to slam shut. Prochnow stated she was dumbfounded by Barnes' actions.

On cross-examination, Prochnow stated that she never asked any of the employees in the customer care center if they had been disturbed by Barnes' actions during or after the third meeting.

Amy Klinghoffer (Klinghoffer) is the Personnel Assistant in Human Resources under DSS. She stated that in September 2016, Scheibener asked her to investigate whether employees who were deviating from the dress code had ADA accommodations. Because Barnes was wearing sneakers, she asked Prochnow whether Barnes had a doctor's note. She recalled receiving an email from Jaichner that morning stating that Barnes would not get a new note because it was too expensive and unnecessary because she had already submitted a doctor's note. Klinghoffer recalled meeting with Barnes and Barnes' supervisor, Prochnow, later that morning, wherein she told Barnes that she did not have any paperwork but that she would look for it and get back to her. Klinghoffer stated that she looked in boxes that were available and called the downtown office, where records were moved after the DSS reorganization, to ask if someone could locate Barnes' medical folder. According to Klinghoffer, no records were found. At approximately 3:00 p.m. that day, Klinghoffer went to Prochnow's office and because Jaichner was already there and familiar with the situation, she asked him to stay. Klinghoffer asked Prochnow to call Barnes to her office. Barnes complied, but when she entered the office she stated that she wanted to tape the meeting. Klinghoffer told her that taping was not permitted. Barnes responded by stating that the meeting was over, walked out, and slammed the door. Because of Barnes' abrupt departure, Klinghoffer never told her that she could not find her paperwork. Klinghoffer stated that Barnes' behavior was inappropriate and she reported it to Scheibener. Klinghoffer also stated that she was only trying to help Barnes get the proper documentation for an ADA accommodation.

On cross-examination, Klinghoffer stated that she thought that Barnes may have been confusing her paperwork for Family Medical Leave Act (FMLA) with ADA. She also testified that she never found any of Barnes' medical records. When questioned about whether Barnes' behavior disrupted her co-workers, Klinghoffer responded that she never asked any of Barnes' co-workers if they had been disrupted.

On recall, Klinghoffer testified that Barnes never mentioned having the paperwork for an ADA accommodation allowing her to wear sneakers. Klinghoffer testified about the process stating that the employee would first have to submit a doctor's note which would trigger the interactive process for a determination if an accommodation was warranted. She stated that she never got the chance to talk to Barnes because Barnes walked out of the meeting before she had the chance. Klinghoffer maintained that she could not find Barnes' medical records despite her best efforts to locate them.

Robert Jaichner (Jaichner) is the Assistant Administrative Supervisor with DSS. On September 21, 2016, he was in Prochnow's office when Klinghoffer came in to talk about Barnes' accommodation for wearing sneakers. She asked him to stay because he was familiar with the topic. He recited the same story that when Barnes was told by Klinghoffer that she could not record the meeting, Barnes abruptly left and slammed the door. Jaichner stated that he was taken aback by Barnes' behavior. On cross-examination, Jaichner was asked about his prior knowledge of the incident and he responded that he had been informed of the situation by Prochnow.

Bernacine Barnes testified on her own behalf. Regarding the twenty-day suspension, she admitted including confidential information within the packet that she delivered to the five Freeholders, the County Clerk, the County Administrator, County Solicitor, and the Investigator for OPS. Due to her level of distress, she forgot to redact the confidential information from the customer's files before including them in the packet. She maintained that her actions were not intentional. She was using the logs to show how she was being singled out by her supervisor, when in her opinion she did not do anything wrong. She attributed the mistake to her state of mind and anxiety caused by her unfair treatment at work. Pertaining to the issue of leaving the packet with a copier man, Barnes stated that when she knocked on the door for the OPS office accompanied by a security guard, she did not know that the man in the office was the copier repair man. She placed the packet face down on the secretary's desk in a secure room. She believed that the man who opened the door worked there. She had previously filed grievances with the OPS but was unfamiliar with the new office.

Regarding the three-day suspension, Barnes testified that she was concerned that her medical records were missing. She stated that she is disabled and has had numerous surgeries during her employment with the County. She questioned how the County could lose her confidential medical files which she assumed had to be extensive given her medical history over twenty-seven years.

In support of her defense to wearing sneakers in the workplace, Barnes provided the following documentation (P-2):

> 1. Prescription dated November 1, 2014 from Magdy L. Shendouda, M.D. describing her condition and specifying an accommodating chair, stamped as being received by Human Resources on November 5, 2014;
>
> 2. Human Resources ADA Medical Questionnaire – Request for Accommodation Form dated November 24, 2014. The doctor's answer to question number 6 states that "using sneakers help to reduce her back pain" and the impairment was listed as permanent. In answer to number 10, the doctor responded that she could continue to perform her duties "as long as she can use sneakers." The doctor's recommendation at question number 20 was to provide an accommodating chair and allow her to wear sneakers; and
>
> 3. Disability certificate dated November 24, 2014 that stated that the "Patient needs to wear sneakers at all times during work hours."

Barnes testified that she was not willing to hand over her copies of her accommodation form to her supervisors without a receipt. According to Barnes, she wanted a letter signed by either Klinghoffer or Prochnow acknowledging that the County had lost her records before Barnes would provide her copies. She claimed that they refused to sign a receipt. Instead, Klinghoffer stated that she would look for her records. Barnes disputed Klinghoffer's and Prochnow' s testimony about her statement that she gave a note within the last six months to Ann Sayer. She had given the note and ADA Accommodation Form to Mr. LeMeune as stamped on her documents in November 2014. Barnes stated that she had been wearing sneakers every day since her accommodation was granted in November 2014, but for some reason on September 21, 2016, she was summoned to three meetings to discuss whether she had paperwork

allowing her to deviate from the dress code. Barnes stated that she felt bombarded, so after being called into the third meeting on the same day with three supervisors behind closed doors, she told them she was going to record the meeting. When Klinghoffer said she could not record the meeting, Barnes stated that the meeting was over and left. According to Barnes, she opened and closed the door behind her. She stated that she did not slam the door and none of her co-workers commented when she walked out of Prochnow's office. She did not notice any disruption in the workplace.

On cross-examination, Barnes stated that she keeps all her documents, emails, and paperwork relating to her job. She did not offer the ADA accommodation documents because Klinghoffer told her she was going to try and locate them and she wanted a receipt before handing them over. She stated that she wore sneakers in the workplace every day since her accommodation in November 2014 and was never questioned until September 21, 2016. She also noted that she was given a different chair as part of the same accommodation and that was not questioned but the sneakers were questioned.

Barnes testified that she never saw the May 11, 2016 letter from the Director of Human Resources regarding her misuse of county property by sending inappropriate emails. (R-7.) She stated that it is her practice to respond to any email sent to her. She takes exception to the statements contained in the letter; therefore, she would have sent the Director a responding email had she received it. In addition, she maintained that she saves every email and document from the County because of her on-going unanswered complaints about her disparate treatment. If she had opened this email, she is confident that she would have saved it, and responded to it. She vehemently denied ever receiving it.

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). " A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions

which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

The credibility issues to be determined concern Barnes' receipt of the May 11, 2016 letter from Director Tragno (R-7) and certain discrepancies in the testimony about the events of September 21, 2016.

I **FIND** that the testimony of Barnes regarding her receipt and review of the May 11, 2016 letter authored by Human Resources Director Frank Tragno (R-7) to be sincere and credible. Barnes testified that she never saw the letter before it was sent to her by respondent in discovery. She further stated that it is her practice to respond to every email sent to her. Given the inflammatory content of the letter, Barnes' testimony that she would have responded to it is consistent with her conduct as testified to by the County's witnesses and as shown by the documents submitted. The overall sense from the testimony is that Barnes filed numerous complaints and challenged any action that she perceived as unfair. The post-hearing submissions submitted by respondent show that the letter was transmitted from Mr. Tragno's computer to Barnes' county computer at her county email address on Wednesday, May 11, 2016 at 17:03. Converting the military time to civilian time, the email was sent at 5:03 p.m., after Barnes' 4:30 p.m. departing time. I have no doubt from the documents submitted that Director Tragno sent this email to Barnes. However, without a county "read receipt," I only have Barnes' testimony that she did not open the emailed letter which I found to be credible. While I note that email is a widely accepted form of communication, the fact that this email was sent on May 11, 2016 in response to emails sent by Barnes on February 25, 2016 makes it less reliable, because the communication chain was clearly interrupted by the passage of three months' time. Therefore, I **CONCLUDE** that the email of May 11,

2016 does not show that Barnes had prior notice from the County about the use of her work-related computer and emails when she drafted her August 23, 2016 complaint and copied confidential client files.

Barnes disputes certain testimony regarding the events of September 21, 2016. In judging the strength of the evidence, I **FIND** that the testimony presented by Klinghoffer that she was trying to assist Barnes on September 21, 2016 because she believed Barnes may have confused FMLA paperwork with ADA accommodation paperwork lacked credibility. Barnes had been wearing sneakers every day for almost two years and had been given an accommodating work chair. The alleged infraction of deviation from the dress code did not warrant the urgency of a frantic search for medical records and the need for involving Barnes in three meetings in one day. From the testimony, it was clear that both Klinghoffer and Prochnow were aware that Barnes referenced the existence of a doctor's note that had been given to the former head of Human Resources. After twenty-seven years and numerous surgeries, Barnes clearly had a medical file with DSS. While Klinghoffer did not know whether that file contained appropriate accommodation paperwork, she was more concerned with repeatedly questioning Barnes rather than finding Barnes' missing medical records. I further **FIND** that Barnes' disbelief that her supervisors were only trying to help her has a greater "ring of truth" than the scenario offered by respondent. Klinghoffer's testimony was geared to the ADA accommodation process. It was never clear if she intended to find the missing medical records before subjecting Barnes to a repeat of the ADA accommodation process. Barnes also disputed the testimony by all three supervisors, Klinghoffer, Jaichner, and Prochnow, that she slammed the door when she left the office. In support of her position, Barnes' claimed that none of her co-workers noticed anything amiss. There was no testimony offered by any of the co-workers about the incident, and the supervisors acknowledged that no one was questioned. Barnes left the meeting, abruptly. She needed to open and close the door to leave the office. Barnes' actions took the supervisors by surprise and their shocked reactions to Barnes' departure was genuine. However, I cannot **FIND** based on the evidence presented whether Barnes intentionally slammed the door or shut it forcefully as she left.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented numerous times during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

1. On August 24, 2016, Barnes included personal and confidential client information in a packet that contained a complaint about unfair treatment in the workplace and disseminated this information to third parties without authorization.

2. Barnes utilized county property to write her complaint and removed county property in the form of privileged and confidential information from her workplace without authorization.

3. On August 23, 2016, Barnes logged off her county computer at 5:26 p.m., one hour past her 4:30 p.m. assigned end of day.

4. In November 2014, Barnes submitted a doctor's note to Human Resources and received an ADA accommodation form that was completed by Barnes' doctor. (P-2.) Thereafter, the County provided Barnes with an accommodating chair and allowed Barnes to wear sneakers to work.

5. On September 21, 2016, Barnes was questioned by two supervisors, Prochnow and Klinghoffer, about her authorization to wear sneakers in the workplace.

6. On September 21, 2016, Klinghoffer could not locate Barnes' medical records that should have been maintained by the County within its Human Resources department.

7. On September 21, 2016, Barnes was summoned to a third meeting regarding her wearing sneakers. When Barnes entered the office, there were three supervisors, Klinghoffer, Prochnow, and Jaichner, already present. Before anyone

spoke, Barnes stated that she intended to record the meeting on her phone. Klinghoffer told Barnes that recording the meeting was not permitted. Barnes replied that the meeting was not going to happen and she abruptly left the office.

8. After September 21, 2016, Barnes continued to wear sneakers to work.

LEGAL DISCUSSION

The Civil Service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. Super. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory, and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provision of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employments. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21; N.J.A.C. 4A:2-14(a). The County bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

CONCLUSIONS OF LAW

FNDA- November 9, 2016

Barnes received a twenty-day suspension after being charged with insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); Neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); Misuse of public property, N.J.A.C. 4A:2-2.3(a)(8); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 104, Business ethics and conduct; County Policy 181, Confidentiality; County Policy 516, Computer and email usage; and County Policy 701, Employee conduct and work rules. Although the same specifications support each of the charges and they are not compartmentalized, I will discuss each charge in turn.

Barnes was charged with insubordination. Black's Law Dictionary 802 (7th ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Barnes was charged with delivering a packet that contained confidential client information and utilizing county property to generate the documents contained in the packet. In support of the insubordination charge, the County relied on the letter from Director Tragno dated May 11, 2016. The contents of that letter contained a directive informing Barnes to immediately desist from using her work computer systems to present her grievances and to stop misusing county property. The County provided sufficient information to show that Director Tragno sent this email. However, I accepted as credible Barnes' testimony that she never saw the email; therefore, the emailed letter, in this instance, did not provide adequate notice of a specific order or directive to Barnes that was disobeyed. In addition, there can be no issue with Barnes' right as an aggrieved

employee to file a complaint of disparate treatment. While the County expressed concern with the tone of Barnes' emails and the nature of her complaints, these actions do not meet the definition of insubordination. Therefore, I **CONCLUDE** that the County did not produce sufficient evidence to support the charge of insubordination under N.J.A.C. 4A:2-2.3(a)(2) by a preponderance of the credible evidence. The charge of insubordination is **DISMISSED**.

The next charge was conduct unbecoming a public employee. This charge is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Scheibener testified that she was aware, in her capacity as Executive Consultant, that the County had concerns about Barnes' use of county property, specifically, her use of emails to lodge complaints. She also testified that she had knowledge of certain complaints made by Barnes that were investigated by DSS. However, when asked on cross-examination, Scheibener stated that Barnes had never been disrespectful. Thomas, who was charged with investigating this incident, also testified that Barnes had never been disrespectful to her during any of their meetings. Barnes' misuse of confidential client information, which is the gravamen of the complaint, was addressed to the Freeholders and County Officials. It was not disseminated to the public or made public by Barnes. Therefore, I **CONCLUDE** that the County did not produce sufficient evidence to support the charge of conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6) by a preponderance of the credible evidence. The charge is **DISMISSED**.

Barnes was also charged with neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that an "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009),

http://njlaw.rutgers.edu/collections/oal/. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "negligent" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). There is no doubt that preserving client confidential information was an essential element of Barnes' duties. Therefore, I **CONCLUDE** that the County has met its burden of proving by a preponderance of the credible evidence that Barnes' conduct constituted neglect of duty.

Barnes was also charged with misuse of public property under N.J.A.C. 4A:2-2.3(a)(8). This phrase can be understood to mean the unauthorized use of property owned, leased or otherwise acquired by a governmental or official entity, which is provided to employees to assist them in the performance of their official duties in carrying out the mission of the entity, other than such incidental or minimal use not unexpected by the employer. Such property can include vehicles, computers, copiers, telephones, uniforms, etc. Barnes copied and disseminated call center records in violation of County Policy 104, 181, and 701. Barnes prepared her Complaint that included call center records on August 23, 2016. The County records indicated that Barnes logged off her computer at 5:26 p.m. that evening; therefore, the evidence shows that Barnes stayed after hours to use county property to prepare her complaint about disparate treatment. I am mindful of the fact that Barnes did not use public property for personal reasons; however, her taking and copying a client's confidential information and computer use after work hours were not authorized. Therefore, I **CONCLUDE** that the County has met its burden of proving by a preponderance of the credible evidence that Barnes' misused public property.

Barnes was also charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Specifically, Barnes was charged with the following employee policy violations: County Policy 104, Business ethics and conduct; County Policy 181, Confidentiality; County Policy 516, Computer and email usage; and County Policy 701, Employee conduct and work rules.

Policy 104 prohibits the taking of materials from the worksite for any purpose. As discussed above, I **FIND** that Barnes took materials from her worksite. Therefore, I **CONCLUDE** that Barnes violated this policy.

Policy 181 states that all client information is classified as confidential and may not be copied or removed from the premises. As discussed above, I **FIND** that Barnes copied and removed client information from her worksite. Therefore, I **CONCLUDE** that Barnes violated this policy.

Policy 516 regulates computer and email usage. Barnes is charged with using her county computer to write her letter of complaint. The testimony from Scheibener indicated that Barnes used her work email to present complaints or grievances and that the County was concerned by the tone of those emails. The only letter written by Barnes, for my consideration, is her complaint dated August 23, 2016. I note that Policy 104 invites employees to discuss concerns with their supervisors, contact the County Administrator's Office, or the Personnel Department. Barnes used her county computer to lodge a complaint relating to an event that transpired during working hours on August 23, 2016. In the letter, Barnes wrote that she was using her lunch; therefore, she was not on county time. Although it was established by the County that Barnes stayed after hours to complete her packet on August 23, 2016, that conduct is not specifically addressed in Policy 516. Significantly, Thomas, the investigator for OPS who received the letter, described it as a letter of complaint wherein Barnes stated that she was being singled out and disrespected by her supervisors. Therefore, I **CONCLUDE** that Barnes did not violate the County's computer and email usage policy by using her county computer to type a complaint against her supervisors on August 23, 2016.

Policy 701 regulates employee conduct and specifies certain work rules. Among the listed examples are: unauthorized use of county-owned equipment and unauthorized disclosure of confidential information. As discussed above, I **CONCLUDE** that Barnes violated both those policies.

Therefore, I **CONCLUDE** that, after consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) limited to Policy 104, 181,

and 701, the County has met its burden of proving by a preponderance of the credible evidence the charge of other sufficient cause and violations of Policy 104, 181, and 701.

Minor Disciplinary Action

Barnes received a three-day suspension for the following sustained charges: Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 722, Workplace etiquette; and County Policy 701, Employee conduct and work rules.

Regarding the events that transpired on September 21, 2016, I accepted Barnes' testimony as having the greater "ring of truth." Prior to September 21, 2016, Barnes had been wearing sneakers for two years without incident pursuant to a 2014 ADA accommodation. The County charged Barnes with being insubordinate for wearing sneakers in the workplace without approval. (R-3 and 4.) To support this charge, the County presented testimony that Barnes' paperwork and medical files could not be found on the day in question. The concern about whether Barnes had the appropriate doctor's note could have been rectified by allotting more time to locate the missing records or by asking Barnes to produce her documentation in a fair and appropriate manner. The County also charged Barnes with conduct unbecoming a public employee for what the County deemed as "gross misconduct" (R-3) and behavior that damages the workplace morale and created an unprofessional working environment. To support this charge, the County presented undisputed testimony that when Barnes was told she could not tape the third meeting of the day, she left the meeting and closed the door with enough force that it slammed. Barnes' behavior shocked the three supervisors. However, the supervisors never considered how intimidating it is for an employee to be summoned into a closed office with three supervisors for a third meeting in one day. This occurred just seven days after Barnes had been notified of her twenty-day suspension for an incident involving treatment by these same supervisors. A third meeting with three supervisors in one day to discuss paperwork for sneakers that she had been wearing for two years could easily be perceived as hostile. There was no evidence presented by the County that other employees in the call center were even

aware of what had transpired. In addition, Scheibener testified that she only discussed the incident with the supervisors; she never interviewed Barnes about what happened that day. I reviewed County Policy 701, intended to promote a respectful workplace environment, and County Policy 722, intended to promote courtesy and respect among all employees. From the testimony presented and the description of Barnes' conduct on September 21, 2016, I do not find that Barnes violated either policy by walking out of a meeting that appeared hostile. Therefore, I **CONCLUDE** that the County did not prove by a preponderance of the credible evidence insubordination, conduct unbecoming a public employee, and violations of Policy 701 and 722. These charges are **DISMISSED.**

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19. Factors determining the degree of discipline include the employee's work history, his prior disciplinary record and the gravity of the misconduct.

In addition to the two matters on appeal herein, Barnes only received a Notice of Counseling dated October 18, 2016 for an incident that occurred in the call center on September 14, 2016 for inappropriate behavior after accusing Supervisor Prochnow of discriminating behavior. She had no other prior disciplinary history.

In mitigation, Barnes had worked for the County for over twenty-seven years with no prior disciplinary history until the events herein. Barnes was very distressed about her feelings of disparate treatment by her supervisors. From the contents of her letter of complaint dated August 23, 2016, she felt that she was being singled out and treated unfairly. A further mitigating factor is that I did not sustain all the charges.

However, an aggravating factor is the seriousness of any breach of confidential information in the workplace. Having found that Barnes committed the violations set forth above, and having considered the aggravating and mitigating factors, I

CONCLUDE that the proper penalty must remain the twenty-day suspension for the breach of confidential information.

Based on my finding that the County did not support the charges for the minor disciplinary action, I **CONCLUDE** that no penalty is warranted.

ORDER

Regarding the twenty-day suspension, I **CONCLUDE** that the County has sustained its burden of proof as to the following charges: N.J.A.C. 4A:2-2.3(a)(7), Neglect of duty; N.J.A.C. 4A:2-2.3(a)(8), Misuse of public property; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause, including violations of Policy 104, 181, and 701. Accordingly, I **ORDER** that the action of the County in suspending Barnes for twenty-days is **AFFIRMED.**

Regarding the three-day suspension, I **CONCLUDE** that the County has not sustained its burden of proof on any of the charges. Accordingly, I **ORDER** that the action of the County in suspending Barnes for three days in **REVERSED**. Barnes is entitled to back pay if the penalty has already been served, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10 for the three-day suspension.

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

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

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

March 22, 2018
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: March 22, 2018

Date Mailed to Parties: March 22, 2018

cmo

APPENDIX

PWITNESSES

For Appellant:

Bernacine M. Barnes

For Respondent:

Lorraine Scheibener
Gwendolyn Thomas
Diane Prochnow
Amy Klinghoffer
Robert Jaichner

EXHIBITS

For Appellant:

P-1 Not admitted
P-2 November 2014 ADA Accommodation paperwork

For Respondent:

R-1 FNDA 20-day suspension
R-2 PNDA 20-day suspension
R-3 Minor Disciplinary Action Results
R-4 Minor Disciplinary Action Notice
R-5 County Information Sheet
R-6 Job specifications
R-7 May 11, 2016 letter (not admitted as notice)
R-8 Memorandum from Thomas
R-9 Statement from Echevestre

R-10 Statement from Hazel

R-11 DSS client records

R-12 Statement from Prochnow (not admitted)

R-13 Employee Guide to Policies

R-14 Acknowledgement Form

R-15 Sign-in Sheet

R-16 Admissions

R-17 Letter from Rosenstein

R-18 Notice of Counseling (not admitted – progressive discipline)

R-19 County metadata showing email transmittal

5-2-18

A-3

STATE OF NEW JERSEY

In the Matter of Neila Clitus
New Jersey Veterans Memorial Home
at Paramus, Department of Military
and Veterans Affairs

CSC DKT. NO. 2015-3110
OAL DKT. NO. CSV 07691-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 4, 2018 BW

The appeal of Neila Clitus, Human Services Technician, New Jersey Veterans Memorial Home at Paramus, Department of Military and Veterans Affairs, removal effective September 29, 2014, on charges, were heard by Administrative Law Judge Caridad F. Rigo, who rendered her initial decision on March 26, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 2, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Neila Clitus.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07691-15
AGENCY DKT. NO. 2015-3110

IN THE MATTER OF NEILA CLITUS,
NEW JERSEY VETERANS MEMORIAL HOME,
PARAMUS, DEPARTMENT OF MILITARY
AND VETERANS AFFAIRS.

Amie DiCola, Esq., for petitioner, (Fusco & Macaluso Partners, attorneys)

Elizabeth A. Davies, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 12, 2018 Decided: March 26, 2018

BEFORE **CARIDAD F. RIGO**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals her removal from the position of human services technician (HST) at the New Jersey Veterans Memorial Home at Paramus, Department of Military and Veterans Affairs on a charge of neglect of duty, loafing, idleness or willful failure to devote attention to tasks, which could result in danger to persons or property in violation of N.J.A.C. 4A:2-2.3(a)(7). And, the negligent contribution to an elopement or escape of

a resident. The incident that brought about these charges took place on September 8, 2014.

The matter was transmitted to the Office of Administrative Law (OAL) on May 28, 2015, for a hearing as a contested case. The matter was heard on January 11, 2016, February 19, 2016, May 9, 2016, June 14, 2016, November 15, 2016, January 5, 2017, and September 19, 2017. The petitioner changed her counsel three times during this time and one of her attorneys had to withdraw due to an illness.

ISSUES

Was appellant neglectful of her duties? Did such neglect of duty result in danger to persons and property? Was appellant's removal appropriate?

FACTUAL DISCUSSION

Pamela Kovacs

The first witness to testify for respondent was Pamela Kovacs. She is employed by the respondent as assistant chief executive officer for clinical services of the facility since June 2015. Prior to that position she was director of nursing services, in total she has worked for respondent 4.5 years. At the time of the incident, September 2014, she was the director of nursing.

The Veterans Memorial Home in Paramus is a long-term-care facility for veterans and/or spouses or for dependent children of a veteran.

Kovacs testified that she was notified on September 8, 2014, that a patient had eloped from his room. According to Kovacs an elopement is a serious event that requires reporting to the N.J. Department of Health. The elopement took place at K-L unit. Kovacs said she interviewed the staff members in the unit at the time, she also went to the area of the elopement. The incident was documented in respondent's

exhibit R-13. After the investigation was completed a final report was completed and that is exhibit R-12, this report was rendered by this witness.

Kovacs said that K-L unit has an ongoing video camera of the nurses' station and that she looked at the video. Kovacs noted appellant spent at least six hours of her shift in the Break Room. The video records all activities that take place in the nursing stations. She especially noted that Appellant was in the Break Room during the time the elopement took place. The elopement took place during the 11:00 p.m. to 7:00 a.m. shift. Kovacs furthered that she viewed the video from 10:45 p.m., until 7:30 a.m. Five people generally work the 11 p.m. to 7:00 a.m. shift. There is one charge nurse, a registered nurse, and four nurse assistants.

The video recording was played over the course of four hearing days that Kovacs testified. In the course of Kovacs's testimony, she identified appellant as well as other employees. Kovacs also identified the area of the nurses' station identifying the various room doors.

The resident that eloped from K-L unit was spotted between 3:10-3:15 a.m. by other staff in the other unit. The resident was spotted at the R-S unit and found outside the building. The R-S unit is on the first floor and the K-L unit is on the second floor. (See R-5, a diagram of both floors.)

Kovacs testified that as she viewed the video during the 11 p.m. to 7:00 a.m., shift she noted that appellant came into the nurses' station at 11:21 p.m. and that at 11:22 p.m., appellant went into the Break Room. Kovacs noted that appellant reported to work twenty-one minutes late. Kovacs furthered that appellant exited the Break Room at 11:34 p.m. Kovacs said that she saw appellant enter the Nourishment Room, which is a room that has a refrigerator for staff use and she returns to the Break Room. At 11:36 p.m. appellant exits Break Room and returns to the Nourishment Room. At 11:38 p.m., appellant exits Nourishment Room and returns to the Break Room. Appellant exits Break Room and stands in the north side of the nurses' station by the door of the Nourishment Room and she is there until 11:49 p.m., when she returns to the Break Room until 11:54 p.m. The Break Room is for staff to take their breaks.

Kovacs stated that appellant was in and out of the Break Room and the Nourishment Room for approximately 2.5 hours after having clocked in to work at 11:21 p.m. Kovacs stated that at 2:31 a.m., appellant leaves the nurses station and she cannot be seen on the video. Appellant is next seen entering the Linen Room at 3:19 a.m. Kovacs furthered that between 3:19 a.m. and 3:38 a.m. appellant enters and leaves the Break Room and the Nourishment Room numerous times.

Kovacs reported that the video shows that at 3:38 a.m. appellant exits the Break Room with a book in her hand, she puts the book down, and goes outside the nurses' station returns and goes back into the Break Room. In the Break Room she turns off the light leaves the door open and does not emerge from that room until fifty-six minutes later at 4:34 a.m. At 4:55 a.m., appellant exits the Break Room and goes to the K wing hallway and at 4:56 a.m., she returns to the Break Room. Appellant exits the Break Room at around 5:13 a.m., and enters the Nourishment Room, she exits that room at 5:14 a.m., and goes to the bathroom.

Kovacs furthered that at about 3:15 a.m., a patient escaped from his room. The patient was eighty-eight years old, had Alzheimer's disease, and numerous other serious diseases. Cognitively the patient was confused and his ability to make decisions were moderately impaired. Kovacs stated that this particular patient was not assigned to appellant; however, an alarm was sounded and all personnel was to assist in looking for the patient but appellant was nowhere to be found during this emergent moment. According to Kovacs the video indicates that appellant was in the Break Room for six hours out of her assigned eight-hour shift, this includes the fact that appellant was twenty-one minutes late in starting her shift.

Under cross-examination Kovacs stated the reason why appellant was being disciplined was because of the amount of time appellant spent in the Break Room. And, because appellant was twenty-one minutes late she missed getting the reports from the prior shift workers. Reports are done at 11:00 p.m. Kovacs also said that procedure called for nurse assistants to do checks on patients every two hours. Kovacs noted that appellant did not do any patient checks during her shift. Kovacs said appellant was not

around to assist with finding the patient that had escaped. According to Kovacs everyone in the unit is responsible for all patients.

Almalyn Robinson

Almalyn Robinson at the time of her testimony worked as a nurse assistant/nurse's aide, also known as a Human Services Technician (HST). She was assigned fifteen patients. She has worked in this unit for twenty-eight years and works the 11:00 p.m. to 7:00 a.m. shift.

Robinson explained that part of her job is to do rounds every two hours. Rounds is the checking of patients making sure they are safe and clean. When an HST does rounds you are to check everybody not just the patients that have been assigned to you. Robinson furthered that between rounds you are to refill supplies, check the stock, and complete patient's charts.

Under cross-examination she acknowledged that she was suspended for forty days because it was her patient that eloped; she said she was on break when the patient escaped. She said when she left for her break all three HST's were in the nurses' station and they were responsible for her patient.

Peasama Joseph

Peasama Joseph was employed by the respondent for seventeen years, she worked the 11:00 p.m. to 7:00 a.m., shift. She is an HST. Her co-worker HST on that shift were the appellant, Olga Delgado, and Almalyn Robinson. She said that her nurse supervisor/charge nurse was Jane Semifranco. It is the charge nurse that provides the medications as ordered by the doctor and she too makes rounds.

Olga Delgado

Olga Delgado is employed at respondent's facility as an HST. She works the 11:00 p.m. to 7:00 a.m. shift. She recalls the night that the resident eloped and recalls

that appellant was in the unit. She stated that whoever is not on a break is responsible for looking after the patients. She was suspended for sixty days as a result of the patient escaping.

Neila Clitus

Appellant Neila Clitus testified on her own behalf. She started working for respondent in January 2000, as a Human Services Technician (HST). She admitted that she received training on how to do her job and how to review records and chart a resident's file.

Appellant said that every day when she got to work she would receive her assignments for her shift, she was assigned K wing. She said she was also considered a "floater" so her assignments were even more fluid. Appellant stated that on the night of September 8, 2014, she came in at 11:00 p.m., and went directly to K wing to look into her residents. She explained that she checked thirty residents as she came in that night before entering the nurses' station.

She furthered that the time she spent in the Break Room was because she was reading the resident's care plans. She said that is where she sat and reviewed all of her care plans. She furthered that her director of nursing (DON) encouraged her to review care plans. Specifically, she stated she read fifteen care plans. She said no one ever told her to leave the Break Room. She said the Break Room has one table with chairs that have no arm rests. The room also has wall-to-wall lockers.

According to appellant the eloper was an Alzheimer's resident and did not belong there. She said an Alzheimer's resident belongs in the T-V unit not in the K-L unit.

Under cross-examination she reiterated that she had been assigned fifteen residents that shift. She denied that there was a mandatory two-hour check. According to her the care plan books are not kept in the Break Room that she had to bring them into the Break Room to read them.

FINDINGS AND LEGAL DISCUSSION

In an appeal such as this from a disciplinary action or ruling by an appointing authority, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). That burden is to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Based upon the testimony of the witnesses and the documentary evidence submitted at the hearing I **FIND**, that:

1. Appellant worked as a Human Services Technician (HST) at the N.J. Veterans Memorial Home in Paramus, New Jersey.
2. Appellant on September 8, 2014, was assigned to work the 11:00 p.m. to 7:00 a.m. shift on K-L unit. She reported to work at 11:21 p.m., arriving after the shift reporting time.
3. Appellant spent six hours in the Break Room out of the eight hours she was to be actively working completing her job duties.
4. Appellant failed to make the required resident check every two hours.
5. Appellant failed to make any rounds on all residents in K-L unit.
6. Appellant was not available to her peers and did not work for six hours out of her eight-hour shift.
7. Appellant failed to assist and ensure the safety and security of the residents on K-L unit.

I **FIND** nothing in the testimony or the documents that substantiated or supported appellant's arguments that she did not have to make rounds every two hours because the residents told her not to disturb them. Appellant's self-serving testimony contradicts the testimony of Kovacs and Robinson who explained in very clear terms the responsibilities of an HST. I **FIND** appellant's testimony incredible.

I **FIND** that appellant neglected her duty by being idle when she should have been doing her assigned tasks. I **FIND** appellant violated the work rules, she neglected her residents, and showed a bold disregard for the health and welfare of the elderly veterans who were placed in her care.

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6. The Act also recognizes that the public policy of this State is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline and termination of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). The charges in this matter may be considered violations of N.J.A.C. 4A:2-2.3(a)(1), such as incompetency, inefficiency or failure to perform duties, and neglect of duty. The Final Notice of Disciplinary Action found appellant guilty of the charges brought against her. (See R-1.)

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty in disciplining a civil servant. The penalty should be reasonable and relative to the charge. W. New York v. Bock, 38 N.J. 500, 523-24 (1962).

In this matter, appellant was employed at New Jersey Veterans Memorial Home-Paramus for a period of approximately fourteen years. She was a seasoned HST. Appellant had been trained numerous times on various aspects of caring for a resident at such a facility, a nursing facility that provides direct long-term care for veterans and their spouses.

Appellant's disciplinary record was entered in evidence at the hearing. (R-21, R-22, and R-23.) The disciplinary record shows a series of incidents that required respondent to discipline appellant for her failure to observe the rules and policy of her job. For example, leaving the work area without permission and refusing to accept a regular assignment.

I believe that appellant's conduct in this matter was so irresponsible and flagrant as to justify her removal. Where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public to be served, good cause exists for removal. Golaine v. Cardinale, 142 N.J. Super. 385, aff'd, 163 N.J. Super. 453 (App. Div. 1978). In this case appellant was obligated to provide the utmost of diligence in providing care to the residents of the nursing home who essentially are helpless. Therefore, I **CONCLUDE** that appellant's removal from her position as a Human Services Technician at the N.J. Veterans Memorial Home-Paramus effective September 29, 2014, should be affirmed.

ORDER

Based on the above findings It is hereby **ORDERED** that appellant's removal as a Human Services Technician at N.J. Veterans Memorial Home-Paramus effective September 29, 2014, is hereby **AFFIRMED** and appellant's appeal is hereby **DISMISSED**.

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

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

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

March 26, 2018
DATE

CARIDAD F. RIGO, ALJ t/a

Date Received at Agency: March 26, 2018

Date Mailed to Parties: MAR 27 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Appellant:

Neila Clitus

For Respondent:

Kamala Kovacs

Almalyn Robinson

Peasama Joseph

Olga Delgado

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Final Notice of Disciplinary Action dated 4/27/15

R-2 Preliminary Notice of Disciplinary Action dated 12/09/14

R-3 Chronological Timeline of Appellant's activities

R-5 Building 2 Floor Plan

R-7 Statements of Jane Semifranco dated 9/08/14

R-8 Residency Responsibility List

R-10 Statement of Kamala Kovacs dated 9/8/14

R-11 11:00 p.m. to 7:00 a.m. thirty-minute rounds dated 9/08/14

R-12 Final Investigation Report dated 9/16/14

R-13 Incident Case Report

R-15 Neila Clitus PAR for 2014

R-19 Resident's Rights Handbook

R-21 Record of Counselling or Oral Warning dated 1/26/04

R-22 Notice of Official Reprimand dated 9/25/02

R-23 Record of Written Warning dated 3/15/02

R-24 Video of the Nurses' Station on 9/8/14

R-25 Corrective and Disciplinary Action Booklet

5-2-18

A-4

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of Juan Cortes, Jersey City School District

CSC Docket No. 2017-3112
OAL Docket No. CSV 05253-17

Remand to the
Office of Administrative Law

ISSUED: MAY 25, 2018 (ABR)

The appeal of Juan Cortes, a Boiler Operator with the Jersey City School District, of his 90 working day suspension, on charges, was heard by Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on March 19, 2018. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 2, 2018, ordered that the matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appellant, a male, was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant had sexually harassed S.W., a female Custodial Worker, on multiple occasions. Upon the appellant's appeal to the Commission, the matter was transmitted to the OAL as a contested case.

At the OAL, only four witnesses testified: the appellant; Henry Padua, a Maintenance Supervisor; Jody Walker, Esq., an attorney retained by the appointing authority to investigate S.W.'s complaint; and Celeste Williams, Chief of Talent, who supervised the Affirmative Action Office and the discipline of instructional and non-instructional employees. Padua had received S.W.'s complaint and initially

investigated the matter. Padua interviewed four witnesses[1] before the matter was referred to the appointing authority's Human Resources Department. Padua recorded S.W.'s statement with her consent. Walker was subsequently retained by the appointing authority to investigate the matter. During her investigation, she interviewed the appellant, S.W., Serrano, Santiago and Smith. She also interviewed Michael Charles, a Boiler Operator, along with Glenda Jennings and Robert O'Connor, the Principal and the Assistant Principal, respectively, at P.S. #41, where the incidents were alleged to have occurred. Padua and Walker testified that Serrano and Santiago claimed that the appellant had asked Serrano if he was having sex with S.W. and he told Serrano that if he was having sex with S.W., then the rest of them should also get to have sex with her. During her interview with Padua, Smith denied hearing those comments. However, during her interview with Walker, Smith indicated that she heard the appellant ask Serrano if he was having sex with S.W. Walker testified that Serrano and Santiago also stated that they witnessed another incident where the appellant leered at S.W.'s genital area in a sexually suggestive manner. The ALJ noted that although S.W., Serrano, Smith and Santiago were witnesses to alleged incidents of harassment, none of them testified. The ALJ also observed that Smith had given conflicting statements about what she did and did not observe to Walker and Padua. Accordingly, the ALJ found that the only evidence against Cortes that was presented was hearsay and that no legally competent evidence existed in the matter to support the finding that the appellant sexually harassed S.W. Therefore, the ALJ concluded that the appointing authority failed to prove by a preponderance of evidence that the appellant was guilty of the charges. Accordingly, the ALJ recommended that the appellant's 90 working day suspension be reversed.

In its exceptions, the appointing authority argues, in relevant part, that the ALJ failed to recognize that Padua's testimony supported a finding of fact that Santiago was present when the appellant asked Serrano if he had sexual relations with S.W. and it maintains that such a finding could have changed the outcome of the ALJ's initial decision. Additionally, the appointing authority maintains that the credible testimony of Walker and Padua provided a residuum of legally competent evidence that was sufficient to support a finding of fact that the appellant asked Serrano if he was having sex with S.W. It maintains that because the ALJ did not find that the admission of that hearsay evidence would have consumed an undue amount of time, created substantial undue prejudice or caused confusion, the ALJ should have weighed its probative value. Finally, it contends that the ALJ failed to accord sufficient probative value to Padua's recording of S.W.'s complaint. Accordingly, it argues that the evidence it presented at the OAL supports the charges and the major suspension it imposed.

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[1] Padua interviewed Peter Serrano, a Head Custodian; Robert Santiago, a Custodial Worker; Maranda Smith, a Custodial Worker; and Leroy Minatee, a Custodial Worker.

Upon its *de novo* review of the record, the Commission finds it necessary to remand this matter so that S.W., Santiago, Serrano and Smith can be called as witnesses. In this regard, it is well established that hearsay evidence is admissible before the OAL as long as some legally competent evidence exists to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. *See N.J.A.C.* 1:1-15.5(b) (Also known as the Residuum Rule); *See also e.g., Matter of Tenure Hearing of Cowan,* 224 *N.J. Super.* 737 (App. Div. 1988). Based on the current record of this case, the Commission agrees that there was no legally competent evidence to support a finding that the appellant sexually harassed S.W. However, the seriousness of the accusation of significant and repeated instances of sexual harassment cannot be ignored. To reverse the appellant's 90 working day suspension is especially troubling given the fact that the record shows that S.W., Serrano, Santiago and Smith claimed to have witnessed the appellant's conduct and yet were not called to testify at the OAL. The appellant was the only witness to the incidents who testified at the OAL and although he denied staring at S.W.'s genitals, he confirmed that Serrano, Santiago, Minatee and Smith were present when he asked if a relationship existed between Serrano and S.W. because she was not assigned as much work as other staff members.

Thus, the Commission is compelled to invoke its subpoena powers pursuant to *N.J.S.A.* 11A:2-7 which states in pertinent part that:

> The commission may subpoena and require the attendance of witnesses in this State and the production of evidence or documents relevant to any proceeding under this title. Those persons may also administer oaths and take testimony.

Therefore, in the interest of the public and so that justice may be served, the Commission orders that the case be remanded back to the OAL for the appointing authority to call S.W., Serrano, Santiago and Smith as witnesses. The appellant will have the opportunity to cross examine these witnesses. If the appointing authority does not call these witnesses, the Commission authorizes the ALJ, pursuant to her powers under *N.J.A.C.* 1:1-14.6(n), to act in its stead to take the testimony of these witnesses. Without such testimony, the Commission cannot determine whether or not the recommendation of the ALJ to dismiss the charges is appropriate.

ORDER

The Commission orders that this matter be remanded to the OAL for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05253-17
AGENCY DKT NO. N/A

IN THE MATTER OF JUAN CORTEZ,
JERSEY CITY SCHOOL DISTRICT.

Theresa L. Moore, Esq., for petitioner (Riker, Danzig, Scherer, Hyland, Perreti)

Seth Gollin, Esq., for respondent appearing pursuant to N.J.A.C. 1:1-5.5(g)

Record Closed: March 5, 2018 Decided: March 19, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Juan Cortez (Cortez or petitioner), filed an appeal of respondent, Jersey City School District's (JCSD or respondent), ninety-day civil service suspension from the position of Boiler Operator for conduct unbecoming and other sufficient cause for allegations of sexual harassment.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) and filed on April 19, 2017. This matter was heard on October 31, 2017, November 16, 2017, and January 16, 2018. The parties submitted closing briefs on March 5, 2018, on which date the record closed.

STIPULATION OF FACTS

The parties stipulated to the following **FACTS**:

1. On May 25, 1999, petitioner Juan Cortez was appointed by the Jersey City Public Schools as a custodial worker.

2. On June 1, 2016, petitioner was transferred from P.S. #33 to P.S. #41, as a boiler operator on the day shift.

3. On August 19, 2016, a female custodian (S.W.) complained in an email to Peter Serrano of harassment by petitioner at P.S.#41.

4. On August 29, 2016, the School District placed petitioner on administrative leave with pay pending the investigation of S.W.'s complaint by the School District's OAA.

5. On or about November 18, 2016, the OAA investigation was concluded and a report was provided to the School District.

6. On January 3, 2017, the School district brought disciplinary charges against Petitioner based on unbecoming conduct and other sufficient cause, based on the results of the OAA investigation.

7. By letter dated January 10, 2017, an Affirmative Action Officer advised petitioner that a written complaint of sexual harassment by him was received on September 15, 2016, and that an independent investigation was conducted which yielded substantial evidence to support the conclusion that petitioner violated the district policy against sexual harassment.

8. On January 25, 2017, a departmental hearing was held on the charges of unbecoming conduct and other sufficient charge.

9. The School District issued to petitioner a Final Notice of Disciplinary Action dated March 17, 2017.

10. The School District imposed a ninety-day suspension on petitioner for unbecoming conduct, effective March 20, 2017.

11. On or about July 21, 2017, petitioner was reinstated to employment with the School District and assigned as a boiler operated at M.S. #41.

TESTIMONY

Jody Walker

Jody Walker (Walker) is an attorney with the Law Firm of Schwartz, Simon, Edelstein Celso. She has been employed there for three years. Ninety-five percent of her work is in employment law. She has conducted investigations of workplace harassment.

Walker investigated a complaint of sexual harassment made by S.W. against Cortez. She had previously investigated a sexual harassment complaint against Cortez for JCSD. She met with Cortez in regard to the prior allegation. Regarding the prior allegation she did not find enough information to prove the he sexually assaulted the woman in that incident. Hope Blackburn, general counsel for JCSD, requested Walker

conduct this investigation. Walker had an initial meeting with Gary Murphy, the Affirmative Action Officer for JCSD.

S.W. filed a complaint of harassment on September 15, 2016. Walker received a copy of the complaint. S.W. was a custodian at M.S. 41 and Cortez was a boiler operator at M.S. 41 during the summer of 2016. Peter Serrano (Serrano) was the head custodian at M.S. 41. Henry Padua (Padua) was the supervisor of custodial staff for M.S. 41.

On August 19, 2016, S.W. emailed Serrano that she was uncomfortable with Cortez. He would override assignments given to her by the head custodian. He singled her out. She told him to only say hello or good-bye to her and he said that was not good with him. Cortez was placed on administrative leave with pay on August 29, 2016, pending the investigation.

Walker testified that S.W.'s complaint was based on sexual harassment. In the complaint, she also listed affectional sexual orientation as the basis for her complaint, but she stated that was a mistake. S.W. wrote a statement regarding her complaint. She stated that Cortez told the head custodian of S.W. "she gets a lot of privileges—you must be fucking her and if you are fucking her we all need to fuck her." Serrano and Santiago confirmed this comment. Serrano looks at her in an intimidating manner. She knows that she does not take orders from Cortez. On August 16, 2016, S.W. was talking to Mike Charles, the night boiler operator, and Cortez interrupted their conversation to ask why was she always late. Cortez appeared to be attempting to record S.W.

Walker met with Art Youmans, the head of security for JCSD. They interviewed several witnesses together. S.W. was interviewed at MS 41. During the interview S.W. stated that originally, she did not have a problem with Cortez. He told her she was pretty and she was okay with that. He later became aggressive. He would stand in her space and become angry when she spoke to other men. He tried to give orders and

became preoccupied with her when she came to work. He leered at her in sexually suggestive ways. S.W. recalled once when she was sitting with her legs open and Cortez leered at her vaginal area. She did not feel safe with Cortez. There were multiple times that Cortez made S.W. feel uncomfortable. S.W. went to the Affirmative Action Officer to complain of Cortez sexual harassment.

Walker interviewed Henry Padua. Gary Murphy, the Affirmative Action Officer, was present for the interview, which took place at the Board's main office. Padua knew Cortez and that Cortez had a history of conflict with employees. Cortez was assigned to the Board's main office because of a physical confrontation with a student's uncle. In addition, a female custodian stated that Cortez had been aggressive with her. A female custodian complained that Cortez was recording her. Padua spoke to Cortez about recording employees. Padua spoke to Serrano, Santiago, and S.W. Santiago and Serrano confirmed that Cortez asked Serrano if he was having sex with S.W.

Walker interviewed Serrano at MS 41. Serrano stated that Cortez was preoccupied with S.W. and had asked if she had a boyfriend. He talked about how she looked and where she was. Cortez asked Serrano if he was having sex with S.W. and stated that they all needed to have sex with her. Serrano was offended and denied sleeping with S.W. Serrano was present when Cortez was leering at S.W. vaginal area.

Walker interviewed Michael Charles with Youmans present. He knew Cortez. Cortez asked him did S.W. have a boyfriend. Cortez interrupted a conversation between Charles and S.W. S.W. told Cortez to keep it professional and Cortez refused. Cortez then motioned to record S.W.

Walker and Youmans interviewed Santiago at M.S. 41. He had previously known Cortez. Cortez asked about S.W.'s skin and ethnicity. Cortez asked him if S.W. and Serrano were having sex. Youmans stated that he was present when Cortez asked Serrano if Serrano and S.W. were having sex. Santiago saw Cortez leer at S.W.'s vaginal area. It was obvious and made him uncomfortable.

Walker also interviewed Miranda Smith, a female custodian at MS 41. Smith did not hear Cortez comment on S.W.'s appearance or give her orders. She was present when Cortez asked Serrano if he was having sex with S.W. She thought the comment was highly inappropriate. Walker also interviewed Glenda Jennings, the principal of MS. 41. Jennings said that Cortez was a great custodian and she did not know of S.W.'s allegations against Cortez. Cortez told Jennings that Serrano and S.W. were in a relationship. Jennings thought this was strange since Serrano had written up S.W.

Robert O'Connor received a complaint from S.W. regarding Cortez's treatment of her. O'Connor interviewed Cortez at the Board offices. Cortez's union representative was present. Cortez initially denied everything. He later admitted that he called S.W. pretty and asking Serrano if he and S.W. were in a relationship. O'Connor did not ask Cortez to supervise the staff. Cortez said that S.W. could come in when she wanted and took two weeks off. He was not interested in the other custodians. Cortez spoke to Serrano regarding S.W.'s punctuality, which was odd because Cortez had issues with punctuality.

Cortez called Walker and stated that Serrano and S.W. bullied him. He complained about the bullying to O'Connor. O'Connor denied this. Cortez stated that he was depressed on medication and had anxiety.

There was an incident where Cortez told S.W. to wet-vac the floor that had been stripped. S.W. refused because she did not have to take orders from Cortez. Serrano then asked her to change her footwear. Serrano did not generally give women custodians heavy work.

Walker is familiar with the JCSD's sexual harassment policy. She did not discuss the policy with the people she interviewed. She reviewed Cortez's personnel file. There was a previous complaint by a female custodian against Cortez at P.S. 33. She investigated that complaint. Walker reviewed the notes in the prior complaint as part of this investigation. She also reviewed S.W.'s personal file. S.W. had not filed any other

harassment complaints. She did have disciplines for falsifying a timesheet. Cortez received a written reprimand for an incident that occurred at Ferris High School with a female custodian in 2011. Cortez had exhibited aggressive and violent behavior at work. He had a history of intimidation of coworkers.

Walker concluded that Cortez's behavior violated the policy and created a hostile work environment based on sexual harassment because he leered at S.W., asked if she and Serrano were having sex, and tried to record her. Walker sent a report regarding her findings. She did not participate in Cortez departmental hearing.

Henry Padua

Henry Padua (Padua) is the maintenance supervisor for the Jersey City Board of Education. His office is in the Board's central office. MS 41 is one of the schools that he supervises. In September 2016 S.W. approached him stating she felt uncomfortable and listed complaints. She came to his office to make a statement, which he recorded with her consent. Padua told S.W. to file a complaint. The Board has web training on affirmative action. S.W. was in fear from Cortez and felt threatened by him.

Padua investigated S.W.'s complaint. He spoke to Serrano, Leroy Minatee, Miranda Smith, and Robert Santiago. Serrano stated that Cortez asked about the treatment S.W. received, if Serrano and S.W. were having sex, and if they were he should "share the wealth." Serrano stated that S.W. was not getting special privileges or treated special. When he is at MS 43 Serrano is in charge and gives directions. Minatee and Smith stated they did not hear anything at MS 41 during the summer of 2016. Padua spoke to Cortez within one week of S.W. allegations. He then turned the matter over to his supervisor, Kevin Reilly, who forwarded it to Human Resources. He did not record his interview of Serrano or anyone other than S.W.

S.W.'s allegations regarding when Cortez gave her an order regarding stripping floors and Cortez sticking his chest out were not sexual harassment allegations. Prior

to the allegations Padua knew S.W. She had been disciplined for attendance and work not being up to par. He was involved in S.W. disciplinary hearing and did not believe her.

Celeste Williams

Celeste Williams (Williams) is the chief of talent at JCPS. The title chief of talent was previously chief of Human Resources. She supervised the Affirmative Action Office and discipline of instructional and non-instructional employees. She receives documents of discipline investigations, then works with the legal department to follow-up on disciplinary proceedings. There is zero tolerance for sexual harassment. There is an annual sexual harassment training for all employees by computer with follow up. Gary Murphy is the Affirmative Action Officer for JCPS. Murphy disseminated the sexual harassment policy.

In late August 2016, S.W. submitted a written sexual harassment complaint to Murphy. The complaint included inappropriate things that Cortez did to her and that she felt threatened by Cortez. The complaint was forwarded to Williams and the legal department, who decided to move forward immediately. A letter was issued to Cortez putting him on administrative leave with pay.

Williams received the investigation report then discussed it with the legal department and the superintendent to determine what type of action to take. It was decided to take the action of removal of Cortez. Williams had input into what charges would be brought against Cortez.

The March 17, 2017, Final Decision of Disciplinary Action (FDNA) lists the incorrect incident. It was revised on July 25, 2017. Cortez served a ninety-day suspension. On February 17, 2011, Cortez was given a written and verbal reprimand.

Juan Cortez

Cortez has worked for JCPS for nineteen years. He was a custodian for the first seventeen years and he has been a boiler operator for the past two years. Beginning in July of 2016 he was a boiler operator at MS 41. Serrano was the head custodian. Cortez was not the supervisor of the custodians, Serrano was their supervisor. At one point Serrano left Cortez in charge of stripping the floor in the building on the second floor. Cortez told the custodians to move the boxes around the elevator. There was an electrician present who was talking to S. W. while the others were working. On that day S.W. arrived late wearing sandals, which are not appropriate footwear for stripping floors. While the others were working stripping the floor, S.W. was playing with her phone. S.W. eventually changed into sneakers and began working. She was upset.

The hours of work were 6:00 a.m. to 2:00 p.m. Cortez stated that he worked with Robert, Leroy, Miranda, and S.W. Leroy and S.W. always came in late. Serrano and S.W. usually came in between at 9:30 and 10:00 a.m. S.W. did not always come to work. Cortez recalled a time when S.W. was out of work for two weeks. Cortez told Serrano. Serrano told the Board that S.W. was sick. Serrano and S.W. were upset by this.

S.W. would bring Serrano lunch and mainly worked with him. Cortez told Serrano it was not appropriate to let one custodian do whatever they wanted while the others had to work. Serrano stated that he was the boss.

When Vice Principal O'Connor returned from vacation, Cortez told him about the attendance issues of Serrano, Robert, and S.W. O'Connor said that he would let it go.

Cortez was never trained in the JCPS sexual harassment policy. He had not seen the sexual harassment policy before the summer of 2016.

Cortez did not record S.W. He did not walk any differently around her than he did around anyone else. Cortez later asked S.W. a question while she was talking to Charles. She answered the question which ended the conversation. He never stared or leered at S.W.'s vaginal area.

Cortez previously worked in PS 22, PS 23, PS 33, PS 41, and Ferris High School. He requested a transfer from all of the above schools except PS 33. At PS 33, Cortez had a problem with co-workers not coming in on time and not following directions. At PS 23 the Principal Ayala did not want him to leave. He never saw the letter from Ayala regarding his transfer. The boiler operator hit him at PS 23, which Cortez reported to the police. He was promoted to boiler operator at PS 33. He was not written up by the principal at Ferris High School. He did receive a letter regarding taking a key.

Serrano, Leroy, Robert, and Miranda were in the office when Cortez asked Serrano if anything was going on between Serrano and S.W. because she was not doing as much work as the others.

Cortez believed that S.W.'s problem with him was with the floor-stripping incident and her falsifying of her sign-in sheets. S.W. never mentioned sexual harassment to him. She made fun of the way he spoke.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

In September 2016, S.W. made complaints to Padua regarding Cortez. Her complaints were:

1. She was on a fifteen-minute break speaking to the electrician when Cortez inserted himself between her and the electrician and told her to clean a certain area. There were other workers present but he only told her to clean.

2. Cortez told her to strip the floor. They argued and Serrano diffused the argument and told her to change her footwear.

3. She was speaking to Charles when Cortez asked her was she working at school fifteen. She said "no" and continued talking to Charles when Cortez asked her why was she always late.

4. Cortez told Serrano that S.W. gets special privileges so she must be sleeping with him.

5. S.W. did not feel comfortable around Cortez.

S.W. was subpoenaed to testify. On two occasions she failed to appear. Serrano and Santiago, who it is alleged heard Cortez say that Serrano and S.W. were having sex and he should share, and allegedly saw Cortez leer at S.W.'s vaginal area did not testify in this matter. Smith appears to have told Walker that she heard Cortez ask Serrano if he and S.W. were having sex. Smith told Padua that she did not hear anything. Smith did not testify in this matter.

The hours for custodians in the summer at MS 41 are 6:00 a.m. to 2:00 p.m. The head custodian at MS 41 is Peter Serrano. Cortez is the boiler operator. The head custodian oversees the building. If the head custodian is not in the boiler operator is in charge. When the head custodian gives an order to a custodian, the boiler operator cannot override the order.

Serrano told Cortez to begin stripping the floors. On that day S.W. was late and had on sandals which are not appropriate for stripping floors. Cortez told her to start stripping the floor. S.W. argued with Cortez and Serrano intervened. S.W. changed into sneakers and began stripping the floors but was upset. Cortez asked Serrano if he

and S.W. were in a relationship because S.W. was given preferential treatment by Serrano.

Cortez received a written reprimand for conduct unbecoming and other sufficient cause on June 20, 2016. On February 18, 2011, and February 25, 2011, Cortez received a warning to follow all directives from his immediate supervisors.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of conduct unbecoming a public employee and other sufficient cause are **not** sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

"Unbecoming conduct" is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy

public respect and confidences in the delivery of governmental services. The conduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

N.J.A.C. 1:1-15.5, known as the residuum rule, states as follows:

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5(b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis's foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

> It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) . . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added

> probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

In this matter JCSD alleged that Cortez sexually harassed S.W. There was no testimony from anyone who was present during any of the alleged harassment. Although S.W. filed a complaint and spoke to Padua, she did not testify in this matter. She was scheduled to testify on two separate days and failed to appear each time. Serrano and Santiago, who spoke to Walker stating that they heard Cortez ask Serrano if he was having sex with S.W. and he should share her, and that they saw Cortez leer at S.W. again did not testify in this matter. At no time did respondent have an opportunity to cross-examine S.W., Serrano or Santiago regarding their statements and observations. Smith gave conflicting statements to Walker and Padua and again she did not testify in this matter. The evidence against Cortez is hearsay. There is no legally competent evidence in this matter to support the ultimate finding of fact.

Prevailing employees in a civil service appeal are entitled to an award of back pay, benefits, seniority, and reasonable attorney fees "as provided by rule." N.J.S.A. 11A:2-22. Pursuant to its broad authority to adopt rules for effective implementation of a comprehensive personnel-management system, the Civil Service Commission has discretionary power to deduct mitigation from a back-pay award. N.J.S.A. 11A:2-6(d); cf. Mason v. Civil Serv. Comm'n, 51 N.J. 115 (1968) (interpreting predecessor legislation as authorizing the Civil Service Commission to require mitigation of back pay upon restoration to employment).

Under the circumstances, discipline is not appropriate; I **CONCLUDE** that the penalty of ninety-day suspension is not supported by the facts and evidence in this matter.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of Jersey City Public Schools that Juan Cortez be suspended for ninety days is **REVERSED**.

I further **ORDER** that appellant be awarded any back pay associated with the ninety-day suspension.

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

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

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

3-19-18
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: March 19, 2018

Date Mailed to Parties: MAR 20 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

WITNESSES

For Petitioner:

Juan Cortez

For Respondent:

Jody Walker

Henry Padua

Celeste Williams

EXHIBITS

For Petitioner:

P-1 Final Notice of Disciplinary Action of S.W. dated April 22, 2016

For Respondent:

R-1 Email from S.W. To Peter Serrano dated August 19, 2016

R-2 Harassment Compiaint Form of S.W.

R-2(a) Statement of S.W.

R-3 Nondiscrimination/Affirmative Action Policy dated March 13, 2008

R-4 Final Notice of Disciplinary Action of Juan Cortez dated June 20, 2016

R-5 Letter from Frank Piccillo to Cortez dated March 11, 2015

R-6 Written Warning to Cortez dated February 25, 2011

R-7 Written Warning to Cortez dated February 18, 2011

R-8 Memo from Flavio Rubano to Jeannette Ayala dated November 3, 2006

R-9 Letter from Cortez dated August 21, 2006

R-10 Transcript of Taped recording of S.W. dated October 31, 2017

R-11 Letter to Cortez from Celest Williams dated August 29, 2016

R-12 Preliminary Notice of Disciplinary Action for Juan Cortez dated January 3, 2017

R-13 Letter from Gary Murphy to Cortez dated January 10, 2017

R-14 Rice Notice dated March 8, 2017

R-15 Final Notice of Disciplinary Action of Juan Cortez dated March 17, 2017

R-16 Revised Final Notice of Disciplinary Action of Juan Cortez dated July 25, 2017

R-17 Not in Evidence

R-18 Not in Evidence

R-19 Memo to Juan Cortez From Jaime Morales dated February 17, 2011

5-2-18

A-5

STATE OF NEW JERSEY

In the Matter of Yolanda Curtis
Department of Children and Families

CSC DKT. NO. 2016-4028
OAL DKT. NO. CSV 8037-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 4, 2018 BW

The appeal of Yolanda Curtis, Assistant Family Service Worker 2, Department of Children and Families, 120 working day suspension, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on February 15, 2018 reversing the 120 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 2, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 120 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, she is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Children and Families,* Docket No. A-5581-01T2F (App. Div. Feb. 26,

2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Yolanda Curtis. The Commission further orders that appellant be granted 120 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF YOLANDA CURTIS, DEPARTMENT OF CHILDREN AND FAMILIES.

OAL DKT. NO. CSV 8037-16
AGENCY DKT. NO. 2016-4028

William A. Nash, Esq., for appellant Yolanda Curtis (The Nash Law Firm, attorneys)

Jamie Valentine, Employee Relations Coordinator, for respondent Department of Children and Families, pursuant to N.J.A.C 1:1-5.4(a)2

Record Closed: January 22, 2018 Decided: February 15, 2018

BEFORE **JEFF S. MASIN**, ALJ t/a:

The Department of Families and Children (DCF) employed Yolanda Curtis as an Assistant Family Service Worker 2 at its Gloucester West Local Office. On April 26, 2016, the appointing authority issued a Final Notice of Disciplinary Action (FNDA) suspending Ms. Curtis for 120 days based on findings that she had violated several provisions of the Administrative Code, specifically, N.J.A.C. 4A:2-2.3(a)1, incompetency, inefficiency or failure to perform duties; (a)6, conduct unbecoming a public employee; (a)8, misuse of public property, including motor vehicles; and (a)12,

other sufficient cause-violation of policy.[1] Ms. Curtis filed an appeal with the Civil Service Commission, which transferred the contested case to the Office of Administrative Law. The assigned administrative law judge held several status and settlement conferences, and scheduled the plenary hearing for January 22, 2018. However, as the judge left the OAL just prior to that date, the case was reassigned to this judge on January 17, 2018, and was heard on January 22, 2018. The record closed that day following testimony and closing statements by counsel and the agency's non-attorney representative.

The Specification of Charges that was set forth in the Preliminary Notice of Disciplinary Action (PNDA) explained that on August 12, 2015, Ms. Curtis was assigned to transport children under the supervision of DCF to a supervised visit with their mother at the local office and to return them to their grandmother's house where they resided. On the return from the visit, "you were almost in an accident with another vehicle." The Specification notes that the Office of the Public Defender Conflict Unit conducted an investigation as to whether Ms. Curtis had engaged in conduct either abusive or neglectful of these children and had concluded that the allegation of either abuse or neglect was "not established." However, the investigation did conclude that Ms. Curtis had placed the children at "substantial risk of harm." The Specification continues, "You admitted to slamming on your brakes. The children sustained injuries." The children were upset by the incident but "you failed to appropriately assess their need for medical treatment and safety" in violation of the expectation that as an assistant family service worker, she would "ensure the safety and well-being of the children in your care while conducting transports in the community. You failed to perform your duties and your actions placed the children at substantial risk of harm."

Amanda Rose Hammond-Jakubowicz, the local office manager for the Gloucester West office, testified that at the time of the incident in question, she was not Ms. Curtis' direct supervisor, although she had supervised her in the past. She

[1]The Charges section of the PNDA did not specify which particular polic(ies) were supposedly violated. The Specification refers generally to the mission of DCF to protect its charges. It also refers to the need for Curtis to know or "should have known" the agency's "established policies, practices and procedures to be followed." The FNDA also does not identify exactly which policies Curtis supposedly violated.

explained the duties of an assistant family service worker, including the supervision of parental visits and transportation of children to and from such visits. She identified the Job Specification for the position and also policies, such as those for seat belt use and regarding the use of State vehicles. Ms. Hammond-Jakubowicz became aware of the incident in question on August 12, 2015, when she was notified by telephone of a "near accident." The investigation began after the children's grandmother referred the matter. The Public Defender's Office Conflict Unit was involved as the investigation involved the actions of a DCF employee. Ultimately, the witness learned that the investigation led to a finding that allegations of abuse or neglect by Ms. Curtis were "not established." Agency-level disciplinary action was then instituted.

The witness identified the DCF Policy Manual provision addressing "Use of State Vehicles." (R-3). This provides that employees are prohibited from using wireless devices, including hands-free devices, while operating a State vehicle. This includes cell phones and GPS devices. As for the use of such directional devices, the policy provides that they are to be utilized "prior to driving" and the operator may "listen to it as they drive. If there is a need to re-program the device, the driver is required to pull over and stop driving to do so."

Ms. Hammond-Jakubowicz did not know if the vehicle's "black box" had been examined after the near accident, and stated that there was no report of any bodily damage to the vehicle. Vehicles are inspected before the car is driven. The witness acknowledged that an employee operating a vehicle is to avoid an accident if that is possible.

Roger Broyles, now retired but previously a principal investigator with the Public Defender's Office Conflict Unit, and prior to that position a police officer for twenty-six years, was assigned to investigate Ms. Curtis' conduct in regard to the near accident. He interviewed the children's grandmother, R. It was her daughter that the children met with that day and from which visit they were returning. The children, ages sixteen, eleven and seven, were removed from their mother's custody in May of 2015. The

grandmother had custody of the two youngest and the older boy, J.G., was residing at a State residential setting due to his behavior.

On August 12, Ms. Curtis first picked up the sixteen-year-old, J.G., and then the two younger children, the seven-year-old, A.S., and the eleven-year-old, D.K. She took all three to the Gloucester West Local Office for the visit. When the vehicle arrived back at the grandmother's home, J.G. jumped out of the car and was yelling and screaming. He said that they had been involved in an accident and that Curtis had left the scene of the accident. He was holding A.S., the seven-year-old, and said that she was injured. He went into the house and placed the girl on a couch. The grandmother called the police and an ambulance. These arrived shortly after the call. The police observed no damage to the State vehicle. The seven-year-old was transported to the hospital, complaining of a bump on her forehead above her left eye, and pain in her stomach area. The grandmother took the two older children to the hospital herself.

Broyles interviewed the children on August 13. According to A.S., they were in a seven-passenger van. She was seated directly behind Curtis, who was driving. She had her seat belt on, and told Broyles, as reflected in his report, that she had put it on herself and "put it extra tight." A vehicle made an abrupt left turn in front of Curtis and she slammed on the brakes. A.S. first said that the vehicles came in contact, but then said that there was no contact. She said that her forehead hit the back of the seat in which Curtis was sitting. Her stomach hurt and she started to cry. Curtis told her to "shut up, you're not hurt, you'll be fine." She also said that they would be home in a few minutes. A.S. did have a bump above her left eye. There was no bruising in the stomach area. The girl recalled that at the house her older brother brought her in and put her on the couch.

A.S. claimed that before the other vehicle turned into the path of their vehicle, Ms. Curtis had been looking down at a GPS on her cell phone. She thought that it was in the ashtray.

D.K., the eleven-year-old, also claimed that he saw Curtis look down at her cell phone just before the near accident. He was seated in the back row, to the right of and

next to J.G., who was seated directly behind A.S. D.K. felt that the vehicles made contact and he felt a "little dizzy." He did not recall much after that.

J.G. was interviewed at Ranch Hope in Alloways Township, the residential setting where he lived. He claimed that Curtis had changed her route from that she had previously used when she had transported the children on other occasions. He did not understand why she got off at Exit 14 rather than at Exit 13. According to J.G., he observed that the vehicle was travelling at 45 miles per hour in a 35-mile-per-hour-zone. He too claimed that Curtis looked down at the GPS just before the other vehicle turned in front of them. According to Broyles' report, J.G. told him that Curtis sideswiped the other vehicle after slamming on her brakes. As recorded by Broyles, J.G. said it was not a solid hit, but her vehicle did make contact with the rear of the other car. The other vehicle then sped up and went into the parking lot into which it had been turning. Curtis came to a complete stop, briefly looked to her right at the other car, and then continued on down the road. The witness testified the boy said she stopped for thirty seconds, although that figure does not appear in his report.

J.G. told Broyles that after the accident, his sister was crying because she was injured. He unbuckled her and lifted her over the seat into his seat and cradled her. The report states that J.G. explained that although he did not hit the seat in front of him because "he was wearing his seatbelt," he had some discomfort to the right of his collar bone.

J.G. told Broyles that after the accident, Curtis missed a turn. He wanted to get out and told her to stop and let them out, but she continued on, telling them that they "will be fine and they were almost home." When they got to his grandmother's house, he jumped out with his sister and took her inside and put her on a couch. Curtis drove off.

The investigator interviewed Yolanda Curtis on August 14. She explained that the visit with the children's mother was cut short because the eleven-year-old had football practice. They left the local office at about 4:50 p.m. Prior to leaving she made sure that

all the children were wearing their seat belts. The girl had outgrown the booster seat. He asked Curtis about the GPS and she said that she had no need to be distracted by it. She had programmed it before she left and it had audio. As for the "accident", she explained that as she was driving she observed a vehicle coming in the other direction which then made a sudden left turn in front of her and she had to slam on the brakes. There was no contact, although it was a close call. She saw that the other driver did not get out of the vehicle after it went into the parking lot where it was headed, and after thirty seconds she departed. All of the children said that they were okay, and said that "we almost got into an accident." After this, they had to travel .7 (seven-tenths) miles to the grandmother's house from the scene of the near collision. She did hear the little girl whimper or moan, and she told the children that they would be at their grandmother's house in one minute. According to Broyles, Curtis told him that she only heard this whimpering after the girl had been removed from her seat by her brother. In her interview, she told Broyles that when she heard the whimpering, she told them that they would be home in a minute, J.G. said, "Fuck that, let me out of this car. My sister is crying." He then began to punch the back panel or back of the seat, took off his seatbelt and lifted his sister over her seat and consoled her. At that point she did hear A.S. crying. Curtis explained that she was not about to stop the vehicle in the middle of the street to let anyone out.

When they arrived at the grandmother's house, Curtis tried to explain what happened, but her other daughter (this actually appears to have been another older sister of the children) became very aggressive, yelling and trying to assault Curtis. Curtis got back in the van and for her safety drove a bit up the street to await the police and EMS. She called 911 once she was safely away from the house. The police told her that they already had received a report and were on the way. Curtis then called her immediate supervisor.

Broyles contacted the investigating officer, Wayne Maiden. There was no contact between the vehicles and no damage. No tickets were issued. Medical records were secured from Salem Hospital.

After concluding his investigation, Broyles wrote his report and determined that allegations of abuse or neglect were "not established." There was not a preponderance of evidence that the children had been abused or neglected, but they had been placed at a substantial risk of harm and there had been minor soft tissue injuries.

Broyles could not recall if the van had hand rests. The front seats are "relatively high." He did not recall if the seat belts were lap and shoulder belts. He agreed that the mark on D.K.'s right shoulder could have been from the shoulder restraint.

According to Broyles, it was the children who volunteered information about a GPS. In his report, he does not mention the GPS in regard to his report of his interview with D.K., nor does he say that D.K claimed that Curtis was "inattentive." However, he explained that he had no reason to doubt Curtis's claim that she had pre-programmed the GPS. In fact, in his view, if had she been inattentive she would have T-boned the other vehicle.

The witness agreed that J.G. made it clear that he did not like Curtis. The boy explained that he did not like the way she talked to the children and, as an example, the boy reported that she had once not finished parking and A.S. was unbuckling her seat belt. Curtis told her to put it on as she was not done parking. J.G. said that what bothered him was not so much what she said as how she said it. A.S. also said that she did not get along with Curtis even before the near accident, although the report does not give an indication why this was so.

Queried about the possibility that A.S. was actually injured either when J.G. lifted her out of and over her seat or when he rapidly exited the vehicle with A.S. in his arms, Mr. Broyles was unable to say how it was that A.S. was actually injured. Broyles also did not know the time sequence regarding when during the .7 mile trip from the scene of the near accident and the grandmother's home J.G. unbuckled his sister's seat belt. He also did not know what the traffic conditions were as the van processed toward the home.

Joanna Delvecchio, M.D. was the emergency room physician on duty at Salem Memorial Hospital when the children were brought there after the incident. In order to testify she reviewed the hospital records to refresh her recollection. A.S. was transported by ambulance and complained of chest and abdominal pain. A chest x-ray and ultrasound were normal, as was her physical examination. She had a frontal hematoma, but no imaging was performed of her head. Her neurological examination was normal. The doctor was told that there had been a sudden slamming of vehicle's brakes and the chief complaints were consistent with such an event. The child was given ibuprofen and discharged the same day. D.K. had no imaging studies performed. He had a right-side neck abrasion, a superficial injury consistent with a seat belt tightening. J.G. complained of pain in his hand from having punched the "car."

A.S., now A.R., having been adopted by her grandmother and now ten years old, testified that there was an "accident", "but there really wasn't." She said that Curtis "kept looking at her GPS." After the incident, Curtis drove to another road not where the house was. The girl recalled getting out of her seat belt and her brother holding her when she was out of the car. She also recalled that when the brakes were put on, the shoulder belt was "tight." She said that Curtis stopped the car two streets from the house when her brother took off her seat belt. She cried because she had hit her head, but she did not tell the driver this. The driver yelled at her to put her seat belt on. J.G. was "kind of really angry" and hit the window with his hand. He pulled her over the arm rest, and she described herself as "arching and stood up." The driver told J.G. to sit down and put A.S. back in her seat.

D.K., now D.R., also adopted by his grandmother, described that after the near accident, he recalled both his brother and sister out of their seatbelts. He remembered that his sister was crying. He does not recall if Curtis asked her why she was crying or if she asked if anyone was injured.

Yolanda Curtis testified that she has been employed by DCF since January 20, 2007. Ms. Curtis explained that when she transported the children, she did have a Tom Tom 4x4 GPS which had an audio feature. She placed the device in the drink cup and

plugged it into the lighter. After the fifty-minute visit she proceeded to drive the children to their residences. She programmed the device as soon as she got into the vehicle. She checked to make sure the children were belted into their seats, turning around to check on each of them. She saw that A.S.'s belt was over her shoulder, and from her experience with this child, during which she had stood with the door open to make sure the seat belt was properly secure, she trusted that A.S. could close the belt herself. The child was not in a booster seat, and at the time the policy was that the booster was to be used for children up to five years old, although that policy has since been changed. She noted that due to the height of the front seats, so long as they were belted into their seats, the children could not see what she was doing as she drove. Although she acknowledged that she had used other routes in transporting the children, on this day she drove the route that she had been using more recently, travelling on Route 295 for thirty minutes and then on Route 130. She then made a right on Broad. She denied that at this point she was looking down at anything or that her phone had fallen on the floor. A black Explorer, travelling in the opposite direction than she was, approached her vehicle, stopped, and then as she, having the right-of-way, continued, the Explorer made a sudden left turn directly in front of her. She braked the van "harder", although she denied that she "slammed" the brakes. The person in the other vehicle, which had driven into the parking lot of a store, did not get out of that vehicle. There was no contact between the vehicles. Curtis noted that she was glad that the children had their seatbelts on, because they were always taking them off. The children all verbally indicated that that they were okay, either saying "yes" or "uhhum." No one said anything about banging their head and she saw no indication of any injury, so she did not think that anyone had been hurt. She was near the grandmother's home, about five blocks away. She made a right and then a left turn. Two blocks from the house, the girl began to cry and her seat belt was off, as her brother pulled her from her seat. Curtis told him to put her back in the seat. At this point she was one block from the house, which was already in sight. Curtis was travelling at the speed limit. She agreed that she had never been trained that it was acceptable to drive with anyone not belted in.

According to Curtis, even before he removed his sister's seat belt, J.G. was ranting and punching the window, saying that they had had an accident, when in fact

they had not. Curtis described J.G. as having a violent temper and as he was acting out, she felt that she needed to get to the grandmother's home. This was not the first time that the boy had acted this way; he "just mouthed off at times."

Curtis noted that it was quite common for the seatbelts to lock up so as to become very tight. It happened "all the time."

The appellant described the confrontation that she was faced with at the house, with the children's sister. She never had an opportunity to ask why A.S. was crying. J.G., who had carried his younger sister into the house, came out to restrain his older sister to keep her from assaulting Curtis. Curtis got back in the van and pulled away, and as she did, something was thrown at the van. She knew that as J.G. did not live at his grandmother's home, he could not be left there, so Curtis called J.G.'s caseworker.

Ms. Curtis explained that seat belt training was not mandatory, but she had taken one day of training, not completing a five-day course due to car trouble. She did not get out of the van directly after the near accident to check for damage. She did not stop the vehicle in the street when she became aware that the girl's seat belt was off, as she was so close to the house and felt it best under the circumstances to get the children there. She did not know if there were vehicles behind her on the street as she proceeded to the home over the last block or two.

Curtis recalled that Mr. Broyles asked her if she had been distracted, which she denied.

Discussion

In a civil service disciplinary proceeding, the appointing authority bears the burden of proving by a preponderance of the credible evidence that an employee has violated provisions of the Administrative Code. N.J.A.C. 4A:2.2-3 provides the several grounds for the imposition of discipline. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk , 90 N.J. 550, 560 (1982).

The appointing authority provides the charged employee with notice of the charges through the medium of a PNDA, which contains a section denoted "Incident giving rise to the charge(s)." This section provides the specification of the basis for the contention that the employee acted in opposition to the expected standards of conduct that govern her employment. Here, the specification refers to certain "facts" upon which the claim that Ms. Curtis violated her duties and placed the children at "substantial risk of harm" are based. Referring to the events of August 12, 2015, it notes that the employee and her juvenile charges were "almost in an accident with another vehicle", that the investigation of possible abuse or neglect resulted in a finding of "not established", that Curtis acknowledged that she had slammed on the brakes, that the children sustained injuries, that they were upset and that Curtis "failed to appropriately assess their need for medical treatment and safety." No indication of exactly how she failed in that task is revealed by the Specification, although there does seem to be an implication that the fact that there was almost an accident was somehow a failure on her part to protect the children's safety.

I **FIND** that on August 12, 2015, Yolanda Curtis was performing her delegated responsibility to transport three children to and from a visit with their mother. On the way back to the children's grandmother's home, where the younger two of the three resided, an Explorer suddenly turned directly in front of the van Curtis was driving. Apparently the Explorer was doing so in order to enter a store parking lot. Faced with the prospect of immediate danger to herself and the three children, Curtis applied the van's brakes quickly and with force. She herself described doing so "harder," meaning harder than normal, whereas the children said that she slammed on the brakes. Indeed, the Specification claims that Curtis "slammed on your brakes." Of course, faced with the direct threat of a collision, it would be the natural and correct course of action for her to do just that, slam on the brakes to avoid colliding with a vehicle turning abruptly into her path. Even by their own accounts, the children were belted in at the time.

In assessing the incident as a conclusion to an investigation conducted by the Conflict Unit of the Public Defender's Office, the investigator, Mr. Broyles, and his

supervisor who approved the release of his report and the report of the conclusion regarding whether any abuse or neglect occurred, characterized the children as having been "placed at substantial risk of harm." This statement in and of itself is no surprise. Of course they were placed at such risk at the time that the Explorer crossed in front of the van. An actual collision could have substantially harmed them, as well as Ms. Curtis. However, this threat of harm was not caused by Curtis, that is, unless her driving was a factor in the near collision. However, the police issued no tickets to her for any offense. Mr. Broyles, a police officer for over twenty years, testified that in his opinion if she had been inattentive she would have collided with the Explorer, she would have "T-boned" that vehicle. Despite what the children had told him, he also had no reason to doubt Curtis' explanation that she had pre-programmed the GPS.

The Specification claims that by her actions, Curtis "placed the children at substantial risk of harm." N.J.A.C. 3A:10-7.3(c) defines several findings that can be made following an investigation of an allegation of child abuse or neglect. A charge can be either "substantiated", "established", "not established", or "unfounded." "Not established" means "there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or was placed at risk of harm." N.J.A.C. 3A:10-7.3(c)3. By its very definition, this finding means that even where the alleged perpetrator of child abuse or neglect did absolutely nothing wrong, if the situation under investigation by its facts did involve exposure of a child to "risk of harm" or the child was harmed, the finding must be "not established." This is in contrast to a finding of "unfounded", where just as with "not established", "there is not a preponderance of the evidence indicating that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21", but where "the evidence indicates that a child was not harmed or placed at risk of harm." Based upon the competent evidence presented here, I **FIND** that Ms. Curtis testified truthfully that she pre-programmed the GPS which then operated verbally and that she was not distracted when she was driving just before the Explorer unexpectedly crossed directly in front of her as she proceeded, with the right-of-way. She had no choice but to push hard on her brakes in order to avoid a collision. The threat of such a crash was quite real, and, as such, she and the children were all placed in a situation which presented a real risk of

harm, even substantial harm to each of them. However, despite the choice made here by the appointing authority to charge her with placing the children at "substantial risk of harm," in fact, I **FIND** that Ms. Curtis' action prevented the children from suffering any significant harm.

As for the children's each having claimed that Ms. Curtis was looking down at the GPS or phone just before the near collision, I find it hard to believe that even if the three could all see above or around the high front seats to observe the area where the GPS rested, that each just happened to be looking right there just before the brakes were applied. While I cannot be sure that they were coached to say this, it seems far-fetched that all three would claim having been aware of this supposed distracted conduct. I therefore discount their assertions of distracted driving or inattentiveness on Curtis' part as unreliable.

As noted, the Specification does not clearly detail exactly what facts the appointing authority contended showed the alleged lack of proper conduct by Curtis. But the reference to the children being upset and injured suggests that at least part of the supposed misconduct occurred after the crash was avoided and Curtis began to drive to the grandmother's home, some .7 of a mile from the spot where the near collision occurred. After the near collision, it is not surprising that the occupants of the van would have been shaken by the sudden stop and the realization of such a near miss. As for her conduct after leaving the scene of what thankfully was a near miss, I **FIND** that Ms. Curtis did not ignore the children or berate them. She inquired if all were okay, and at first they might well have thought that they were. I **FIND** that they each verbally confirmed that they were okay. The abrasion caused by the seat belt, and any muscle soreness resulting from the tightening of the belts at the time of the sudden application of the brakes, might well not have manifested enough immediate discomfort for the children to have even been aware so quickly that they were injured. As for the bump on A.S.'s head, as the van proceeded for the short journey from the scene of the near crash to the children's grandmother's home, the seven-year-old girl, perhaps the most vulnerable of the three to becoming upset at the sudden event, began to cry. Whether her initial response of crying was characterized as a whimper or not, she was upset. By the time this child arrived at the hospital she had clearly bumped her head, as the

doctor confirmed. But how she sustained this injury, which fortunately was not serious and required only ibuprofen as treatment, is not at all clear. There is absolutely no evidence that either at the time of the near collision or directly thereafter any of the children were not securely seat-belted. In fact, the girl told Broyles that she had made the seat belt "extra tight." As such, it is not clear how A.S. would have been thrust forward in such a manner as to bump her head on the rear of the driver's seat. None of the other occupants appear to have been moved in such a fashion. While the doctor confirmed that this type of injury was consistent with a sudden slamming of the brakes, it is also possible that this injury could have been the result of the child being yanked up and over the back of her seat by J.G. into his seat as the vehicle moved, as she may have banged her head then, or she might have banged her head on the door frame as she was rushed out of the van by J.G. And, even if the injury did somehow result from the sudden application of the brakes in an emergency, given that the girl was wearing her seat belt at the time, I **FIND** that that is hardly any reason to fault Ms. Curtis for the child having been injured. Indeed, in the face of the sudden emergency, her action undoubtedly saved all of the children from more serious injury.

As for what occurred as the van proceeded for less than one mile to their grandmother's, it is clear enough that when J.G. heard his sister crying he got upset. In fact, he was already upset before she cried. He seemed to blame Curtis for the near miss. As Broyles related, the children all seemed to have thought that an actual collision did occur, or at least that is what they claimed. Even his siblings confirmed that J.G. had a temper. He admitted to Dr. Delvechhio that he punched the window. He unbuckled his sister from her seat and somehow pulled or yanked her over the seat into his lap. He yelled at Curtis. Apparently, the appointing authority thinks that at that point Curtis should have stopped the van, either in the middle of the street, or possibly pulled over if such was possible on this street, rather than proceed directly to their grandmother's house. Curtis explained her judgment as that it was best, given the extremely limited distance left to travel, to get to that house, where presumably some adult assistance could limit J.G.'s rage and calm the children.

I **FIND** that Ms. Curtis exercised rational judgment in the face of the conduct of J.G. It is true that hindsight might suggest that she possibly could have stopped the vehicle in the midst of the .7 mile trip, tried to calm J.G., who might well have been out of control at that point, and made sure that all were buckled up. But the situation must be examined as it presented itself to her at the time. If the journey she needed to take from the point when J.G. started to act out had been longer in distance or time, I would agree that she likely would have had to stop and try to regain control. But events do not happen in a vacuum. Here, the necessary journey was of minimal distance, and stopping on the street to try to calm things down might well have ended up with J.G. bolting off, with or without his sister. The grandmother's home was at least a better place for him to go than out of the van at some spot short of that house.

While perhaps what Curtis did was not 100 percent perfect, I **CONCLUDE** that she did not fail in her charge to assess the situation and try to assure the safety of her charges. I **CONCLUDE** that the appointing authority has failed to establish by a preponderance of the credible evidence that Ms. Curtis violated any of the several provisions of the Administrative Code. The charges against her are **DISMISSED** and it is **HEREBY ORDERED** that if she has served any of the suspension time, she is to be made whole for any lost wages and benefits.[2]

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

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

[2] Should the Civil Service Commission see fit to find against Ms. Curtis, it is noted that she has no prior disciplinary record.

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

February 15, 2018
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 2/15/18

Date Mailed to Parties: 2/16/18

mph

APPENDIX

LIST OF WITNESSES:

For appellant:

Yolanda Curtis

Amanda Rose Hammond-Jakubowicz

For respondent:

Roger Broyles

LIST OF EXHIBITS:

For appellant:

None

For respondent:

R-1 NJ Civil Service Commission Job Specification No. 54249 for Assistant Family Service Worker 2

R-3 DCF Use of State Vehicle Policy

R-4 Preliminary Notice of Disciplinary Action for Yolanda Curtis, dated 12/3/15

R-7 Final Notice of Disciplinary Action for Yolanda Curtis, dated 4/26/16

R-10 NJ Office of the Public Defender letter to Lisa Von Pier, dated 1/6/15

R-11 NJ Office of the Public Defender, Conflict Investigations Unit, Report of Investigation

R-12 Training Transcript for Yolanda Curtis

R-17 DCF Screening Summary

5-2-18

A-6

STATE OF NEW JERSEY

In the Matter of Sha-Keana Davis
Mercer County Correction Center

CSC DKT. NO. 2017-3577
OAL DKT. NO. CSV 07308-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 4, 2018 BW

The appeal of Sha-Keana Davis, County Correction Officer, Mercer County Correction Center, 10 working day suspension, on charges, was heard by Administrative Law Judge Judith Lieberman, who rendered her initial decision on March 26, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority. A reply to the reply was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 2, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Sha-Keana Davis.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07308-2017
AGENCY DKT. NO. 2017-3577

IN THE MATTER OF SHA-KENANA DAVIS,
MERCER COUNTY CORRECTIONS CENTER,

Respondent.

DAVID BECKETT, Esq., for appellant (Law Offices of David Beckett, attorneys)

KRISTINA E. CHUBENKO, Esq., Assistant County Counsel, for respondent Mercer County Corrections Center (Paul R. Adezio, County Counsel)

Record Closed: February 9, 2018 Decided: March 26, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

The appellant, Sha-Keana Davis, appeals the determination by the respondent, Mercer County Corrections Center (Appointing Authority), that she committed Conduct Unbecoming a Public Employee and violated Administrative Procedures and/or Regulations involving Safety and Security, for which she received a ten-working-day suspension.

PROCEDURAL HISTORY

On February 10, 2017, the Appointing Authority issued a Preliminary Notice of Disciplinary Action (PDNA) setting forth the charges and specifications made against appellant. After a departmental hearing, which was held on April 4, 2017, the Appointing Authority issued a Final Notice of Disciplinary Action (FNDA) (J-1) on May 2, 2017, sustaining the charges in the PDNA and suspending the appellant from employment for ten working days, effective May 15, 2017, and ending May 29, 2017, for failing to attend mandatory harassment training. The appellant filed a timely appeal on May 8, 2017, and the matter was transmitted to the Office of Administrative Law on May 22, 2017, for hearing as a contested case. The case was heard on November 16, 2017. The record remained open for the receipt of written summations by the parties. On February 9, 2018, all summations were received, and the record closed.

FACTUAL DISCUSSION

Joint stipulations:

1. Officer Sha-Keana Davis has been employed with the County of Mercer since July 6, 2010, in the position of County Correction officer [sic] for the Mercer County Correction Center ("MCCC").

2. This Stipulation concerns disciplinary charges set forth in a Final Notice of Disciplinary Action, dated May 2, 2017, a copy of which is attached as Exhibit J-1.

3. From November 2016, through January 2017, Officer Davis' bidded shift was A-Tour, which is 11:00 p.m. to 7:00 a.m.

4. On or about November 5, 2016, a memorandum was issued at MCCC with the subject Mandatory Training – Harassment listing times and dates for such training. A copy of that Memorandum is attached as Exhibit J-2.

5. The attached calendar shows scheduled days of work and leave for Officer Davis at relevant times from November 2016, through January 2017. See Exhibit J-3.

6. During the time period between November 5, 2016, and January 18, 2017, Officer Davis worked a total of 209.280 overtime hours.

7. The attached time keeping records show certain overtime shifts worked by Officer Davis during that time period, and are attached as Exhibit J-4.

8. On December 7, 2016, Officer Davis was absent from work; the absence was covered by the Family Medical Leave Act ("FMLA"). Exhibit J-3.

9. On December 8, 2016, Officer Davis worked overtime on B-Tour which is 7:00 a.m. to 3:00 p.m. (Id.)

10. On December 15, 2016, Office Davis worked a mandatory overtime shift on B-Tour which is 7:00 a.m. to 3:00 p.m. (Id.)

11. On December 19, 2016, Officer Davis was absent from work and the absence was covered by FMLA. (Id.)

12. On January 4, 2017, Officer Davis worked overtime on C-Tour, which is 3:00 p.m. to 11:00 p.m. and stayed for her regular shift for A-Tour, which is 11:00 p.m. to 7:00 a.m., on January 5, 2017. (Id.)

13. On January 9, 2017, Officer Davis worked overtime on B-Tour, which is 7:00 a.m. to 3:00 p.m.

14. On January 18, 2017, and January 19, 2017, Officer Davis was absent from work on a job-related injury.

15. Officer Davis's disciplinary history is set forth in Exhibit J-5.

Testimony

For respondent:

Deputy Warden Phyllis Oliver testified that all officers were required to attend one session of the harassment training. Training sessions for non-supervisory officers were scheduled on various days, starting December 7, 2016, and ending January 19, 2017. A memorandum advising of the training was read aloud by shift commanders during lineup for seven consecutive days and was displayed in the lobby and officer's dining room. The memorandum stated that failure to attend the training would result in discipline. The officers were given early notice of the training requirement so that they could adjust their schedules to be able to attend. Officers were to attend on their own time and would be compensated for attendance. They did not need to register in advance; attendance was on a first come, first served basis.

December 8, 2016, was the first training day that the appellant could have attended. That day, training sessions were scheduled for 7:30 a.m. and 12:00 p.m. The appellant worked the 11:00 p.m. to 7:00 a.m. shift preceding the training sessions and could have attended both training sessions. However, she worked a voluntary overtime shift on December 8, 2016.

December 15, 2016, was the next day the appellant could have attended a training session. She was unable to attend because she was assigned mandatory overtime.

January 5, 2017, was the next day the appellant could have attended a training session. The appellant worked a voluntary overtime shift from 3:00 p.m. to 11:00 p.m. on January 4, 2017, and then her regular shift, 11:00 p.m. to 7:00 a.m., from January 4 to January 5, 2017. After departing at 7:00 a.m. on January 5, 2017, she could have returned to the facility to attend either the 12:00 p.m. or 3:30 p.m. session that day.

The next training sessions that the appellant could have attended were scheduled for January 9, 2017. The sessions were held 7:30 a.m. and 12:00 p.m. The appellant could have attended either training session but instead worked a voluntary overtime shift from 7:00 a.m. to 3:00 p.m. that day.

Oliver testified that the appellant would have been able to attend the January 18 and 19, 2017, sessions had she not been injured while working on January 18.

Oliver testified that the training schedule was issued early to allow officers to adjust their schedules in advance so they would be able to attend a session. Oliver added that ninety percent of the officers attempt to be the first to attend mandatory training sessions to ensure that they comply in the event they are later prevented from being able to do so. The appellant was on notice that the training was mandatory and that failure to attend would result in discipline. The appellant failed to comply, notwithstanding that she could not attend training during the last two days.

The appellant was disciplined pursuant to the Mercer County Public Safety Table of Offenses and Penalties that applied to the Correction Center. The offense was "Violations of Administrative Procedures and/or Regulations Those Involving Safety and Security." (D6). The "step charge" was "step two", which indicated a three-day removal for a second infraction. (R-1.)

For appellant:

Sha-Keana Davis testified that between November 2016, and January 2017, she was assigned to the 11:00 p.m. to 7:00 a.m. shift. She had attended training sessions in the past and understood that she would either be paid or receive compensatory time for attendance at a mandatory training session.

The appellant is the parent of three children who have asthma who need to utilize a machine every three to four hours to help them when they are ill. The appellant used family leave time to be with her children when they were ill. She would also use compensatory time when she needed to tend to the children.

The appellant testified concerning the assignment of overtime shifts. The need for officers to accept overtime varied from day to day; sometimes fifteen officers would be needed to work overtime, while on another day, it might be seven. An officer was often required to work an overtime shift even though she may have indicated she did not want

to do so. Two consecutive overtime shifts would result in a total of sixteen hours of work. Officers were prohibited from attending training if they previously worked sixteen hours.

Officers with less seniority were more likely to be required to work an overtime shift. The appellant estimated there were three officers with less seniority than her in December 2016. Therefore, she was more likely than more senior officers to be "stuck" with overtime. However, once she worked an overtime shift, she would be less likely to be required to work a subsequent overtime shift, given the prohibition on working more than sixteen consecutive hours. A more senior officer would be required to cover an overtime shift under these circumstances. The appellant would opt to work an overtime shift knowing that she would be able to tend to her children the next day.

The appellant testified concerning the days she did not attend the training session. December 8, 2016, was the first day should could have attended the training session.[1] However, she worked a voluntary overtime shift from 7:00 a.m. to 3:00 p.m. after her regular 11:00 p.m. to 7:00 a.m. shift. She voluntarily worked overtime so that it would be less likely that she would be "stuck" with overtime afterward.

January 5, 2017, was the next day she could have attended a training session. She worked an overtime shift, 3:00 p.m. to 11:00 p.m. the prior day, January 4, 2017, and then worked her regular 11:00 p.m. to 7:00 a.m. shift on January 5, 2017. She opted to work overtime on January 4, 2017, so that she would not be "stuck" after 7:00 a.m. on January 5, 2017, and be able to take her daughter to school.

On January 9, 2017[2], the appellant worked a voluntary overtime shift from 7:00 a.m. to 3:00 p.m.

---

[1] The parties stipulated that the appellant was unable to attend training sessions on December 7 and 19, 2016, because she used FLMA leave those days. They also stipulated that she was unable to attend a training session on December 15, 2016, because she was assigned mandatory overtime that day.

[2] During direct examination, the appellant referred to January 9, 2017, as the next day listed on the training memorandum. Rather, the next training session listed on the memorandum was January 8, 2017, to which the appellant stipulated.

The appellant testified that she intended to attend the 3:30 training session on January 18, 2017. She worked an overtime shift from 3:00 p.m. to 11:00 p.m. on January 17, 2017, and then her regular shift, 11:00 p.m. to 7:00 a.m. on January 18, 2017. She sustained an injury during the overnight shift. She was sent for a medical appointment at 2:30 p.m. on January 18, 2017, and the medical staff ordered a two-week medical leave. She was not permitted to attend the training while she was out of work.

On cross-examination, the appellant testified that she could have attended the 3:30 p.m. training session on January 5, 2017. She did not ask anyone if she could attend the 12:00 p.m. session that day, as she would have been prohibited because she previously worked sixteen hours.

Officer James Chambers is a corrections officer for the respondent and Acting President of the PBA. He testified that overtime was frequently required in November 2016. Knowing this, officers would attempt to schedule their work hours in advance, as an assignment would likely continue throughout the week. The officers would utilize scheduling strategies to be able to attend trainings or tend to family matters.

Because overtime was often mandatory, officers would need to come to work on their days off to attend training sessions. However, the appellant was unable to do this here, as none of the training sessions was scheduled on her days off. Officers may not work more than sixteen hours in twenty-four hours. Any hours worked beyond sixteen are considered "double time" and such assignments are "frowned upon."

After having the opportunity to review the evidence and consider the testimony, and the joint stipulation, I **FIND** the following additional **FACTS**:

1. The appellant was aware of her obligation to attend mandatory harassment training on one of the specified days.

2. The appellant was aware that officers who failed to attend the training session would be disciplined.

3. On December 8, 2016, the appellant voluntarily worked an overtime shift that precluded her from attending training sessions that day.

4. On January 4, 2017, the appellant worked an overtime shift prior to her regular shift on January 5, 2017, so that she would not be required to work after her regular shift. She did not attend training sessions scheduled for 12:00 p.m. and 3:30 p.m. on January 5.

5. On January 8, 2017, the appellant worked a voluntary overtime shift instead of attending either training session that day.

6. The appellant believed she would not be permitted to attend a training session after having worked sixteen consecutive hours.

7. The appellant knew she would not be able to attend a training session on any of her regularly scheduled days off.

8. The appellant did not alert a supervisor that she was unable to attend the training session due to overtime assignments or medical leave.

CONCLUSIONS OF LAW

Appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated there under. A civil service employee who commits a wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A2-2.2, -2.3

The Appointing Authority has the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to

a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

As a corrections officer, appellant is held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). Corrections officers represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

"Conduct unbecoming a public employee", pursuant to N.J.A.C. 4A:2-2.3(a)(6), is an "elastic" phrase that encompasses conduct that "adversely affects the morale or efficiency of a governmental unit ... [or] which has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998)(citing In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, the appellant had been employed by the Appointing Authority for over six years at the time she was disciplined. She previously attended mandatory training sessions, and was fully aware of her responsibility to attend the mandatory training session at issue. There was a limited number of days during which the appellant could

have attended the training session. She knew that she could not attend training sessions on her days off and that she could be required to work a mandatory overtime shift that would conflict with a scheduled training session. Despite this, she opted to work voluntary overtime shifts on three days, December 8, 2016, January 4, 2017, and January 8, 2017, even though those shifts prevented her from attending training sessions. As such, the appellant waived her limited opportunities to attend the mandatory training session when she could.

The appellant did not alert any of her supervisors that she was having difficulty attending the training session. She did not alert a supervisor that her work-related injury would cause her to lose her last opportunities to attend the training session. Rather, she made clear, through her testimony, that she would utilize the overtime scheduling system to her best advantage, when possible.

The complexities associated with involuntary overtime assignments are significant. However, it was incumbent upon the appellant to ensure that she complied with mandatory work duties. Compliance is essential to the morale and efficiency of a governmental unit. This would necessarily impact the operations of the corrections center, which requires discipline and rule compliance.

Accordingly, I **CONCLUDE** that the respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming a Public Employee), and that such charge must be **SUSTAINED.**

The charge of violating N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, is based on an allegation of violation of a rule, regulation, policy, procedure, order or administrative decision. Here, the record reflects that the appellant failed to satisfy her clearly stated obligation. Accordingly, I **CONCLUDE** respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)

(12) (Other Sufficient Cause), and that such charge must be **SUSTAINED.**[3]

PENALTY

A civil service employee who commits a wrongful act related to her duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

The Appointing Authority seeks to suspend the appellant ten-working-days for her actions. In her seven years as an officer for the Appointing Authority, the appellant has been disciplined multiple times. (J-5.) On February 28, 2013, she received a written reprimand for chronic, excessive absenteeism. On June 28, 2013, she received a written reprimand for having been absent without proper notice. On July 1, 2013, she was suspended ten days for neglect of duty, conduct unbecoming and for violating a rule, regulation or policy. On February 5, 2016, she received a written reprimand for chronic, excessive absenteeism. On June 21, 2016, she was suspended five days for chronic, excessive absenteeism. On January 5, 2017, she received a written reprimand for having been absent without proper notice. Ibid. Here, the petitioner has been disciplined once before for Conduct Unbecoming an Officer and for violating a rule, regulation or policy.

[3]Appellant argued that the respondent applied its rules inequitably because Deputy Warden Oliver did not attend the training sessions at issue. As discussed during the hearing, it is of no moment whether the Deputy Warden attended the training. Nonetheless, the appellant was provided an opportunity to offer evidence that officers, similarly situated to the appellant, failed to attend the training and were not disciplined. The appellant did not offer such evidence.

After having considered the proofs offered in this matter and the impact of the appellant's behavior upon the institution, and after having given due deference to the principal of progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon her the seriousness of the failure to comply with training mandates. The petitioner did not conduct herself in a manner intended to ensure she would be in compliance. As this is a second violation for Conduct Unbecoming and Public Employee and violation of Administrative Procedures and/or Regulations, I **CONCLUDE** that the action of the appointing authority in suspending the appellant for ten working days is reasonable and consistent with progressive discipline, and should be affirmed.

ORDER

I hereby order that the charges are sustained. Accordingly, I order that the action of the Appointing Authority is **AFFIRMED**, and the appellant shall be suspended for ten working days.

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

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

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

March 26, 2018
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Received at Agency: 3/26/18

Date Mailed to Parties: 3/26/18

/vj

APPENDIX

LIST OF WITNESSES

For appellant:

Sha-Kenana Davis

Officer James Chambers

For respondent:

Deputy Warden Phyllis Oliver

LIST OF EXHIBITS

For appellant:

P-1 Union Contract between the County of Mercer and P.B.A. Local 167

For respondent:

R-1 Mercer County Public Safety Table of Offenses and Penalties—Correction Center

Joint:

J-1 Final Notice of Disciplinary Action

J-2 November 5, 2016, Mandatory Training Memorandum

J-3 Time and attendance record for appellant

J-4 Hours Detail Inquiry for appellant

J-5 Appellant's disciplinary history

A-1

STATE OF NEW JERSEY

In the Matter of Peter Guralewycz
New Jerey City University

CSC DKT. NO. 2016-2313
OAL DKT. NO. CSV 04007-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 2, 2018 BW

The Civil Service Commission, at its meeting of May 2, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04007-16

IN THE MATTER OF PETER GURALEWYCZ,
NEW JERSEY CITY UNIVERSITY.

Luretha M. Stribling, Esq., for appellant

Caroline Jones, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 9, 2018 Decided: April 9, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On March 14, 2016, the Civil Service Commission transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

4/9/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

dr

Attachment

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Director

April 9, 2018

VIA FACSIMILE (973) 648-2358 AND INTER-OFFICE MAIL
The Honorable Barry E. Moscowitz
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Guralewycz v. New Jersey City University
Docket No. CSV 04007-2016N

Dear Judge Moscowitz:

Enclosed please find a settlement agreement signed by both parties in the above-referenced matter.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: Caroline Jones
Caroline Jones
Deputy Attorney General

cc: Luretha Stribling, Esq. (Via Facsimile (732) 382-3384 and Regular Mail)

OAL DKT. NO. CSV 04007-2016 N

SETTLEMENT AGREEMENT

PETER GURALEWYCZ

v.

NEW JERSEY CITY UNIVERSITY

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated November 24, 2015 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1.Neglect of duty	Removal	December 23, 2015
2.Unauthorized use of a state vehicle	Removal	December 23, 2015
3.Insubordiation	Removal	December 23, 2015

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: 6 months.
2. The total amount of backpay to be paid by the appointing authority to the Appellant is as follows: $10,000.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Approved Leave of Absence -- Unpaid.
4. Appellant will return to work on November 27, 2017.
5. Appellant will return to work on the day shift.
6. Appellant agrees that in the event that Appellant is subject to discipline for any conduct of the same or similar nature in the future, that the University will seek removal.

C. The Appellant Peter Guralewycz withdraws his appeal and request for a hearing, and the Respondent Appointing Authority New Jersey City University agrees that:

the following result will occur with regard to each charge:

Charge	Disposition
1.Neglect of Duty	Sustained
2.Unauthorized use of a state vehicle	Withdrawn
3.Insubordination	Sustained

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. New Jersey City University shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of New Jersey City University will be kept intact. Nothing herein shall preclude the University from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent University with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Peter Guralewycz's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey City University, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the

Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. Appellant understands that for a period of seven (7) days following the execution of this Settlement Agreement and Release (the "Revocation Period") she may revoke the Settlement Agreement and Release by delivering written notification to Alfred Ramey, University Counsel, and this Settlement Agreement and Release will not become effective or enforceable until the Revocation Period has expired.

I. This Settlement Agreement and Release is intended to be a waiver of rights by the employee in compliance with the Older Workers Benefit Protection Act, 29 U.S.C. Sec. 626(f). By executing this Settlement Agreement and Release, Appellant acknowledges and represents as follows:

a. I voluntarily waive any and all rights under the Age Discrimination in Employment Act ("ADEA") and any and all claims I may have against the University and the State of New Jersey arising under the ADEA;

b. I have been informed of my right to consult with an attorney before executing this Settlement Agreement and Release and further represent and warrant that I had sufficient opportunity to consult with an attorney regarding

this Settlement Agreement and Release, my ADEA rights, and this waiver of my ADEA rights;

c. I acknowledge that I have had a reasonable and sufficient period of time to review and consider this Settlement Agreement and Release;

d. I know and understand that in exchange for the waiver of my rights under ADEA, I am receiving consideration in addition to compensation to which I may be already entitled;

e. I understand that I am not waiving ADEA rights or claims against the University that may arise after the date that this Settlement Agreement and Release is signed.

J. Appellant acknowledges that he shall be solely responsible for the payment of appropriate taxes on this settlement, if any, and he agrees and understands that the University has not made any representation regarding the tax treatment of the sums paid pursuant to this agreement. In the event a claim for such taxes, and/or penalties and interest, is assessed by any taxing authority, he agrees to, and do hereby holds the University harmless and indemnify the University against any and all tax liability, interest and/or penalties as due thereon from himself.

K. Appellant acknowledges that he is solely responsible for the payment of any claims or liens that may be asserted against the proceeds of this settlement. In the event a claim for such payment is asserted by anyone, including Medicare and/or Medicaid, he agrees to make those payments and do hereby hold the University harmless and indemnify the University against any and all liability for same.

L. Appellant acknowledges that if a debt/lien is owed to the State, its agencies or departments, such debt/lien shall be deducted from the payment prior to its disbursement to me. The holders of these liens/debts include but are not limited to:

Office of the Public Defender, the Motor Vehicle Commission, Division of Taxation, Division of Developmental Disabilities, Department of Corrections, Department of Children and Families, the Probation Division of the Administrative Office of the Courts, and the State Parole Board.

M. Appellant hereby acknowledges and understands his obligation to comply with the legal requirements of N.J.S.A. 2A:17-56.23b, including, but not limited to, the requirement to perform a certified child support judgment lien search and to provide the University with said documentation prior to the University's disbursement of the Payment. Appellant agrees that he shall direct his attorney to perform the judgment search required by N.J.S.A. 2A:17-56.23b, and deliver a copy of the certification to the University's counsel. Appellant further understands and acknowledge that, (a) no settlement funds due to me under this Release shall be released prior to the receipt of the judgment search certification, and (b) any fees incurred, and payments made, by the University in connection with N.J.S.A. 2A:17-56.23b shall be deducted from the payment prior to its disbursement to Appellant.

N. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

O. The parties waive the right to file exceptions and cross exceptions.

P. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

03/10/2018 _____
DATE

_____
DATE

_____
ON BEHALF OF

OAL DKT. NO. CSV

Alfred E. Ramey, Jr.
University Counsel

March 28, 2018
DATE

ON BEHALF OF New Jersey City University

CERTIFICATION

I, Peter Gukiewycz, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

03/10/2018
DATE

5-2-18

A-7

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Van Jenkins

CSC Docket No. 2018-1038
OAL Docket No. CSV 15785-2017

ISSUED: MAY 23, 2018 (SLK)

The appeal of Van Jenkins, a Mechanic with the City of Camden, of his removal, effective August 1, 2017, on charges, was heard by Administrative Law Judge Elaine B. Frick (ALJ), who rendered her initial decision on March 22, 2018. Exceptions were filed on behalf of the appointing authority and a reply to exceptions and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 2, 2018, accepted and adopted the Findings of Fact as detailed in the initial decision. Further, the Commission adopted the ALJ's recommendation to reverse the removal. However, the Commission did not adopt the ALJ's recommendation to reinstate the appellant to suspended without pay status. Rather, the Commission ordered that the appellant's reinstatement be subject to a return to work drug test.

DISCUSSION

The appellant was charged with violating the appointing authority's Drug and Alcohol Policy (D&A Policy) and a second chance agreement. Specifically, the appointing authority alleged that after the appellant initially tested positive for marijuana, the appellant's return to work drug screen tested positive for marijuana. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in her initial decision that the appellant began his employment with the appointing authority in 2005. On July 27, 2017, the appellant tested positive for drugs. The ALJ noted that the appellant had never been previously tested positive for drugs nor had he ever previously been disciplined.

Martin Hahn, Risk Manager for the appointing authority, testified that there was no evidence that the appellant ever had a drug problem or been impaired at work prior to being randomly selected to take a drug screen on July 27, 2017 pursuant to the appointing authority's D&A Policy. Hahn indicated that, like other employees who test positive, the appellant was given an opportunity to sign a second chance agreement. The second chance agreement stated that the appellant would be suspended without pay from August 1, 2017 until he was cleared to return to work, which included the appellant passing a return to duty drug test among other criteria. Hahn stated that on August 29, 2017, he was informed that the appellant was ready to be considered for return to duty and therefore, he directed the appellant to get a return to work urine screen completed through the appointing authority's designated laboratory facility. He then received the drug testing summary report for the appellant which indicated that he tested positive for marijuana on August 30, 2017. Hahn agreed that the appellant was a reliable and valuable employee who had no prior employment issues. Additionally, Hahn confirmed that if the appellant had not used drugs after signing the second chance agreement and the positive drug test was a result of residual marijuana in the appellant's system from use prior to July 27, 2017, then the appellant would not be in violation of the second chance agreement. However, Hahn indicated that he did not have the ability to determine if the positive drug test was due to residual marijuana use and, since the appellant did not pass the return to duty urine screen, he could not return to work.

Harsh Dangaria, M.D., Medical Review Officer for the appointing authority, testified that he reviewed the appellant's laboratory test result from the urine sample collected on August 30, 2017, which was positive for marijuana. Further, Dangaria called the appellant on September 6, 2017 and he did not receive any information from the appellant that indicated that there may have been an alternate medical reason as to why he tested positive. Dangaria acknowledged that the appellant's July 27, 2017 drug test indicated quite a high result for marijuana metabolite and the appellant's August 30, 2017 marijuana metabolite result was significantly lower. However, Dangaria stated that the August 30, 2017 results were still above the federal Department of Transportation guidelines (guidelines) for a positive test for marijuana, which he is required to follow. Dangaria indicated that the guidelines provide that residual marijuana may stay in one's system for up to 30 days from the time of use. Dangaria agreed that it is possible that someone may test positive, negative, and then positive again for the same marijuana use; however, he stated that situation would only be within the 30 day time frame from when the use occurred. Dangaria acknowledged that he was aware of other

research where individuals tested positive for marijuana for up to 40 days from use, but he emphasized that he is required to follow the guidelines which only indicate that residual use may stay in one's system up to 30 days. Dangaria agreed that weight loss after marijuana use could impact the length of time it remains in one's system. However, he reiterated that he would follow the guidelines, which are the "gold standard" for employee drug testing, which state that a positive result would only continue up to 30 days from use.

The appellant testified that on August 22, 2017, he had a positive test for marijuana. Thereafter, on August 29, 2017, he submitted another urine sample and was advised that the test was negative. Accordingly, the appointing authority was advised he was ready to return to work. The appellant indicated that on August 30, 2017, he was tested at the appointing authority's approved facility and he expected that the result would be negative based on the results from the day before. The appellant states that if he knew that the results would come back positive, he would have never requested the return to duty drug screen. The appellant indicates that he lost 25 pounds during his suspension.

Gary Lage, Ph.D., testified as an expert in pharmacology and toxicology for the appellant. Lage presented that there have been studies that indicate that marijuana can stay in one's system for up to 70 days after initial exposure even if there has been no additional exposure to marijuana. Lage stated that it was his expert opinion that the appellant's 90 percent decrease in his marijuana metabolite level from the initial drug screen to the return to duty drug screen indicated that this dramatic decrease represented residual marijuana in the appellant's system from use prior to the first positive test and the appellant had not been exposed to marijuana after the initial drug screen. However, Lage did concede that it was possible that the appellant was exposed to marijuana in between the two tests, but reiterated this would contradict the facts in this matter. Lage also testified that there is a high correlation between weight loss, which affects the release of the metabolite from fat tissue, and how long the last positive urine test for marijuana occurs.

The ALJ found all the witnesses to be credible, but that Lage's testimony was the most persuasive based on his expertise and the scientific research he used to support his conclusions. Specifically, the ALJ found that the appellant's positive drug test on August 30, 2017 was due to residual marijuana from use prior to the initial drug test on July 27, 2017 and not from subsequent use based on the appellant's significant decrease in his marijuana metabolite level and the impact that the appellant's weight loss could have on the length of time he could have tested positive for marijuana without subsequent use. Additionally, the ALJ found that both the appointing authority's and the appellant's expert witnesses confirmed the appellant's positive, then negative, and positive drug tests were not unusual. Further, the ALJ stated it would not make sense for the appellant to have sought to

return to duty if he thought he would test positive again. Based on the foregoing, the ALJ found that the appellant had not violated the appointing authority's D&A policy and the second chance agreement and the ALJ reversed the appellant's removal and ordered that he be reinstated to suspended without pay status.

In the appointing authority's exceptions, it argues that it cannot be confirmed that the August 30, 2017 positive drug test was a result of residual marijuana use. Instead, the appellant's expert could only testify that it was likely that the positive result was due to residual marijuana. Further, the appellant signed a second chance agreement that indicated that if he failed a subsequent drug test, he would be removed. Therefore, the appellant violated the appointing authority's D&A Policy and the second chance agreement by failing the return to duty drug screen and should not be given a third chance. The appointing authority presents that *N.J.A.C.* 4A:2-2.4 does not provide for a suspension for greater than six months except for when there are pending criminal charges. Therefore, the appointing authority asserts that the ALJ incorrectly ordered the appellant to be reinstated to "suspended without pay" status and it was further error for the ALJ to not specify how long the appellant would remain in that status. The appointing authority emphasizes that it has an obligation to put the safety of the public and its employees at the forefront of all decisions and argues that it is arbitrary, capricious and unreasonable to reinstate an employee who has twice tested positive for marijuana.

In the appellant's reply to exceptions and cross exceptions, he states that the appointing authority has not provided any factual or legal argument to support its exceptions. Specifically, the appointing authority failed to demonstrate that the ALJ's conclusion that the appellant's positive drug screen on August 30, 2017 was a result of residual marijuana was arbitrary and unreasonable. On the contrary, the ALJ explained why that the appellant's expert's testimony was the most persuasive based on his experience and scientific studies that supported the conclusion that the appellant's decreased marijuana metabolite level and weight loss were evidence that the positive result on the return to duty drug screen was based on residual marijuana and not new use. Further, Hahn confirmed that if the positive drug test was based on residual marijuana than the appellant would not be in violation of the appointing authority's D&P Policy and the second chance agreement. Additionally, he argues that the Commission is not bound by the appointing authority's drug policy to determine the proper penalty and the appellant is not being provided a third chance as he only tested positive on August 30, 2017 due to residual marijuana being in his system. Further, public safety is not at risk as the appellant will only return to work upon passage of a return to work drug screen, which is a common condition that the Commission imposes where positive drug tests are involved.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the reversal of the charges, but does not agree with the ALJ's recommendation that the appellant be reinstated to suspended without pay status. In this regard, where a removal is reversed, an appellant is normally entitled to be reinstated subject to any conditions imposed by the Commission. Where charges are dismissed and the penalty reversed, an appellant cannot be returned to any type of suspended status. Accordingly, as it has done in similar matters, the Commission orders that the appellant undergo a return to work drug test as a condition of reinstatement. Should the appellant fail his return to work drug test, the Commission orders that the appointing authority issue a new Final Notice of Disciplinary Action (FNDA) removing the appellant effective August 1, 2017. Upon receipt of the FNDA, the appellant may appeal that matter to the Commission in accordance with *N.J.A.C.* 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the **current drug test only**. Should he be unsuccessful in that appeal, he shall be deemed removed effective August 1, 2017.

If the appellant passes the drug test, the appellant is to be reinstated, and is entitled to mitigated back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. Typically, when there is a reversal of charges, mitigated back pay, benefits and seniority would be from the effective date of the suspension, which in the case is August 1, 2017. However, in light of the fact that the appointing authority had legitimate grounds for suspending the appellant effective that date due to an undisputed positive drug screen on July 27, 2017, the Commission finds that the appellant is entitled to mitigated back pay, benefits and seniority from August 30, 2017, the date of the appellant's return to duty drug screen by the appointing authority's authorized facility which resulted in a positive result due to residual marijuana.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12 provides for the award of full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission. In this case, the Commission reversed contingent on his passing a return to work drug test. Should he pass that test, he is entitled to reasonable counsel fees. Should he fail that test, counsel fees are denied. Additionally, in light of the Appellate Division's decision in *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. However, under no circumstances should his reinstatement be delayed pending resolution of any back pay or counsel fee dispute.

ORDER

The Civil Service Commission finds that the removal of the appellant was not justified and therefore, reverses that action. The Commission also orders that the appellant undergo a return to work drug test prior to his reinstatement. Should the appellant fail the drug test, the appointing authority is to issue a new FNDA with a removal date of August 1, 2017. Should he pass the drug test, he should be immediately reinstated. If ultimately reinstated, the Commission further orders that the appellant be granted back pay, benefits and seniority for the period from August 30, 2017 to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of the issuance of this decision.

It is further ordered that, should the appellant pass the return to work drug test, counsel fees should be awarded to the appellant as the prevailing party pursuant to *N.J.A.C.* 4A:2-2.12. The appellant shall provide proof of income earned and an affidavit of services to the appointing authority within 30 days of issuance of this decision. If the appellant fails the drug test, counsel fees are denied.

Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of the appellant's reinstatement. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2nd DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 15785-2017
AGENCY DKT. NO. 2018-1038

IN THE MATTER OF VAN JENKINS, CITY OF CAMDEN, DEPARTMENT OF PERSONNEL.

James Katz, Esq., for appellant Van Jenkins (Spear Wilderman, P.C., attorneys)

Ilene Lampit, Esq., Assistant City Attorney, for respondent City of Camden

Record Closed: February 5, 2018 Decided: March 22, 2018

BEFORE **ELAINE B. FRICK**, ALJ:

STATEMENT OF THE CASE

Respondent, City of Camden (the City), removed appellant, Van Jenkins, from his position as a mechanic, effective August 1, 2017. The City alleges there was just cause for the disciplinary action under N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, because the appellant's return to work drug screen tested positive for marijuana, in violation of the City's Drug and Alcohol Policy (D&A Policy) and a second chance agreement.[1] Appellant contests his removal and seeks reinstatement to his employment and back pay.

[1] Although the Preliminary and Final Notice of Disciplinary Action forms in this matter list additional charges of insubordination, conduct unbecoming, and neglect of duty, the City has specified the only charge upon which they are basing the removal of appellant is N.J.A.C. 4A:2-2.3(a)(12) other sufficient causes.

PROCEDURAL HISTORY

On August 1, 2017, the City issued a Preliminary Notice of Disciplinary Action setting forth charges against appellant, and suspending him effective August 1, 2017, without pay. On September 7, 2017, the City issued a second Preliminary Notice of Disciplinary Action to appellant, recommending removal effective August 1, 2017.

A departmental hearing was conducted on September 28, 2017. The City issued a Final Notice of Disciplinary Action on October 2, 2017, disciplining appellant with removal from his position, effective August 1, 2017. Appellant requested an appeal, and the matter was filed with the Office of Administrative Law (OAL) on October 24, 2017, to be scheduled for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on January 25, 2018. The parties submitted post-hearing summation briefs and the record closed on February 5, 2018.

FACTUAL DISCUSSION

The parties stipulated the following facts and I therefore **FIND** them as **FACTS**:

1. Vance Jenkins began employment with the City of Camden on April 27, 2005.

2. His permanent Civil Service title at [the] time of removal was mechanic.

3. Prior to the incident which occurred on July 27, 2017, Mr. Jenkins had never been disciplined by the City of Camden for any reason in connection with his employment.

4. Prior to the drug test on July 27, 2017, Mr. Jenkins was previously tested for drugs in connection with his employment with the City of Camden.

5. Prior to the drug test on July 27, 2017, Mr. Jenkins had never previously tested positive for drugs in connection with his employment with the City of Camden, nor had there been any issues in connection with any prior drug test administered by the City of Camden to Mr. Jenkins in connection with his employment. (J-1).

TESTIMONY

Martin Hahn, Risk Manager, City of Camden, testified for the respondent. He has been employed as a risk manager for approximately thirty-six years, and has worked for the City of Camden in that position for the past fourteen years. Approximately twelve years ago, he crafted the City's D&A Policy with the then City attorney. (R-1.) The D&A Policy outlines six types of employee drug and alcohol testing that may occur, two of which are random drug screens for employees in safety sensitive positions, such as appellant's position as a mechanic; and return-to-work testing, used in situations where an employee has been absent from work due to enrollment in a drug or alcohol rehabilitation program. (R-1 at 104.)

The City had no evidence of appellant ever having a drug problem or being impaired at work prior to, or on July 27, 2017. The City had no evidence of appellant ever failing to perform his job duties prior to, or on July 27, 2017. Pursuant to the D&A Policy, an outside vendor randomly selects employees to submit to drug screens. Appellant was randomly selected on July 27, 2017.

Mr. Hahn is the Drug Enforcement Representative (DER) for the City, and is responsible to oversee the City's drug testing program and the Employee Assistance Program (EAP) related to the D&A Policy. As DER, he receives the results of employee drug tests and received the appellant's positive random urine screen of July 27, 2017. The result of the random drug screen was positive for marijuana. (R-4.)

The City issued a Preliminary Notice of Disciplinary Action to the appellant, charging him with violation of the D&A Policy, for having tested positive for marijuana. (R-6.) The appellant was suspended without pay, pending a hearing. The appellant was not terminated. Rather, like all other employees who test positive, he was given the opportunity to sign a second chance agreement.

Mr. Hahn assisted the City's attorney in crafting the City's second chance agreement many years ago. The purpose of the second chance agreement is to give an

employee who has tested positive for drugs the opportunity to become rehabilitated, instead of immediately being discharged. The parties signed the appellant's second chance agreement on August 1, 2017. (R-3.)

The second chance agreement identifies that appellant would be suspended without pay from August 1, 2017, until he was cleared to return to work. (R-3.) The agreement provided that the appellant had to cooperate and comply with the EAP recommended program or treatment. (R-3 at paragraph 3.) If he did not comply with the EAP program, the City could precede with disciplinary action. (R-3 at paragraph 3.)

The second chance agreement also required the appellant to pass a return to duty drug test. (R-3 at paragraph 4.) Mr. Hahn acknowledged there were no consequences in that paragraph as to what would occur if the appellant did not pass the return to duty drug test. There are no time constraints as to when the appellant would be required to pass a return to duty drug screen. Mr. Hahn identified a subsequent paragraph in the agreement which provides that if appellant tested positive at any time in the future, then his employment with the City would be terminated. (R-3 at paragraph 8.)

The second chance agreement further provided that upon the appellant's return to active duty, he would be required to participate in a two-year after-care program and would be required to submit to at-will drug testing. (R-3 at paragraph 5.) The consequences for non-compliance with the after-care program, or a positive test for drugs during that time, would result in immediate termination. (R-3 at paragraph 5.)

After the second chance agreement was signed, Mr. Hahn did not reach out to the company that independently operates the EAP program. He did not reach out to the appellant regarding the status of his compliance with the EAP program. Mr. Hahn learned that appellant wanted to return to work and had tested negative for drugs through a test the appellant had obtained on his own. Mr. Hahn received a letter dated August 29, 2017, from an EAP representative, indicating that appellant was ready to be considered for return to duty. (P-1.) He directed appellant to get a return to work urine screen completed through the City's designated laboratory facility. He then received the

drug testing summary report for the appellant, with a positive result for marijuana, from the return to work urine sample collected from appellant on August 30, 2017. (R-2.)

Another Preliminary Notice of Disciplinary Action was issued, this time recommending removal because of the positive return to duty drug screen of August 30, 2017. (R-7.) A departmental hearing was conducted on September 28, 2017. (R-8.) The City issued a Final Notice of Disciplinary Action, removing appellant, effective August 1, 2017. (R-9.)

Mr. Hahn agreed that appellant was a reliable and valuable employee. The appellant had no prior employment issues.

Mr. Hahn confirmed that if the appellant did not use drugs after signing the August 1, 2017, second chance agreement, then he would not be in violation of the agreement. He further confirmed that if the August 30, 2017, positive result for drugs was due to residual marijuana in the appellant's system, from use prior to the July 27, 2017, positive random drug screen, then the appellant would not be in violation of the agreement. He emphasized he does not have the ability to determine if the positive result was due to residual marijuana, because the D&A policy only requires a positive result, without any further analysis of the quantity or comparison to prior tests. The appellant could not return to work, because he did not pass the return to duty urine screen.

Harsh Dangaria, M.D., testified on behalf of the City. He is a doctor of medicine and his primary line of work is in the field of pain management and he also works as a Medical Review Officer (MRO). He was qualified as an expert in the field of reviewing medical reports and urinalysis report review.

All MROs are required to follow federal Department of Transportation (DOT) guidelines when reviewing medical reports. Even though the appellant is a non-DOT employee, Dr. Dangaria, as a certified MRO, must adhere to DOT guidelines. Those guidelines provide that a urine screen will be considered positive for marijuana if the marijuana metabolite level is greater than 15 ng/mL.

Dr. Dangaria's duties as an MRO are to review an employee's positive laboratory drug result to determine if the result is correct, and speak to the employee to determine if there is some other medical explanation as to why the positive result occurred. He accepts the written results at face value, and does not conduct tests on the actual sample. It is beyond his duties as an MRO to conduct research to determine how or when an individual was exposed to marijuana. He reviews the chain of custody notations regarding the urine sample to ensure that each step has been initialed by an individual as having been completed. He does not independently verify that every individual involved, from the collection of the sample to the handling and testing of the sample, completed each task and complied with proper procedures.

Dr. Dangaria reviewed the appellant's laboratory test result from the urine sample collected on August 30, 2017, which was positive for marijuana with a level of 33 ng/mL. (R-2 at page 4.) He called the appellant on September 6, 2017, after 9:00 p.m. and spoke to him, but did not independently recall the conversation. He could not recall specifically what they discussed, but indicated that he did not receive any information from the appellant that there may have been an alternate medical reason as to why the test was positive. Dr. Dangaria signed the report confirming the test result to be positive for marijuana. (R-2 at page 3.)

If there happens to be a prior drug test, Dr. Dangaria does not review it as part of his duties. He did not review appellant's first test from July 27, 2017, until a few days prior to the hearing when he received a copy of it. (R-4.) He agreed that the quantitative result from July 27, 2017, of 319 ng/mL of marijuana metabolite was quite high. He would not be able to determine when the usage occurred, but the quantitative result would be indicative of recent high quantity use, and not a casual use a long time prior to the testing. He agreed that marijuana can stay in one's system, generally seven days for casual user, and up to thirty days for a chronic user, according to the DOT guidelines he must follow.

Dr. Dangaria acknowledged that the 33 ng/mL marijuana metabolite result from appellant's return to duty drug test of August 30, 2017, was significantly lower than the

July 27, 2017, quantitative result of 319 ng/mL. That differential would not have affected his conclusion that the second test was positive, since the 33 ng/mL quantitative result was still above the DOT guidelines of 15 ng/mL being the cut off for a positive test. He agreed that the August 30, 2017, result may reflect casual use of marijuana a long time ago, but such use would have occurred within thirty days prior to the test sample being collected, as per the DOT guidelines.

Dr. Dangaria has not done research into the length of time marijuana can remain in one's system, but has reviewed research articles. He agreed there is the possibility that someone may test positive, negative, then positive again from the same use, but that would only be within the thirty-day time frame from when the use occurred. He is aware of other research literature where individuals tested positive for marijuana thirty to forty days from use, but they are just case studies, they are not the DOT guidelines he is required to follow as an MRO.

Dr. Dangaria agreed that weight loss after use of marijuana can have an impact on the length of time marijuana remains in one's system because marijuana metabolite is stored in fatty cells. When there is a loss of weight, the marijuana may continue to show up in urine screens for some time after the drug use. However, he would still adhere to the DOT guidelines that a positive result would only continue up to thirty days from use. The DOT guidelines are considered the "gold standard" for all types of drug testing for employers. He is retained to review a report and if it is considered positive, over the DOT guideline cut off of 15 ng/mL, it is a positive test, regardless of weight loss, or when and how the drug use occurred. Thus, the appellant's August 30, 2017, return to work drug screen was confirmed as positive for marijuana.

Van Jenkins testified on his own behalf. He was hired by the City of Camden to be a mechanic in 2005. He was suspended without pay because of testing positive for marijuana from the random drug screen urine sample collected on July 27, 2017. His last pay was as of July 28, 2017.

The appellant was presented a second chance agreement. He reviewed it and executed it in the presence of his union representative on August 1, 2017. He

understood the terms of the second chance agreement to require him to complete a recommended course of EAP treatment and produce a clean return to work urine screen before he would be returned to active duty. Once he would be returned to active duty, he knew he must comply with an after-care program for two years. He also understood that if he tested positive for drugs at any time after being reinstated to active duty, he would be immediately terminated.

He was evaluated by a representative of the EAP program. He was required to refrain from drug use. He has not used marijuana or any illegal drugs since he tested positive from the random screen collected on July 27, 2017.

The EAP representative recommended that appellant attend three weekly lectures. (P-2.) He attended those lectures as scheduled in August of 2017. (P-3.) He was told by the EAP representative he did not have to attend a fourth lecture listed on the schedule, regarding grief and loss.

The EAP program representative also recommended that the appellant take his own drug screens, to monitor his status. On August 22, 2017, he went to his primary care doctor and submitted a urine sample. He was advised it was positive for marijuana. He went back to his primary care doctor on August 29, 2017. He submitted another urine sample and was advised it was negative. His primary care doctor noted on her prescription blank form that appellant had a negative urine drug screen in the office on that date. (P-4.)

Upon receipt of the note from his doctor, the appellant advised the EAP representative of the negative result. The EAP representative authored a letter dated August 29, 2017, indicating the appellant was ready to return to duty. (P-1.) The EAP representative advised the appellant to contact the City's Risk Manager, which he did. He was given forms to go to the City's approved laboratory facility to submit a urine sample for a return to duty drug screen.

The appellant went the next day, August 30, 2017, to the City's specified laboratory facility and provided a urine sample. He was later advised the result was

positive. He believed he would be negative since the day prior his primary care doctor advised him that his urine screen was negative and he had not used any illegal drugs since he entered into the second chance agreement. He never would have requested to submit to the return to duty drug screen if he knew he would be positive. He never was advised he could be re-tested or submit a second sample. Instead, he was notified he would be terminated.

The appellant lost approximately 25 pounds while he was suspended. He had gone to his doctor in mid-July, and recalled being told he weighed 223 pounds, which he thought was high for him. On August 22, 2017, when he went to his doctor to have a urine screen done, he weighed 198 pounds.

The appellant asserts he is ready, willing, and able to return to work. He has had his own urine screen completed again. As of January 16, 2018, he tested negative for illegal drugs. (P-5.)

Gary Lage, Ph.D., testified on behalf of the appellant. He was qualified as an expert in pharmacology and toxicology. He explained that a positive urine screen indicates there is a suggestion of previous exposure to marijuana at some time in the past. It cannot pinpoint how or when it was ingested. The urine screen is testing for THC COOH, (marijuana metabolite) which is a metabolite of THC, the active ingredient in marijuana, which is formed in the body when someone is exposed to marijuana. Marijuana metabolite is a fat-soluble substance which has a long elimination from one's system because it can have a long half-life. For example, when marijuana is smoked, it effects the brain first because of the fatty tissue in the brain. Over time, the metabolite ends up being stored in the body fat, where it can remain for a long time. Once in the body fat, it will leek back into the blood, then into the urine, where it is excreted. As a result, an individual may continue to have a positive urine screen for marijuana for a very long time, after the use.

Mr. Lage is aware that the DOT standard setting the time frame for marijuana remaining in one's system is up to thirty days. He considers that cut off as a "regulatory" standard. There have been research studies finding that marijuana may remain in an

individual's system for thirty to seventy days after initial exposure. (P-7A at 1.)[2] This may occur even when there has been no additional exposure to marijuana. It is also not unusual for an individual to test positive, then negative, then positive again, as the metabolite is released from the fat to the blood to the urine. (P-7A at 1.)

Mr. Lage correlated one research study with the appellant's circumstances. (P-7A and B.) The purpose of the study was to determine the time period for the urinary excretion of marijuana metabolite by individuals who were under a monitored abstinence program. This would enable a better understanding of the patterns of excretion, to differentiate recent cannabis use from residual drug excretion in urine screens. The study followed sixty individuals, breaking them into three subset groups according to initial positive quantitative levels of marijuana metabolite. The individuals were also tracked according to their Body Mass Index (BMI).

The appellant's random positive drug screen of July 27, 2017, had a quantitative result of 319 ng/mL, which correlated with 20 individuals in the subset group of the study who had a greater than 150 ng/mL initial positive test. (R-4.) The study monitored numerous urine samples of the individuals over a fixed protocol of thirty days. Six of the individuals in the group similar to appellant's situation, were still testing positive for marijuana in their drug screens late into the study, on the twenty-seventh day, twenty-eighth day, and the twenty-ninth day, which was the final testing day. (P-7B; P-7A at 5.) Mr. Lage opined that some of those individuals may have continued to test positive beyond thirty days. However, he conceded that the study did not go beyond thirty days and he recognized that the appellant's positive return to work screen on August 30, 2017, was thirty-four days after the July 27, 2017, result.

The research study results that have found large differentials of the quantitative levels of marijuana metabolite from the initial positive test to the subsequent positive tests, that marijuana metabolite will continue to be excreted for a long time after initial exposure. Similarly here, the appellant had a nearly 90 percent decrease in his

[2] Mr. Lage referred to five different research articles which are references cited in Exhibit P-7A, Goodwin, Robert, et al, *Urinary Elimination of 11-Nor-9-carboxy-9-tetrahydrocannnabinol in Cannabis Users During Continuously Monitored Abstinence*, Journal of Analytical Toxicology, 2008 Oct; 32(8): 562-569.

quantitative initial positive result of 319 ng/mL versus the positive result with 33 ng/mL. Mr. Lage reasoned that if the appellant had abstained from any exposure after his first positive test, the dramatic decrease would represent residual marijuana in his system from the first positive test of July 27, 2017. He conceded there was the possibility that appellant was exposed to marijuana between July 27, 2017, and August 30, 2017, but it was not consistent with these facts.

The appellant's BMI also correlated with the six individuals in the research study who continued to test positive late into the study. The appellant's BMI based upon his height and weight as of mid-July 2017, would be considered overweight, just as the six individuals were categorized by their BMI. The appellant lost twenty-five pounds within a month. During a period of abstinence from marijuana, the release of the metabolite from fat tissue into the blood is highly variable, and weight loss can affect that release, which in turn leads to variability in the urinary marijuana metabolite concentration. (P-7A at 5.) Thus, there is significant correlation between BMI and the time until the last positive urine test occurs. (P-7A at 5.) Coupled with weight loss, where any body fat chemicals get thrown into the blood, then excreted through the urine, the metabolite will continue to be excreted and will result in a positive urine screen.

Mr. Lage concluded that it was his expert opinion that it was toxicologically probable that appellant's positive urine screen of August 30, 2017, was the result of residual marijuana from the first positive test of July 27, 2017, if the appellant had not been exposed to marijuana since that time. The conclusion was based upon the decline in quantitative levels from the appellant's July 27 random test to the August 30 return to work test; the scientific research finding that individuals may test positive, negative, then positive again as the marijuana metabolite is excreted; the scientific research finding the length of time marijuana remains in one's system more than thirty days after use; and the variability that occurs in the excretion of marijuana from one's system for an individual who has lost weight during a period of drug abstinence.

FINDINGS OF FACT

A fact finder is obligated to weigh the credibility of witnesses. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). Credibility is the value that a fact finder gives to a witness' testimony. It is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950).

A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency, and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). The fact finder also should consider the witness' interest in the outcome, or any motive or bias. The fact finder may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I deem the testimony of Martin Hanh, Risk Manager for the City of Camden, as being credible. He testified in a forthright and confident manner, having decades of experience in his line of work. He assisted in crafting the City's D&A Policy and the second chance agreement and had firsthand knowledge of the City's intent to rehabilitate employees to enable them to return to active work. He candidly acknowledged that Mr. Jenkins would not be in violation of the second chance agreement, if the positive test result of August 30, 2017, was due to residual marijuana in Mr. Jenkin's system.

I deem the testimony of Van Jenkins to be credible. He testified in a very business-like manner, with a flat affect. He did not fidget. He maintained eye contact with the attorneys when questioned during direct and cross examination. He did not respond to questions in a mechanical or coached manner. Rather, he was very

thoughtful in his responses and paused at times before responding. His factual assertions were consistent with other facts, and not inherently incredible. He has a substantial stake in the outcome, but he did not exaggerate his testimony, nor was he displaying desperation in his demeanor. His disposition came across as a man who simply wants to get back to work. This intent is supported by the logical steps he took in following the terms of the second chance agreement to get reinstated to active duty.

I further deem his factual testimony credible, because it is consistent with the scientific research. The appellant refrained from drug use from the time of the positive random screen of July 27, 2017, through the time of the positive return to work screen on August 30, 2017. This is supported by his actions in immediately following the EAP recommendations. He monitored his own drug level status by getting drug screens through his primary care doctor's office. When he still tested positive on August 22, 2017, he went back a week later, and tested negative on August 29, 2017, according to his primary care doctor. It defies logic that the appellant would seek out taking the return to work screen the very next day if he had used marijuana.

I deem the testimony of Dr. Harsh Dangaria as credible, but not as persuasive as Mr. Lage. His testimony was consistent with the job he was engaged to do: review a lab report. He is required to follow DOT guidelines. That is why he would adhere to the DOT standard position that marijuana may remain in one's system up to thirty days, but it is irrelevant to him because he only confirms if a report is positive or negative. He thus acknowledged the possibility that the appellant's August 30, 2017, positive test result could be due to residual marijuana, but only because of use within thirty days prior to the positive result, because that is what the DOT guidelines provide. He rigidly held to the DOT standards, because he is bound to them, despite his knowledge of scientific studies that identify the possibility of marijuana remaining in one's system beyond thirty days.

I deem the testimony of Gary Lage, PhD, to be credible, and most persuasive. He has decades of experience and has testified as an expert in hundreds of matters. He is deemed to be credible not just due to experience, but also due to his reasoning and opinion being supported by several scientific studies, which were not discredited or

rebutted.

Mr. Lage's expert opinion is consistent with the totality of the facts, when viewed with the scientific research, which compels the conclusion that the positive return to work drug screen was the result of residual marijuana. The quantitative levels of marijuana metabolite from the random test, 319 ng/mL, compared to the subsequent result of the return to work test of 33 ng/mL, demonstrates that this was residual marijuana, for an individual who has abstained from marijuana. Both experts confirmed this was a significant decrease. Although there is the possibility that the positive result of the return to work test was due to recent exposure, all other factors weigh in support of this being residual marijuana.

Both experts agree that weight loss could have an effect on the time frame when marijuana remains in one's system. The appellant experienced a twenty-five-pound weight loss during the time frame the marijuana continued to be excreted from his system. Therefore, the weight loss caused variability in the excretion of the metabolite.

The City's expert could only agree that the appellant could test positive up to thirty days, because that is the DOT guideline he is bound to follow as an MRO. Those guidelines are regulatory. As Mr. Lage explained, the research supports appellant's circumstances, that the length of time to excrete the residual marijuana may go beyond thirty days. It is not a stretch to think that residual marijuana was still in appellant's system four days beyond a thirty-day regulatory cut off, and when coupled with the appellant's weight loss.

The pattern of appellant's self-initiated drug screen results also supports the proposition that residual marijuana continued to be excreted. Both experts confirmed that an individual may test positive, negative, and positive again while the metabolite continues to be excreted. It defies logic for appellant, as a long-term employee with no prior issues, to seek out return to active duty, if he thought he would test positive again. He had a negative self-test the day prior to the return to work screen. This pattern is not unusual, as described by both expert witnesses. Although the City's expert again adhered to the thirty-day cut off period for that pattern to occur, the totality of the

circumstances, as supported by other scientific studies cited by Mr. Lage, compels the conclusion that that this was residual marijuana.

Based upon a review of the documentary evidence and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following as **FACTS** in this matter:

1. The City's D&A policy governs the drug testing procedures for illegal and abusive drug use for City employees and job applicants.

2. The City's D&A policy outlines six types of drug tests the City is authorized to conduct, two of which are return-to-work testing and random testing.

3. The City's D&A policy may require employees in safety-sensitive positions to submit to random drug testing.

4. The City's D&A policy may require employees in safety-sensitive positions to submit to return-to work drug testing at the discretion of the DER, where the employee has been absent from work due to enrollment in a drug or alcohol rehabilitation program.

5. The City's D&A policy provides that upon receipt of a verified or confirmed positive drug test result, the employee will be permitted to return to work upon verification of rehabilitation and/or treatment by the DER and the employee successfully completing a drug screen.

6. The City's D&A policy provides that when the employee returns to work after their rehabilitation and/or treatment, they are required to enter a two-year program of EAP supervision and be subject to drug testing without prior notice.

7. Van Jenkins submitted to a random drug screen on July 27, 2017, which tested positive for marijuana. The quantitative result was 319 ng/mL.

8. The City issued a Preliminary Notice of Disciplinary Action to Mr. Jenkins on August 1, 2017, notifying him of the charges against him, and that he was suspended effective August 1, 2017, without pay, until after a Loudermill Hearing, and then it would be determined when he would be suspended or removed from employment.

9. The parties entered into a second chance agreement on August 1, 2017.

10. The second chance agreement held in abeyance the City's disciplinary action, but suspended the appellant without pay, until he was cleared to return to work.

11. The second chance agreement required Mr. Jenkins to submit to and cooperate in a substance abuse program through the EAP, and participate and comply with the recommendations of the EAP.

12. The second chance agreement required Mr. Jenkins to pass a return to duty drug test, in order to return to work.

13. The second chance agreement required Mr. Jenkins to participate in a continuing after care program, including at-will testing, for a period of two years, commencing with his date of return to active duty.

14. Mr. Jenkins was recommended by EAP to attend a lecture series, which he did in August 2017.

15. Mr. Jenkins was recommended by EAP to monitor his status by obtaining his own independent drug screens, which he did on August 22, 2017, and August 29, 2017, through his primary care doctor's office.

16. The result of Mr. Jenkins' August 22, 2017, drug screen administered through his doctor's office was positive for marijuana.

17. The result of Mr. Jenkins' August 29, 2017, drug screen administered through his doctor's office was negative for marijuana.

18. Mr. Jenkins took a return to duty drug screen, at his request, on August 30, 2017, administered through the City-approved facility.

19. The result of Mr. Jenkins' August 30, 2017, return to duty drug screen was positive for marijuana. The quantitative result was 33 ng/mL.

20. Mr. Jenkins did not use marijuana or illegal drugs from July 27, 2017, through August 30, 2017.

21. Mr. Jenkins had a weight loss of twenty-five pounds from mid July 2017, through August 22, 2017.

22. Mr. Jenkins positive return to work drug screen of August 30, 2017, was the result of residual marijuana metabolite from appellant's prior exposure to marijuana before the July 27, 2017, test.

LEGAL ANALYSIS AND CONCLUSIONS

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an inducement to attract qualified people to public service. Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). A civil service employee who commits a wrongful act related to his or her employment, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metropolitan Bottling Co.,

26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Here, the City has the burden to demonstrate by a preponderance of the evidence that the appellant violated the D&A policy and the second chance agreement, to justify the disciplinary action of removal. N.J.A.C. 4A:2-2.3(a)(12). This is a fact-sensitive determination as to whether the positive return to work drug screen of August 30, 2017, mandated removal of the appellant.

I **CONCLUDE** that the appellant is required under the City's D&A Policy and the second chance agreement, to complete two conditions before he is returned to active duty, and then is subject to the conditions of the after-care program. The two conditions to be completed before return to active duty are compliance with the treatment recommended to him through the EAP program, and for him to pass a return to duty drug screen. A plain reading of the D&A policy in conjunction with the second chance agreement, supports that both conditions must be completed before the appellant is returned to active duty.

I **CONCLUDE** the appellant has completed the terms of the EAP program that were recommended to him. After executing the second chance agreement, the appellant immediately contacted the EAP representative, was evaluated, and then given the recommended course of treatment: stay drug free; complete the three weekly lecture series; and monitor his status with self-obtained drug screens. He followed all those recommendations, completed the tasks, and the EAP representative confirmed he was ready to return to active duty. (P-1.)

The second condition the appellant was required to complete to be returned to active duty, was to pass a return to duty drug screen. He did not do that. The return to duty drug screen of August 30, 2017, was positive for marijuana. The City contends the positive screen mandated the removal of the appellant because it was a violation of the D&A policy and the second chance agreement.

The paragraph of the second chance agreement requiring the appellant to pass a return to duty drug screen, before returning to active duty, does not specify any consequences if the appellant tested positive. Nor does the D&A policy outline any consequences. There are no time constraints as to when the appellant must pass the return to work drug screen. In contrast, there are consequences outlined in the second chance agreement if he failed to comply or complete the recommended treatment of the EAP program. There are consequences outlined if he failed to comply with the after-care program once he is returned to active duty. The only requirement without consequences within the second chance agreement is the requirement to pass a return to duty drug screen. The only consequence would be he is not yet returned to active duty. Thus, it logically flows that if the City, which was the scrivener of the agreement, intended the major disciple action of removal to occur if the return to duty test was positive, that consequence would have been spelled out, and it was not.

To interpret paragraph 4 of the second chance agreement to require immediate termination if a positive return to work drug screen was produced, frustrates the intent of the second chance agreement. The City's long time Risk Manager, and assistant drafter of the policy and agreement, confirmed that the City intended to provide an employee who tests positive from a random drug screen the opportunity to be rehabilitated before returning to active duty. It is contrary to that intent if the appellant is removed because he has not yet demonstrated compliance with a second condition of the agreement, which has no time frame, nor such drastic consequences specified within the agreement or the policy.

It is logical that there is no time constraint on the employee to produce a clean return to work drug screen. An employee may be compliant with recommended EAP treatment, but may continue to test positive for drugs that remain in one's system for some time after the use of the drug that resulted in the initial positive random drug screen. They may also test positive, negative, then positive again before the metabolite is completely excreted from their system. This was confirmed by both experts. That is precisely what occurred here. The appellant was compliant with the recommended EAP program, refrained from drug use, but tested positive by his primary care physician, then negative, then was positive on the return to work screen.

It is further reasonable and logical for the appellant to believe he was still in suspended status. That is supported by the structure of the agreement. Paragraphs 1 through 3 of the second chance agreement address the EAP conditions and consequences of non-compliance. Paragraph 4 addresses the suspension without pay and that appellant must pass a return to duty drug test to be considered an active duty employee. Paragraphs 5 through 7 address the conditions of the after-care program and the consequences of non-compliance. Paragraph 8 of the agreement provides that the appellant could be terminated at any time if there was a positive test, which reasonably is interpreted to mean *after* the appellant returned to active duty.

The structure of the City's D&A Policy supports the appellant's interpretation of the second chance agreement. The D&A Policy outlines six different types of employee drug testing that may occur. There is a distinction between a random drug screen and a return to duty drug screen. A return to duty test means just that: it is a test taken before an employee is returned to duty. Hence, it is logical and reasonable for Mr. Jenkins to believe that he had to pass that test, before he was considered returned to active duty.

Although the D&A Policy only goes by a positive or negative result, and does not get into an analysis of the quantity of marijuana metabolite from the initial test versus the subsequent test, the City's Risk Manager confirmed that if there was no drug use by Mr. Jenkins after the random screen on July 27, 2017, and the return to work drug test of August 30, 2017, was positive because of residual marijuana metabolite from the prior exposure, then there would be no violation of the second chance agreement. Since the totality of the circumstances supports that the positive return to work screen of August 30, 2017, was the result of residual marijuana, and Mr. Jenkins refrained from drug use, by the City's own admission, Mr. Jenkins would not be in violation of the D&A policy or the second chance agreement.

I **CONCLUDE** that the appellant's positive return to duty drug test of August 30, 2017, occurred while the appellant was suspended from his work duties. I **CONCLUDE** that the positive return to work drug screen did not violate the D&A policy and the second chance agreement. I further **CONCLUDE** that the neither the D&A policy nor the

second chance agreement mandated removal of the appellant because of his positive return to work drug screen.

The City certainly has a duty to put the safety of the public of paramount importance and require employees in safety sensitive positions to undergo random drug screens. However, the City also recognizes the rights of their employees and have balanced the importance of safety with the rights and health of their staff, by providing the second chance agreement as an opportunity for rehabilitation, rather than automatic termination.

The appellant is exactly the candidate for a "second chance". He is a long-term employee with no prior discipline issues and is responsible and valuable to the City. Clearly something was amiss for him to test positive for marijuana approximately fourteen years into his employment, without ever having tested positive previously. When given the second chance opportunity, he immediately agreed to comply with the conditions of the agreement to be reinstated to work. He immediately began the EAP recommended program. He did everything he was advised to do by the EAP representative. He did not hesitate in attending the lectures, and submitting himself to independent urine screens through his primary care doctor to ensure he would have a clean urine screen. He took on these tasks within one month from when he signed the second chance agreement. He reasonably interpreted the second chance agreement in a logical manner consistent with the language of the D&A policy and the language of the agreement. This is a man who wanted to get himself rehabilitated and get back to work as soon as possible.

I **CONCLUDE** that the positive return to work test of August 30, 2017, did not violate the City's D&A Policy and the second chance agreement. I **CONCLUDE** that the D&A policy and the second chance agreement do not mandate that removal will occur if there is a positive return to work test. I **CONCLUDE** that the appellant would still be in suspended without pay status, subject to the terms of the second chance agreement, before he can be returned to active duty. Therefore, I **CONCLUDE** the City has not sustained its burden by a preponderance of the evidence that removal of the appellant is warranted pursuant to N.J.A.C. 4A:2-2.3(a)(12), other sufficient causes.

DECISION AND ORDER

I **ORDER** that the City's decision to remove the appellant is **REVERSED**. I further **ORDER** that the appellant shall be reinstated to suspended without pay status.

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

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

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

March 22, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: March 22, 2018

Date Mailed to Parties: March 23, 2018

mph

APPENDIX
LIST OF WITNESSES

For Appellant:

Van Jenkins

Gary Lage, PhD

For Respondent:

Martin Hahn

Dr. Harsh Dangaria

LIST OF EXHIBITS

Joint Exhibits:

J-1 Stipulation of Facts

For Appellant:

P-1 EAP letter August 29, 2017
P-2 EAP lecture schedule
P-3 Meeting attendance Verification Form EAP lectures
P-4 Prescription Blank - negative UDS in office 08/29/2017
P-5 Drug screen 01/16/2018
P-6 Gary L. Lage, Ph. D, curriculum vitae
P-7 A: Research article: "Urinary Elimination of 11-Nor-9-carboxy- 9-tetrahydrocannnabinol in Cannabis Users During Continuously Monitored Abstinence"
B: Table/charts

For Respondent:

R-1 City's Drug and Alcohol Policy
R-2 Return to work drug screen 08/30/2017
R-3 Second Chance Agreement August 1, 2017
R-4 Random drug screen 07/27/2017
R-5 Collective Bargaining Agreement
R-6 Preliminary Notice of Disciplinary Action 08/01/17
R-7 Preliminary Notice of Disciplinary Action 09/07/17
R-8 Memo 09/29/2017 with Hearing Officer Report 09/28/17
R-9 Final Notice of Disciplinary Action 10/02/17
R-10 Job specifications-mechanic
R-11 Harsh Dangaria, M.D., curriculum vitae

5-2-18

A-8

STATE OF NEW JERSEY

In the Matter of Joseph Maglione
Ewing Township Police Department

CSC DKT. NO. 2018-1233
OAL DKT. NO. CSR 16797-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 4, 2018 BW

The appeal of Joseph Maglione, Police Lieutenant, Ewing Township Police Department, removal effective October 18, 2017, on charges, were heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on April 3, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 2, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Joseph Maglione.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 16797-17

AGENCY DKT. NO. N/A

IN THE MATTER OF JOSEPH MAGLIONE,
EWING TOWNSHIP, POLICE DEPARTMENT.

Frank M. Crivelli, Esq., for appellant, Joseph Maglione (Crivelli & Barbati, LLC, attorneys)

Rocky L. Peterson, Esq., for respondent, Ewing Township Police Department (Hill Wallack, LLP, attorneys)

Record Closed: March 9, 2018 Decided: April 3, 2018

BEFORE **TAMA B. HUGHES,** ALJ:

STATEMENT OF THE CASE

Joseph Maglione ("Maglione" or "appellant") a lieutenant with the Ewing Township Police Department ("respondent" or "Department") appeals the Department's decision to remove him from employment.

PROCEDURAL HISTORY

On July 14, 2017, a Preliminary Notice of Disciplinary Action (PNDA), was issued seeking appellant's removal based on the following violation of Departmental Rules and Regulations (DR&R), specifically, Sections: 3.1.1(a) (Police Officers Shall: Take Appropriate Action To Protect Life And Property); 3.1.3 (Police Officers Shall: Abide By All Rules, Regulations And Department Procedures And Directives Governing Police Officer Employees); 3.1.5 (Police Officers Shall: Coordinate Efforts With Other Employees Of The Department To Achieve Department Objectives); 3.1.10 (Police Officers Shall: Perform All Related Work As Required); 3.2.1 (Supervisors In The Department Shall: Enforce Department Rules And Insure Compliance With Department Policies and Procedures); 3.2.3 (Supervisors In The Department Shall: Exercise Necessary Control Over Their Subordinates To Accomplish The Objectives Of The Department); 3.2.4 (Supervisors In The Department Shall: Guide And Train Subordinates To Gain Effectiveness In Performing Their Duties); 4.1.1 (General Conduct - Performance Of Duty); 4.1.5 (General Conduct - Truthfulness); and 4.12.6 (Judicial Appearance And Testimony - Truthfulness)

On August 23, 2017, and September 3, 2017, a Department hearing was held. On October 18, 2017, all charges against appellant were sustained and incorporated into a Final Notice of Disciplinary Action (FNDA). (R-146.) The proposed penalty was removal from employment.

Appellant appealed his removal to the Office of Administrative Law (OAL), where it was perfected on November 2, 2017. Prior to the hearing, appellant partially waived the 180-day rule, granting a 90-day waiver. The hearing in this matter commenced on January 26, 2018, and continued thereafter on January 31, 2018, February 1, 2018, February 12, 2018, and February 21, 2018. Upon receipt of the parties' summation briefs, the record closed on March 9, 2018.

FACTUAL DISCUSSION AND FINDINGS

Nicholas A. Muscente (Muscente), a detective with the Ewing Township Police Department, testified that he has been with the Department for the past fifteen years and in the Internal Affairs Department (IAD) since 2015. On May 31, 2017, he was formally assigned to handle an internal investigation (Investigation) regarding an incident that occurred on May 20–21, 2017, involving a high-risk missing child and how Maglione, as the supervisor on duty, handled the investigation. As part of the investigation, Muscente pulled and reviewed several reports, including telephone records and tapes (audio and video), and conducted interviews. Muscente's findings were placed in an Administrative Investigation Report. (R-12.)

According to Muscente, there are Departmental "General Orders" or Guidelines in place for the investigation and handling of a missing-person case, as well as Attorney General (AG) directives. (R-13; R-17.) Each officer is required to read and initial receipt of General Orders and AG directives. (R-14; R-18.) Protocol for investigating a "high-risk" missing person requires the responding officers and/or supervisor to, among other things:

- Search the house completely—inside and out, including basement and attic areas;
- Treat the place last seen (PLS) as a crime scene;
- Set up a command post;
- Notify the appropriate supervisors in the chain of command;
- Contact the "on-call detective";
- Notify the Child Abduction Response Team (CART) in accordance with the Attorney General Guidelines;

- Contact the K-9 unit.

Procedures for setting up a command post are typically kept in a binder in the supervisor's vehicle or can be accessed on the patrol-car computer. Additionally, General Orders and AG Guidelines can also be accessed back at the station.

Muscente testified that one of the first reports that he reviewed as part of his investigation was the investigative report (IR) prepared by Officer Paul Dorio (Dorio), dated May 21, 2017. (R-1.) According to the IR, on May 20, 2017, at 11:53 p.m., Dorio was detailed to the residence of a missing juvenile (J.D.). Upon arrival, Dorio met with J.D.'s father (J.B.) and stepmother (L.S.), who informed him that J.D. was last seen earlier that day around 3:00 p.m. and had not been seen since. The report further stated that "a search of the residence and surrounding area proved negative" and that a side window had been left open, indicating that J.D. had left through the window. The IR was approved by Maglione. In looking at the report history, prior to approving the report, it was "modified" by Maglione four times. (R-21.) Muscente stated that when a report is "modified" it means that something has been changed in the report.

Dorio's body-camera footage (footage) was also reviewed as part of the Investigation. (R-87.) According to Muscente, the footage, which included audio, picked up the voices of Dorio, Maglione, J.B., and L.S. Review found that neither Dorio nor Maglione conducted a search of the house; they did not request permission from the parents to conduct a search; and they did not have any discussion between themselves regarding a search of the residence. Additionally, while there was a seventeen-year-old sibling asleep upstairs, he was not interviewed at the time.

Muscente went on to state that there was no request by Maglione to Dorio to search the surrounding area at that time; no command center was set up; no K-9 unit was called in even though one was available; the on-call detective was never notified; and no additional backup was called in to assist in the search, even though resources were available.

Also reviewed were the taped calls that were made on May 20 – 21, 2017, pertaining to the missing juvenile. (R-86.) The first call was the 911 call by L.S. reporting that J.D. was missing. The second call was from Dorio to the New Jersey State Police, Regional Operations Intelligence Center (ROIC). The third call was from Dorio to Maglione wherein Maglione instructs Dorio to go back to the residence to speak to J.D.'s brother. The fourth call was from Officer Cabell (Cabell) to Maglione wherein Maglione requested Cabell to accompany Dorio when he returned to J.D.'s residence to speak to the brother. A fifth call was from Dorio to Maglione filling Maglione in on the visit to the residence. The sixth call was from Dorio to Officer Pellegrino, a former juvenile detective, seeking his expertise. Muscente noted that at no time was CART contacted or Dorio or Cabell advised to search the interior of the residence.

As part of his Investigation, Muscente also interviewed a number of witnesses, which included Cabell, Captain David Muller (Muller); Detective Patrick Holt (Holt); Lieutenant Jeffrey Jacobs (Jacobs); Sergeant William Lardieri (Lardieri); J.B.; J.S.; Dorio; and Maglione. All interviews were taped. (R-88.) In synopsizing their interviews, Muscente stated:

> Cabell. Cabell was interviewed twice. During his first interview, Cabell stated that he accompanied Dorio when he (Dorio) returned to J.D.'s residence for the second time. While he was the K-9 officer, no K-9 services were requested by Maglione. Cabell informed Muscente, for this type of missing person, a bloodhound, not his K-9, would have been recommended. Maglione only asked him to accompany Dorio to the residence not to search the interior or exterior of the home. During Cabell's second interview, which occurred after Maglione had been interviewed, Cabell did not recall Maglione asking him to search the house, much less every floor and closet.
>
> Muller. Muller stated that the first he learned of the incident was on May 21, 2017, from Jacobs, the Day Shift Supervisor. Jacobs learned of the missing juvenile after reading the Line-up (shift report) which gets distributed via email and at roll call for the next shift. (R-22; R-23.) It was not reported to him by Maglione.

Jacobs. Jacobs stated that no information was relayed to him from Maglione during the shift change regarding the missing juvenile. He learned about it from the shift report.

Lardieri. During Lardieri's interview, he knew that the juvenile was still missing however, did not know that anything else needed to be done. If additional actions needed to be taken, there would have been a directive to continue the investigation.

Holt. Holt stated that he was the on-call detective on May 21, 2017, and after reading the shift report, called to see if the juvenile had been located. After learning that the juvenile was still missing, he contacted CART and was informed that they had not been contacted. After activating CART, he reached out to the Ewing schools superintendent for contact information at J.D.'s school. Upon reaching school officials at J.D.'s school, Holt was able to get the names and numbers of J.D.'s friends. Thereafter J.D.'s friends were contacted, resulting in J.D. being located unharmed. Prior to reaching out to school officials, a complete search of J.D.'s residence was performed.

J.B. and J.S., (J.D.'s parents) stated that they would not have objected to their house being searched however, there was no such request. J.S. was familiar with the missing person protocol, due to one of her children having previously gone missing and found hiding in the house after the police searched it.

Dorio. Dorio initially stated that he searched the residence however, this statement changed at the end of the interview with the admission that he had not searched the residence. He did not recall Maglione telling him to search the residence including the exterior, even on his (Dorio's) second visit. According to Dorio, Maglione while present during the initial contact with J.D.'s family, left when Dorio went out to the patrol car to get paperwork. While he thought that he had contacted CART and told Maglione the same, in actuality he contacted ROIC not CART. Dorio could not recall what changes were made to his IR by Maglione.

Maglione. Rather than synopsizing Maglione's interview, the taped interview was played, which revealed in relevant part:

Maglione stating that he and Dorio arrived at J.D.'s residence at the same time. Upon entering the residence, they met with J.B. and J.S., in the foyer area of the home. While Dorio was obtaining information from the parents, he stood nearby and listened. While he could not remember the explicit conversation, he requested Dorio to search the interior of the residence while he went outside to check the exterior. Shortly thereafter, they met on the sidewalk outside of the residence at which point he told Dorio to contact Pellegrino as a resource, which Dorio did. Maglione stated that when Dorio left to meet Pellegrino, he also left to go back to the station. When Dorio arrived back at the station, he entered J.D. into NCIC.

Once back at the station, he met up with Dorio, and given the fact that the initial contact with J.D.'s parents provided no leads other than J.D. liked to play basketball, he instructed Dorio to check the surrounding area, including parks and schools. About an hour later, Dorio and Cabell went back to the residence to speak to J.D.'s brother. Maglione was not sure whether the brother was present at the residence when he and Dorio were initially there. Back at the station, he overheard Dorio talking to Pellegrino about CART activation.

After a short break, wherein Muscente requested Maglione's counsel and Maglione to step out, the interview continued. Maglione stated that J.B. was questioned about his son's possible whereabouts however, no real answers were provided. At some point he went outside while Dorio remained inside. When Dorio came out, he (Maglione) suggested that Dorio contact Pellegrino, given his prior experience as a juvenile detective. After that, he left and went back to the station where he met with Dorio and asked if he (Dorio) had contacted the Detective Unit and CART. Maglione could not remember Dorio's response other than he did speak to a sergeant regarding CART and

had K-9 respond. Maglione then had Dorio return to the residence to perform a search.

Maglione stated that he did not have his body camera on or his vest when he responded to J.D.'s residence. Once inside the residence, he stayed in the foyer and did not see the window where J.D. climbed out. He stayed in the foyer until he went outside and searched the exterior of the residence - except for the garage. He did not know whether Dorio searched the house after he went outside. He was also unsure whether the garage was searched.

When questioned again about their arrival at J.D.'s residence, Maglione stated that he and Dorio entered the residence together, but at some point he left Dorio alone inside the residence and he went outside. He could not remember when he told Dorio to search the house, the first or second visit, but he did tell him to search it. Maglione went on to state that he did not search the house—his thought was that Pellegrino would be contacted to assist. Maglione agreed that both he and Dorio should not have left the house and that CART and the on-call detective should have been called.

It was Maglione's impression that the Detective Unit had been called however, he himself did not call them. He could not answer why he left the residence the first time without CART's arrival, although he did instruct Dorio to contact them and he was under the impression that they had been called. While he had Dorio and Cabell go back to J.D.'s residence, he could not answer why a bloodhound had not been called in or why backup officers were not utilized to assist in the search other than it was a busy night and he did not know who was available.

Maglione stated that he advised the incoming sergeant on the next shift about the missing juvenile, but did not give them direction. It was his impression that they would follow up. He did not contact Muller. Maglione first found out

that CART had not been contacted when he received a call at home from Holt. He did not realize that the number Dorio called was from a flyer on the station wall for ROIC. (R-24.) While he questioned why CART was not coming in, he did not think to call CART or the on-call detective himself because he thought that they had already been contacted, citing to the fact that Holt was involved. Maglione was unsure whether a "Be On the Look Out" (BOLO) had been sent, the explanation being that it had been a busy night and that was something the officer handles. He was unsure whether anything had been sent to the Attorney General's office.

With regard to Dorio's IR, Maglione stated that he may have made changes to the report. When questioned about the statement "search of the surrounding area proved negative" and "search of the residence proved negative"—he was not sure who wrote it, but he did not believe that he had. He recalled telling Dorio to check the closets, attic and the house. He may also have requested Cabell to search the residence when he went with Dorio. That was the whole reason he sent him (Cabell) and Dorio back—to talk to the brother and search the residence and surrounding area. When asked again whether he told them to search the house, Maglione stated, "I don't know if I told them to search the house...that is what we do." Maglione could not answer why the IR was incomplete or whether he felt the report was adequate.

While Maglione was aware of the Attorney General's Guidelines regarding the handling of a missing person, he could not recall what they stated. (R-17; R-18.) He was not sure why information was left out of his shift report such as who from CART had been contacted; what on-call detective had been notified; and who searched the residence. Maglione acknowledged that it was his responsibility to ensure that the report was complete, that CART had been contacted and that additional assistance was called in—stating, "I'm done, it was my job."

Muscente stated that the interview was stopped one time to allow him (Muscente) to speak to Maglione's counsel regarding his client's inconsistent statements such as searching J.D.'s residence and the instruction to Dorio to search the residence. Other statements Muscente found to be inconsistent included Maglione's comments regarding search of the exterior of the residence; the request that Cabell search the house when he went back with Dorio; and whether Dorio had made the requisite calls. In all, Muscente stated that Maglione lied to him at least three times when questioned on searching the interior of the residence and two times when questioned on searching the exterior.

On cross-examination, Muscente stated that he was verbally assigned to investigate the May 20, 2017, incident on May 31, 2017, at which time he started scanning documents into the IA-Pro, the IA software program. He was aware that Muller had previously been assigned to investigate the matter, but not as an IA investigation—probably to determine if it needed to go to IA. Muscente explained that the IA-Pro is the software program that IAD uses for investigations. The other program that the Department supervisors use is "Blue Team." If documents are scanned in through the Blue Team, it transfers over into the IA-Pro program.

While the system can generate a log which tracks who accesses an IA investigation, Muscente is unfamiliar with the log and could not explain what all of the coding meant. (R-137.) Additionally, even though he may access the IA-Pro to "link" or "add documents," such administrative work does not go into his Investigation reports.

Muscente recollected that the prosecutor's office was contacted on May 31, 2017, by Captain Colanduoni (Colanduoni). He was present during that telephone call. Two weeks later, on June 14, 2017, or June 15, 2017, he was present at a meeting with the Prosecutor's office which lasted approximately two hours. Prior to that however, he was given permission to start his investigation and thereafter, on June 12, 2017, he commenced the investigation reviewing reports, footage, and General Orders, among other things. Over the next few days he conducted witness interviews and went to J.D.'s home to diagram the layout. (R-26.) On June 17, Dorio was interviewed and thereafter, Maglione on June 22, 2017. Dorio and Cabell were re-interviewed on June 27, 2017.

According to Muscente, he drafted the majority of the charges in this matter. When questioned why the charges were brought on July 14, 2017, but the report was dated three days later, July 17, 2017, he explained that the investigation was complete on June 27, 2017, and the report was completed shortly thereafter, however, there was an administrative hold on filing the charges because of ongoing settlement discussions. The report was not signed off until July 17, 2017.

When questioned about Dorio's interview, specifically his questions to Dorio regarding who drafted the search of the interior and exterior of the residence verbiage, Muscente responded that Dorio claimed that it was his verbiage.

With regard to the gap in time between being formally assigned on May 31, 2017, to investigate the May 20, 2017, incident and when he began formal interviews, Muscente testified that he believed that the matter was with the prosecutor's office during that time period. He did not know what action the prosecutor's office took nor did he receive anything from them when the criminal investigation was closed out. He was not familiar with the Attorney General Guidelines regarding cessation of IAD investigations if the matter is being reviewed criminally. (R-128.)

Muscente testified that he has been involved in numerous missing children investigations. After referencing General Order titled, "Handling Missing Persons," he acknowledged that pulling in additional assistance is discretionary on the part of the supervisor, and that command posts are not set up in every instance. (R-13.) He went on to state, however, that while the verbiage in the General Order states the PLS "should" be treated as a crime scene, the word "should" should be interpreted as "shall," given the age of the child. Muscente disagreed that bloodhounds are not required in every situation, especially in high-risk missing persons—if a K-9 is called and nothing is found, then a bloodhound is brought in.

Patrick Holt (Holt), testified that he has been employed by the Department for the past twenty-one years and is currently assigned to the Criminal Investigation Unit. On May 21, 2017, he was the on-call detective for the Department.

According to Holt, on May 21, 2017, when he reviewed the line-up (shift report) from the previous shift, there was a report of a missing eleven-year old. The report noted that the missing child had been entered into the National Criminal Information enter (NCIC) and that a TRAK Message had been sent.[1] Upon reading this, Holt called Jacobs, the Day Shift Supervisor, and questioned whether the child had been found. According to Jacobs, the child had not yet been located and when he (Jacobs) had spoken to Maglione, no additional information was provided other than CART had been contacted. Upon learning this, Holt called the on-call detective from the prior shift and learned that there had been no notification to the Detective Bureau regarding the missing child.

Holt next called the Mercer County Prosecutor's Office CART Team Liaison, Sergeant Gary Wasko (Wasko), to see if they had been notified and learned that there had been no notification. Upon hearing this, Holt called Maglione and questioned him about the status of the juvenile. In response Maglione stated that he had gone to the house; that the child had been entered into NCIC; that a TRAK notification had gone out; and that CART had been notified. Maglione did not know who Dorio had spoken to from CART other than a female. No instruction was given by Maglione as to what needed to be done with regard to the investigation.

According to Holt, based upon what he learned, he went into the station to conduct the investigation into the missing juvenile. As part of his investigation, he went to J.D.'s residence, along with Lardieri and Jacobs to speak to J.D.'s family members. Holt testified that when they arrived at the residence, no other vehicles were there. If CART had been notified, the homicide task force would have been present and the scene would not have been left unattended in case the child comes home. Holt notified Wasko of the situation who indicated that they would be responding immediately to the scene. Holt also reached out to Dorio and questioned who he had spoken to from CART. All Dorio could remember was that he had spoken to a female sergeant but he did not know her name.

[1] According to Holt, the TRAK system is a criminal alert system that is statewide. In the case of a missing child, a picture of the child, physical details of the child and additional identifiers are placed in the TRAK system which disseminates the information statewide. (R-8.)

At that point, Jacobs went back to the station to pull the phone records. In so doing, it was learned that Dorio had called the ROIC and not the CART. This information was relayed to Holt and Wasko. Back at J.D.'s residence, Holt and Lardieri set up a command post. When the CART arrived, they set up in front of the house.

In speaking to J.B., Holt learned that J.D. had not been seen since 3 p.m. the prior day - May 20, 2017. While their son had run away in the past, they had not reported it because he typically came home later in the day. This time was different because he had been gone for so long and had not called. While the location was not set up as a crime scene, a search of both the interior and exterior of the residence was undertaken which proved negative for J.D. Holt testified that at that juncture, the Sheriff's Department was called to activate a bloodhound. Additionally, calls were made to J.D's school to obtain contact information for J.D.'s school friends. Upon receipt of this information, officers spread out to assist in the bloodhound tracking and reaching out to J.D.'s friends. J.D. was subsequently found at one of his friend's houses.

On cross-examination Holt was questioned about his experience with CART. In response, Holt stated that he was involved in one prior case where CART was notified and upon arrival, they (CART) took over the scene. Holt stated that usually the on-call detective is notified of a situation and they in turn, notify CART. It is up to CART to determine if they will respond to the scene.

Holt was also questioned about report procedures as found under General Order "R" (Report Procedures). (R-100.) He testified that road officers are required to get their reports in by the end of the shift, if not then, by the next tour. This rule does not apply in the Detective Bureau, due to the volume of cases however, it is not unusual to finish a report three or four days later. Even then, it may not get reviewed by a supervisor for a couple of days. In this case, his supplemental report regarding the missing juvenile was delayed due to the heavy volume of cases he had at the time. Additionally, it may not have been approved by his supervisor right away. Holt did not recall whether he kept hand-written notes regarding his investigation. If he did, they would have been scanned in and attached to the file.

Holt testified that as part of his responsibilities, he is also assigned to IAD. He is familiar with the policies and procedures of IAD and the IA-Pro system. According to Holt, if he is a witness in a matter, he would not get assigned to investigate it. He could not say one way or the other, whether he could or should access an IAD investigation file if he was a witness in an IAD investigation. Holt was also unable to explain why he accessed the IAD file for Maglione multiple times over the course of the IAD investigation even though he knew he was going to be a witness. (R-137.) Holt noted that documents in the IA-Pro are scanned in as PDF's and cannot be altered.

Holt stated that throughout his investigation on May 21, 2017, he kept his supervisors apprised of the situation which would have included Jacobs, Caldwell and Muller. Holt could not remember if he spoke to Muller or Colanduoni on May 21, 2017, however, recalled a meeting on May 22, 2017, in Stemler's office where Maruca, Muller and Stemler were present.

Michael Pellegrino (Pellegrino), testified that he has been with the Department for twenty-four years and currently holds the position of police officer in the Community Response Unit. Prior to his current assignment, he was in the Detective Bureau—Juvenile Division as a school resource officer.

While on duty on May 20, 2017, he heard the report of a missing child over the radio. At some point during his shift, he received a call from Dorio questioning if he knew the missing child due to his prior involvement in the school system as a Resource Officer. Pellegrino stated that he was not the on-call detective at the time nor was he Dorio's supervisor. Dorio did not ask him to contact anyone regarding the missing juvenile or ask who the current juvenile detective was. According to Pellegrino, the call only lasted a couple of seconds. He saw Dorio back at the station at the end of his shift. Dorio was working on his report and they had limited conversation at that time. There was no discussion regarding CART.

David Muller (Muller), testified that he has been with the Department for the past twenty-one years and a Captain for the past two years. In his current position, he is in charge of, among other things: Patrol; K-9 Unit; vehicle fleet; and traffic services.

Muller stated that on May 21, 2017, he received a call from Jacobs questioning if he was aware of a missing eleven-year-old, of which he was not. Jacobs filled him in on the situation and let him know that the Detective Bureau would be handling the investigation. Jacobs had learned of the missing juvenile by Holt, the May 21, 2017 on-call detective. According to Muller, such late notification on a high-risk juvenile was contrary to policy and procedure as he (Muller) should have been notified sooner as the patrol commander. After speaking to Jacobs, Muller called Stemler to inform him of the situation. Sometime later in the day, Jacobs notified Muller that the child had been located. This information was relayed to Stemler as well.

The following day, May 22, 2017, Muller met with Stemler and after some discussion, Stemler requested that he (Muller) look into whether there were policy and procedural violations such as why the Detective Bureau wasn't contacted; why CART wasn't notified and why he (Muller) wasn't contacted sooner.

Muller testified that as part of his investigation, he reviewed Dorio's IR and footage. In so doing, questions arose regarding the discrepancy in the report versus what was seen on the footage. Specifically the IR stated that the house was searched and CART was activated or notified when the footage revealed that the house was not searched and there was no further action done in the investigation other than taking the initial report. Based upon this, there was concern that the IR was either false or had been changed—the latter being an issue in the past with Maglione. Muller went on to state that supervisors are only allowed to make grammatical but not content changes to reports. (R-100; R-124.) In review of the report log for Dorio's IR, Maglione's name appears multiple times as "modifying" the report. (R-21.)

Based upon these concerns and upon discussion with Stemler, the matter was referred to IAD as it was unclear whether the matter went beyond a policy and procedural

error. Muller did not contact the Prosecutor's office and was not involved in any meetings however, he was aware that they had been contacted.

Muller stated that he is familiar with the IA-Pro system that IAD utilizes and as an Administrator, he has access to it and in fact, initiated the investigation in IA-Pro. (R-137.) Once you enter documents into the IA-Pro, his responsibility ended. Other than being interviewed, he was not involved in the Investigation.

On cross-examination, Muller was questioned about his multiple entries into IA-Pro on May 24, 2017. In response, Muller stated that while he's never seen the IA-Pro log before, he made one entry on that date however, if you make changes, it may show as a different entry and add lines to the log. Muller did not recall what changes if any were made. When questioned if Dorio was included in his entry, Muller could not recall—stating that he added Maglione because he was Maglione's immediate supervisor. He was not Dorio's immediate supervisor—there were levels between he and Dorio. While he knew that Dorio had violated the rules as well, his only concern was Maglione, given his twenty-two years of experience with the Department.

In questioning Muller regarding his statement about Maglione altering reports in the past, Muller stated that there were implications in the past of report content being changed by Maglione. While the allegations could not be substantiated, Maglione was verbally counseled on the issue which was appropriate under the General Order on Professional Review and Disciplinary Procedures. (R-124.) It was Muller's concern that was what happened in the missing juvenile investigation. He did not learn until after formal interviews were conducted that Dorio admitted that the verbiage in his IR was his.

William Lardieri (Lardieri), a sergeant with the Department, testified that he has been employed by the Department for the past ten years. Prior to his promotion to sergeant, he was a patrolman. As part of his responsibilities, he handles roll call; overtime; and shift assignments. His supervisor is Lieutenant Jacobs.

On May 21, 2017, he was on duty working the 7:00-a.m.-to-7:00-p.m. shift. During shift change, he spoke to Maglione about what had occurred on the prior shift at which time he learned about the missing eleven-year old. Maglione informed him that he and Dorio had responded to the juvenile's residence; that Dorio had taken a report; searched the house; and that CART had been contacted.

According to Lardieri, based upon his prior dealings with CART, he was under the assumption that CART was handling the investigation. The information conveyed to him by Maglione and the information in the shift report were passed along to the shift during line-up. (R-23.) He did not notify Jacobs as he assumed that he (Jacobs) had received notification through the shift report. It was not until sometime later that he learned from Jacobs that neither CART nor the on-call detective had been contacted. According to Lardieri, it is the responsibility of the sergeant or lieutenant on duty to notify the on-call detective.

On cross-examination, Lardieri stated that each shift typically has two supervisors working—a sergeant and a lieutenant. If one supervisor is off, which is not unusual, the other supervisor takes on the missing supervisor's responsibilities. Regardless of whether there is one or two supervisors on duty, at all times departmental policies are to be followed. It is the responsibility of the supervisors to contact the on-call detective if an incident occurs, regardless if you are down a supervisor.

Lardieri testified that other than questioning if the juvenile had been located, he did not ask Maglione any additional information regarding the investigation. In discussing the shift report, Lardieri stated that supervisors put what they believe to be pertinent information in their shift report so that the next shift knows what to expect or what happened on the previous shift.

Jeff Jacobs (Jacobs) testified that he has been employed by the Department for the past seventeen years and a lieutenant for the past eighteen months. Currently, he is in the Professional Standards Bureau however, in May 2017, he oversaw a platoon. On May 21, 2017, he was working the 7-a.m.-to-7-p.m. shift. His responsibilities at the time included

oversight of his platoon and patrol sergeant, review reports, cell checks, and review service calls.

Jacobs stated that prior to coming on shift, he read the shift report that had gone out via email. (R-22.) When he came on duty, other than saying good night to Maglione, he did not speak to him regarding the missing juvenile. According to Jacobs, as long as a supervisor is notified on the next shift of the situation, then that suffices. In this case, it appeared that Maglione had updated Lardieri. Jacobs heard Lardieri, during his morning briefing to the platoon, re-read the shift report and tell the platoon that CART had been notified – even though it was not in the shift report. As such, it was his belief that CART was handling the investigation. After receiving a call from Holt, who asked about the status of the investigation into the missing juvenile, he learned that the on-call detective had never been notified.

In looking at the IR, it stated that CART was notified but did not identify who was contacted from that agency. This information was relayed to Holt who thereafter, reached out to CART directly. Around noon, Holt called back and informed him that CART had not been notified. Upon learning this, Jacobs notified his supervisor—Muller. Thereafter, he went to J.D.'s residence to assist in the search of the outside area. Upon arrival, other officers were present, including Lardieri. When CART arrived, he left to assist with the bloodhound search. He later learned that the child was located.

Jacobs testified that he has been involved in numerous missing juvenile investigations in the capacity of a supervisor and a detective. As a supervisor, he made sure that a supervisor went to the scene—even if it was a sergeant. He also made sure that CART and the on-call detective were notified. If he was the supervisor, he would get involved in the search of the residence as one is required. Depending on the type of case, he may or may not leave the scene however, someone should stay if possible. Once the on-call detective is notified, it becomes their case and they determine how to investigate the matter. If deemed beneficial and if available, K-9 would be called in. For the duration of the investigation, Jacobs stated that he would stay in touch with the detectives and CART to get

updates and would most likely have officers involved in the search until CART indicates that their assistance was no longer needed.

On cross-examination, Jacobs stated that when he spoke to Dorio that evening, Dorio did not seem surprised when he informed him that CART had not been contacted. Dorio informed him that the number came from a flyer on the bulletin board in the charge room and he believed at the time that it was the correct number. Jacobs never mentioned anything to Maglione.

When asked if his responsibilities increase when he works without a supervisor, Jacobs responded by stating "yes—obviously, you have one less supervisor so you can't split responsibilities—you handle both the sergeant and lieutenant's job." Jacobs went on to state that while the situation changes every night, the sergeant is the first line supervisor for the officers and conducts roll call; assigns zones and reads the shift report among other things; the lieutenant handles the in-house responsibilities. If both are working on the shift, the lieutenant has the discretion to go out on the road depending on the workload.

When questioned about his shift report for May 21, 2017, Jacobs stated that he only places noteworthy events on his shift report. (R-23.) On May 21, 2017, only one incident was listed as that was the only noteworthy event. With regard to investigations into missing persons, Jacobs acknowledged that the PLS is not always treated as a crime scene and a command post is not always set up—that is in the discretion of the detective or supervisor and on a case-by-case basis. Additionally, while a supervisor does not have to participate in searching the PLS, the PLS must get searched.

Larry Wayne Cabell (Cabell), testified that he has been with the Department since 2002 and currently he holds the rank of sergeant. In May 2017, he was a patrol officer assigned to the K-9 unit.

On May 20, 2017, Cabell heard a call go out regarding a missing eleven year old boy. Sometime thereafter, while on patrol, he received a call from Maglione who asked if he could accompany Dorio to J.D.'s residence so that Dorio, who had less than three years of

service at that time, was not by himself. Maglione did not ask him to search the residence nor was he asked to bring in the K-9.

Upon arrival at the residence, there were no other officers present. After knocking several times on the door with no answer, they had dispatch call the residence to see if anyone was home at which time J.B. answered the door. In speaking to J.B., they learned that J.D.'s brother was not home however, they were able to contact him by phone. While waiting to talk to him, Cabell wandered around the entrance hall area. Neither he or Dorio searched the residence. It was Cabell's assumption that the house had already been searched. When he and Dorio walked out, he briefly looked around outside. He thought it strange that the family was not out looking for the missing juvenile.

Cabell stated that at the end of his shift, he mentioned to Maglione that he thought it was odd that the family did not answer the door; the door was locked so even if J.D. came home he couldn't get in; and he didn't see any photos of J.D. even though there were pictures of the other kids. Cabell could not recall what Maglione's response was.

According to Cabell, as an Officer, he has been involved in the search of high-risk missing persons. Cabell stated unlike his dog that can track scents for up to forty-five minutes, bloodhounds are more effective as they can sense the odor of the missing person.

On cross-examination, Cabell recalled that there was an auto accident during his shift however, it was subsequent to his visit to J.D.'s residence. The accident was a DWI which occurred on a major artery in the township with the call coming in about three hours after the call for the missing juvenile. (R-135.) The vehicle hit a fire hydrant, light pole and traffic signal which caused every officer in the platoon to respond. The driver was transported to the station after being apprehended. According to Cabell, when a suspect is transported to the station, it is ideal to have a supervisor present. The accident was cleared up by the time his shift was done.

Rocco Maruca, Jr. (Maruca), testified that he has been with the Department for over twenty-two years and a Captain since October 2014. Among his responsibilities is

the oversight of the IAD. Maruca first learned about a missing juvenile on May 22, 2017, when he received a text from Stemler informing him that there was a missing eleven-year old and that the investigation had not been handled properly by Maglione. He also learned that CART had not been notified. When he arrived at work the next day, Stemler brought him up to speed on the investigation and informed him that the matter had been assigned to Muller, Maglione's direct supervisor, to gather additional information.

Sometime between May 22nd and May 31st, he learned that Muller wanted the matter referred to IAD due to the inconsistencies in Dorio's IR and the footage. This inconsistency raised a concern that there may be a criminal aspect in the matter if a false report had been filed. Because of the criminal nature of the matter, it was referred to IAD.

On May 31, 2017, a meeting was convened with Colanduoni, the lieutenant in IAD and Muscente. The purpose of the meeting was to discuss the investigation that was being turned over to IAD and to contact the First Assistant Prosecutor, Doris Galuchie (Galuchie) with the Mercer County Prosecutor's Office to discuss the possible criminal activity. The concerns raised with Galuchie were the fact that the report stated that the residence had been searched when it was not; questions as to whether Dorio was ordered by Maglione to put the verbiage in the report to cover their tracks; or did Maglione himself change Dorio's report. According to Maruca, the matter had to be fully investigated before action, if any, was taken against Dorio and/or Maglione.

After speaking to Galuchie, it was decided that the IAD would proceed with the investigation; interview witnesses; collect evidence; and do everything needed to be done before the targets (Dorio and Maglione) were interviewed. At that point, the Prosecutor's Office would be contacted and they would discuss how to proceed from there.

According to Maruca, Muscente took the lead on the investigation however, he remained in constant contact with him. The Prosecutor's Office was also contacted

during Investigation seeking their input on whether certain interviews should be taped. Around mid-June 2017, when the preliminary investigation was complete, the Prosecutor's Office was again contacted to determine how to proceed with the interviews of Dorio and Maglione. Thereafter, on June 15, 2017, a meeting was convened with Galucci to discuss how to proceed with the investigation and target interviews. At that time, it was decided that Dorio would be interviewed first.

On June 17, 2017, Dorio was interviewed. On June 20, 2017, they met with Galucci and went through Dorio's interview. After some discussion, it was decided that the criminal investigation would be closed out and the matter would proceed administratively. Additionally, Dorio was given use immunity.

On June 22, 2017, Maglione was interviewed. Sometime after Maglione's interview, there was some settlement discussions in lieu of charging however, the discussions ended and the Department moved forward with the administrative charges which were drafted by Muscente and reviewed by him. The disciplinary charges were served on Maglione on July 14, 2017 and included ten charges of alleged misconduct. Maruca stated that he signed the disciplinary charges in the capacity of Acting Chief as Stemler was away. (R-63.)

On cross-examination, Maruca stated that he first learned of a missing child on May 22, 2017, when Stemler texted him about the investigation and its mishandling by Dorio and Maglione. When he went into the office later that day, he spoke with Stemler about the incident and was informed that Muller was going to be following up on the matter. Muller is not in IAD. Maruca went on to state that when an investigation is opened in the IAD, it is logged into the IA-pro system through either an IA officer or a supervisor through Blue-Team.

Maruca stated that the prosecutor's office was contacted on May 31, 2017, and informed that there may have been criminal activity surrounding the investigation of a missing juvenile. The call was made by Colanduoni in his presence along with Muscente. Maruca could not recall whether the call was on speaker phone or not.

When questioned about Dorio's interview and whether he (Dorio) lied during the interview, Maruca stated that he could not recall and would have to review the taped interview. Maruca did state however, that he spoke to Muscente after the interview and it was Muscente's opinion that Dorio had lied.

Maruca testified that Dorio was administratively charged with a recommended disciplinary action of removal. (R-79.) While some of the charges levied against Maglione were similar to Dorio's, additional charges were levied against Maglione as a supervisor. When Dorio transferred to the MCSD, the administrative charges were dismissed. He closed the administrative charges out in the IA-pro system because Dorio was no longer with the Department. Maruca does not know who made the decision to dismiss the charges. He was not involved in Dorio's transfer.

The investigator's involved in the IAD investigation were Muscente and Colanduoni. Holt was an IA investigator in the IAD in May 2017, however, was not involved in the investigation as he was involved in the initial investigation regarding the missing juvenile and therefore a witness in the IAD investigation. Maruca stated that to maintain the integrity of an investigation, individuals who are witnesses in an IAD investigation should not access the IA-Pro. He went on to state that there are both word documents and PDF documents in the IA-Pro system. You cannot create a report in the IA-Pro however, you can change certain documents. Maruca was unaware that Holt had repeatedly accessed the IAD file on Maglione. (R-137.)

With regard to the notification to the Prosecutor's Office, Maruca testified that typically initial notifications are done by phone and in some instances, followed up with a written form that provides information on the matter. In this instance, no written form was sent. When the Prosecutor's Office closed out the criminal matter, nothing was sent to the Department confirming that fact. Maruca acknowledged that he read Muscente's report before it was finalized and confirmed that there was no reference to the telephone conversation with the Prosecutor's Office on May 31, 2017.

John Stemler (Stemler) testified that he has been with the Department for twenty-four years and has been the chief for the past three. He became aware that there was a missing juvenile when he read the line-up post online. The line-up post stated that there was a missing juvenile and that there was an investigation. At some point he was contacted by Muller, Maglione's direct supervisor, who explained that the juvenile had been found after Holt came into work to handle the investigation. He was also informed that there were issues with the underlying investigation, among them being no notification to CART.

When he went into work the next day, May 22, 2017, he spoke with Muller who advised that while CART was notified, the notification did not occur until many hours after the report came in. This was contrary to the Attorney General Directive and would have to be reported to the Prosecutor's Office. Once notified, CART immediately came out and shortly thereafter, the juvenile was located. After the juvenile was located, he and Muller started looking at what happened with the investigation, specifically, reviewing the IR, footage and phone logs.

In review of the footage, Dorio and Maglione were observed responding to the juvenile's residence and interviewing his parents. Upon gathering the necessary information, Dorio and Maglione left the residence and went to Dorio's car where they briefly conversed. During this conversation, Maglione told Dorio to contact Pellegrino to see if he had any information. Maglione left after this to go back to the station. There was no search of the residence – inside or out.

Also reviewed were the phone logs. From the logs, it appeared that: Dorio contacted the ROIC not CART; Maglione called Dorio and told him to go back to the residence to speak to the juvenile's brother; and Maglione contacted Cabell and told him to go to the residence with Dorio so that he was not by himself, and to check around outside, "real quick" to see if the juvenile was spotted.

After review of the information, Stemler told Muller to look further into the matter to determine why certain protocols were not followed. At some point, it was brought to

his attention that there was a possibility of a false report filed by either Maglione or Dorio. Given the fact that there may be a criminal element involved, the matter was referred over to the IAD in accordance with the Attorney General guidelines. No charges were brought at that time as the investigation was not complete.

After IAD conducted their investigation, it was determined that Maglione and Dorio did not follow DR&R or the AG guidelines and that both appeared to be untruthful during their statements.

Stemler went on to state that IAD contacted the county Prosecutor's Office. He was only involved in one of the meetings which was in July 2017. The purpose of that meeting was to discuss Dorio's statement and the fact he was untruthful during his interview. Due to his untruthfulness, Dorio would be subject to a "Brady" disclosure and the Department would not be able to have Dorio testify in court and his reports would be called into question. Given that, Dorio would have to be terminated.

According to Stemler, at some point, he was informed by Maruca that the County Prosecutor had closed out their criminal investigation however, IAD's investigation continued. At the conclusion of the IAD's investigation, it was determined that Maglione had been untruthful in his statement regarding the search of the residence and the actions that he took or allegedly ordered to be taken. With his (Stemler's) approval, charges were prepared and signed off by Maruca in his absence.

The decision to suspend Maglione without pay was done in July 2017, to maintain the safe and smooth operation of the Department. Due to the issue of untruthfulness and how the investigation was handled, there was also concern about Maglione's ability to lead a platoon. Termination was recommended because they had an officer who lied during an internal affairs investigation and now, was subject to a "Brady" disclosure. It was questionable whether he could even sign off on any reports because that too, would have to be disclosed. Additionally, he did not want a precedence set that it was acceptable to lie during an IAD investigation. Last, there were concerns about how Maglione would be perceived by the officers and their faith in

his leadership. This was due to Maglione having lied when he claimed to have told the officers to search the house - inferring that they (the officers) did not follow direction when it was clear that no direction was ever given. Stemler went on to state that to keep Maglione on the job, the integrity of the entire police department would be in jeopardy. Therefore, termination was appropriate.

On cross-examination, Stemler stated that as of May 22, 2017, he was aware that Dorio's report conflicted with the footage; that CART had not been notified; that the residence had not been searched; and that the on-call detective had never been notified.

Stemler went on to state that he assigned Muller to look in to what happened with the investigation and that Muller opened the file in the IA-Pro system—not the Blue Team. According to Stemler, regardless of which system the investigation was opened in (IA-Pro or Blue Team), the file would have been merged into the IAD's investigative report in IA-Pro.

According to Stemler, discipline begins and ends with him. He is the only one in the Department who determines what type of discipline is levied against an officer. In this case, he authorized the charges filed against Maglione. With regard to Dorio, the charges were dismissed when he (Dorio) transferred out of the Department pursuant to a settlement agreement. Stemler acknowledged that one of the stipulations in the settlement agreement was the requirement that Dorio testify at Maglione hearing.

When questioned about his meeting with the Prosecutor's Office, Stemler revised his earlier testimony that he met with the Prosecutor's Office in July 2017, stating that the meeting was actually held in June 2017, when the criminal investigation was closed in this matter. (P-1.)

Stemler was also questioned about Holt's access to Maglione's investigative file in the IA-Pro system and whether that was a violation of the Departmental policies

given the fact that Holt was a witness. In response, he stated that he could not respond without first seeing why Holt accessed the IAD report.

Paul Dorio (Dorio)[2] testified that he is currently a sheriff's officer with the Mercer County Sheriff's Department (MCSD) and has been employed in that capacity for the past four to five months. Prior to joining the MCSD, he was a police officer for three years with the Department.

While on duty on May 20, 2017, he was dispatched to the residence of a missing juvenile where he met up with Maglione. Upon entering the residence, they were met by J.D.'s parents. In speaking to J.D.'s father, he learned that J.D. left through the window of the house. The parents did not know who J.D.'s friends were or where he could be. No search of the residence, interior or exterior, was performed by either himself or Maglione, nor did Maglione instruct him to do so on this visit or when he went back later in the day. The parents were not asked for permission to search the house.

When he and Maglione exited the residence, Maglione told him to contact Pellegrino as he may be familiar with J.D. He also told Dorio to contact the Prosecutor's Office, but did not specifically identify CART. When Dorio went back into the residence to obtain additional information from the parents, Maglione left to go to the station. (R-2.) Dorio did not see if he left right away.

Dorio reached out to Pellegrino who informed him that he was unfamiliar with J.D. Dorio also reached out to what he believed to be the Prosecutor's Office for CART, however it was ROIC.

After leaving the residence, he went back to the station and started drafting the IR and entered J.D. into NCIC. (R-1.) Dorio testified that the final draft of his IR was

[2] Prior to Dorio's testimony, appellant made an application to introduce the Fitness for Duty Evaluation of Dorio on the basis that: 1) respondent examined it and considered it in making a decision to charge appellant; 2) the information may further support appellant's defense and may contain admissions by Dorio; and 3) the probative value outweighs any potential prejudice. The application was denied on the basis that the information sought was for a person who was not a party to the litigation; was not himself charged and was not information that was reasonably calculated to lead to the discovery of admissible evidence.

not the same as the first draft. He could not remember all the changes made to the IR however, the IR went back and forth between Maglione and him several times. Dorio did not recall informing Maglione that he had searched the residence and admitted that he did not fully or completely search it.

Additionally, once back at the station and after speaking to Sergeant Estevez (Estevez) who he believed to be with the CART, he filled Maglione in on the conversation. That is when Maglione told him to go back to the residence a second time to speak to J.D.'s brother. Additionally, he was also told to search the exterior of the house and surrounding neighborhood to see if J.D.'s bike was there. Cabell met him at the residence as back-up. Prior to entering the residence, they looked around the exterior of the residence. While Cabell's K-9 was in the patrol vehicle, it was not used.

Upon entering the residence and while waiting to speak to J.D.'s brother, he looked around but did not search the first floor to see if there were any clues. In speaking to the brother via phone, no additional information was obtained. After leaving the residence, he drove around the neighborhood looking for J.D.'s bike. It was around this time that a call came in regarding a car hitting a telephone poll to which he responded.

According to Dorio, the only calls that Maglione asked him to make in reference to the missing juvenile were the calls to Pellegrino and the Prosecutor's Office. At no time did Maglione ask him to contact the on-call detective. Additionally, at no time did Maglione ask him to search the interior of the residence, including the basement or attic or the exterior of the residence.

Dorio stated that when he arrived home from his shift, he received a call from Holt who questioned whom he had spoken to from CART. Dorio relayed his conversation with Estevez to Holt.

On cross-examination, Dorio stated that he was interviewed by IAD two times and was truthful during both interviews. When questioned if he told Muscente that he had searched the residence, he responded by stating that he looked around the first floor. When questioned if he told Muscente that he searched the home outside the presence of Maglione, he stated, "I might have."

When questioned about contacting CART, Dorio stated he did not know what CART was however, acknowledged that Maglione did tell him to contact the Prosecutor's Office. He could not remember if Maglione specifically mentioned contacting CART. He then stated that maybe it was Pellegrino who told him to contact CART when he saw him back at the station. He could not remember the specifics of that conversation; however, he did recall asking Pellegrino for CART's telephone number and Pellegrino referring him to the "on-call book."

The "on-call book" contains various agency contact numbers which includes CART's telephone number. When he went to dispatch to find the "on-call book" he noted that the contact information was outdated. In questioning dispatch for the CART's telephone number, he was directed to a flyer on the wall which he later learned was for ROIC. (R-24.)

With regard to his IR, Dorio testified that he completed it after his second visit to J.D.'s residence and after he responded to the auto-accident. When questioned about the wording in his IR and his interview with IAD wherein he claimed the wording was his, Dorio stated that he told IAD that the wording in the IR "could be" his. He went on to state that he could not remember what wording was specifically his at this time, but at the time he was interviewed by IAD, he was truthful.

Regarding the disciplinary charges levied against him, Dorio stated that he was charged and suspended. Subsequently, he entered into a separation agreement however, prior to entering into the separation agreement, he transferred over to the MCSD.

Dorio's videotaped statement with IA was played during his cross-examination. In relevant part, the videotaped interview revealed:

> On May 20, 2017, Dorio was dispatched to the residence of a missing eleven-year old (J.D.) where he met Maglione. In speaking with J.D.'s father, they learned that J.D. had not come home that night after leaving the residence through the living room window. According to the father, this has happened before with J.D. leaving to play basketball and not telling anyone where he was going. J.D.'s father did not know any of J.D.'s friends. After speaking to J.D.'s parents, he and Maglione went outside to get paperwork however, Maglione left when he went back inside. Upon going back inside, he searched the residence. Dorio went on to state that he searched the neighborhood and later went back to the residence a second time to speak to J.D.'s brother. Cabell was present on the second visit to the residence, at which time the residence was again searched.
>
> Later, back at the station, he spoke to Pellegrino who told him to call CART. He found the number for CART off a flyer on the wall. When he called, a female sergeant informed him that they could not assist him unless the Department needed a helicopter or a dog. After he got off the phone, he told Maglione about his conversation with the sergeant. Maglione told him to go back to the residence to speak to the brother and search the neighborhood for the juvenile's bike. When questioned why the brother wasn't interviewed the first time he and Maglione were at the residence, Dorio stated that the father informed them that the brother wouldn't know anything. While he was out looking for the bike, a call went out over the airways regarding an auto accident to which he responded.
>
> Muscente questioned Dorio a couple of times about whether he searched the residence during his first visit. Dorio changed his statement a couple of times, first admitting that he did not search the residence and

again when he stated that he did not "fully and completely" search the residence. When questioned if he searched the exterior of the residence including the garage on his first visit, he admitted that he had not. When questioned if Maglione gave him any instructions prior to him leaving, he stated that Maglione told him to call Pellegrino. Maglione did not tell him to call CART or the on-call detective. He also did not tell him to search the interior of the residence.

When he went back to the residence the second time, Dorio stated that he and Cabell searched the exterior of the residence. When he went inside, he looked around the downstairs, walking into the rooms, but did not go upstairs. This statement later changed wherein he stated that he only looked in some of the rooms downstairs. When questioned about the kitchen which was one of the rooms he claimed to have looked in, he could not describe it, explaining that he did not turn on the lights and only used his flashlight. When he left the residence, he called Maglione who told him to look around the neighborhood for the juvenile's bike. No other directives were given.

In questioning who drafted the IR, Dorio stated that for the most part, the words were his however, Maglione may have changed a word or two. When questioned who drafted the verbiage "search of the house proved negative," Dorio stated that he was pretty sure that he wrote it but could not remember if Maglione told him to, or if Maglione himself added it. He went on to say that he was under the assumption that J.D.'s parents had been looking all day for him and that he (J.D.) was not in the residence. Dorio also pointed out that the wording doesn't specifically say that he (Dorio) searched the house, just that a search proved negative. The second visit to the residence was not in his report because he had finished the report prior to going out to the residence. He didn't believe that there was any additional relevant information to add.

Joseph Maglione (Maglione) testified that he worked for the Department for over twenty-two years, working his way up through the ranks until he was promoted to the rank of lieutenant in May 2016. On May 20, 2017, he worked the 7:00-p.m.-7:00-a.m. shift. Due to the fact there was no sergeant on duty, he had to handle the responsibilities of both sergeant and lieutenant. The sergeant supervises the road officers and is on calls for service – making judgements as to what is needed out on the road. The lieutenant handles the "house" and administrative matters which includes checking everything the sergeant does. Typically, weekends are the busiest time in the Department.

On May 20, 2017, the Department was busy with officers finishing one job and getting dispatched to another. Among the calls on May 20, 2017, was an assault/robbery which resulted in an arrest; a missing juvenile; and a motor vehicle accident which also resulted in an arrest. If an arrest is made in a matter, the lieutenant needs to be present at the station. On the night in question, he was at the station handling the complaint paperwork for the individual involved in the assault/robbery when a call came in at 11:53 p.m. for a missing juvenile.

He responded to the juvenile's residence where he met Dorio, both arriving at the same time. They had a short discussion prior to going into the residence wherein he told Dorio to search the house; call Pellegrino and to call CART as that was protocol for a missing child under the age of fourteen.

Upon entering the residence, Dorio spoke to J.B. and walked around the first floor. He stayed in the entrance area, not searching the interior of the residence as he was only there to supervise Dorio. It was Dorio's responsibility to search the residence and area to make sure the child was not there and to get the necessary information from the parents to prepare a report. There were protocols that are in place that needed to be followed. According to Maglione, they were there for at least twenty minutes.

Maglione went on to state that there came a point when he left the inside of the residence. Once outside, he spoke to Dorio where he reiterated to him that he needed to call Pellegrino, due to his experience as a juvenile detective and school resource officer, as well as to call the Prosecutor's Office. After speaking to Dorio who went back inside the residence, he looked around the outside and at cars near the house. He also walked the block looking for anything unusual or relevant before he went back to the station. No crime scene was established because in his judgment and based upon what J.B. stated, no crime had occurred.

Dorio arrived back at the station about a half hour later and informed him that he was going to make calls; enter J.D. into NCIC; prepare a TRAK message; and prepare his IR. A little while later, he overheard Dorio discussing CART with Pellegrino. Sometime thereafter, he went into the line-up room to ask Dorio about the case specifically asking if he had spoken to the brother. When he learned that he had not, he had Dorio to go back to the residence to speak to the brother and make sure that J.D. was not there. He also told him to check the area parks and schools. Additionally, he also had Cabell to go to the residence to assist Dorio. No other officers were ordered to assist at that time as he was not sure of their availability and thereafter, everyone was occupied with the auto accident.

Maglione testified that all the officers, including himself, responded to the accident which had occurred at 2:45 a.m., due to the location and gravity of the accident which resulted in road closures. The accident scene was not cleared up until noon the following day due to the utility repair work that was required before the road could be opened. When he returned from the accident scene prior to the end of his shift, he prepared the shift report. He also spoke to the day shift sergeant (Laurdieri) and informed him about the prior night's incidents.

The first he learned that Dorio had not contacted CART was on June 9, 2017. When he was interviewed by Muscente, a month after the incident, he was trying to be truthful. He did not review the footage or listen to the recorded calls prior to his interview. Maglione went on to state that Dorio told him that he had called CART and

spoken to a female sergeant, who questioned if aviation or a K-9 were required. He could not recall whether Dorio informed him that he had called the on-call detective. With regard to the IR, he stated that he probably did edit it, recalling that Dorio had the juvenile's name reversed and the wrong age of the child. Additionally, some of the grammar had to be corrected. At no time did he add, "search of the residence" or "search of the surrounding area proved negative" nor did he add "CART unit was contacted".

Maglione admitted that when he responded to the residence, he did not have his body armor or vest on, explaining that he was working at his desk when the call came in and he responded immediately without putting it on. He acknowledged that things could have been done better however, at no time did he have any malice or ill intent. He went on to state that over the twenty-two years that he has been with the Department, he has received numerous awards, commendations and medals, many of them for saving lives and for exceptional service. (R-40; P-3.)

On cross-examination, Maglione was questioned about Dorio's report log and the number of times he modified the IR. Maglione could not recall what specific modifications were made to the IR or when. When questioned about the verbiage "search of the residence" and whether that was in the IR when it was sent to him, Maglione could not recall. Maglione went on to state that he was in the residence with Dorio half of the time and outside of the residence the other half. The residence was not searched in his presence and he did not know if Dorio searched it when he went back however, it was in his (Dorio's) report and he relied upon that.

Maglione was also questioned why he did not search the residence given the fact that it was a high-risk missing child. Maglione responded by stating that in his judgment, the situation did not call for it, adding that Dorio was sent back to make sure the child had not returned. He also reiterated that he told Dorio to search the residence upon arrival, prior to going inside. When Dorio was inside, he was outside. It was his belief that was when Dorio searched the residence. While ideally, if he had had the time, he would have wanted to make sure that the house had been searched. He made

a judgement call based on his experience and the father's comments that he expected his son to return home.

Maglione stated that he has never been involved in a high-risk missing child investigation. He did not ask any other officer or supervisor to assist him in the matter but in his judgment, there was no indication that the residence was a crime scene. Additionally, Dorio was given instruction and direction and it was his belief that Dorio could handle it. He did not verify that Dorio called CART commenting that he wasn't sure what he would have verified. Other than receiving the General Order, he has never received any training on CART. While he never had any dealings with CART, in his experience with the Department, detectives either respond immediately or in the morning and they may not contact him. He called the on-call detective when he got home after his shift. Muller was notified through his shift report and the TRAK message.

When questioned again about searching the house, Maglione stated that he spoke to Dorio about the case at the station and asked him then if he searched the residence. This statement subsequently changed with Maglione stating that he saw that the residence had been searched when he read Dorio's IR. The statement was later modified wherein, he stated that he told Dorio in the Line-up room to search the interior of the residence, including the basement when he went back for the second visit. When Dorio went back to the residence to speak to the brother, he sent Cabell to assist. While Cabell was not asked to use the K-9, it was Maglione's position that Cabell should know.

Upon speaking to Cabell when he returned to the station, Cabell stated that when he went through the residence, he did not see any photos of J.D. While he did not specifically ask Cabell if he searched the residence, it was his belief, based upon those comments, that he had.

In questioning Maglione on the importance of protocols, he stated that he is familiar with what he signed for. He agreed that the protocols do not say to call a

former juvenile detective, and that the protocols may require that the on-call detective be notified. It was his belief that Dorio had contacted the on-call detective even though admittedly it was his responsibility to confirm it. Maglione went on to state that he did the best he could with what he had to work with, there was no sergeant on duty that night, which happens occasionally and it was a busy night. He likened it to triage—there were life-safety issues that he was trying to deal with and mitigate. In this case, he did not want anything to happen to the prisoner or anyone to burn in the accident and he would have loved to have found the child and return him home.

When questioned about his shift report, Maglione stated that there were four main incidents that occurred that evening: a shoplifting; a warrant arrest; a missing juvenile; and a DWI auto accident. The call for the missing juvenile came in at 11:53 p.m. and two hours later, at 2:45 a.m., the call for the DWI came in. (R-22.) There were no calls in between the two incidents. He did not get assistance from any other officers because he did not ask or know if any were available. He did not call the captain or the on-call detective for their resources either. He relied on Dorio to make the appropriate calls as directed, based upon his (Dorio's) prior work experience. Cabell went with Dorio on the second visit to the residence to assist him, not "hold his hand."

With regard to Dorio's IR and his review of the same, Maglione admitted that the report could have been better and that information was missing such as the second visit to the house; the conversation with the brother; and the search of the residence and area. Despite not having this information, even after reviewing the IR five or six times, he approved it.

FINDINGS OF FACT

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of

the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence offered by the parties, I **FIND** the testimony of all of the witnesses to be credible except for Dorio and Maglione.

With regard to Dorio's testimony, I **FIND** that parts of his testimony were self-serving in his attempt to contrive an interpretation of the word "search" in the context of his report and justify his actions. I also **FIND** that he was not truthful in his IAD interview. Despite this finding, I do **FIND** Dorio's testimony credible that he was never told by Maglione to search the residence—interior or exterior—or that he was given no direction or assistance by Maglione other than to call Pellegrino and the Prosecutor's Office.

I **FIND** Maglione's testimony incredible with regard to his assertion that he told Dorio to conduct a full search of the residence prior to going inside. I further **FIND** Maglione's testimony incredible that when he walked out of the residence, he looked around the area and walked the block. I **FIND** that Maglione did not tell Cabell or Dorio to search the residence, including the attic and basement when they went back to speak to J.D.'s brother.

I **FIND** that on May 20, 2017, a call came into the Department as it relates to a missing eleven-year-old. I **FIND** that due to the juvenile's age, he was deemed a "high-risk" missing child under the General Order "T" and AG guidelines. I **FIND** that General Order "T" and the AG guidelines provide protocol for the handing of missing persons.

I **FIND** that Dorio and Maglione were the initial responders to the residence. I **FIND** that after speaking to the parents of the juvenile, both Dorio and Maglione left the residence without searching either the interior or exterior. I **FIND** that Maglione did not have on his body armor when he responded to the residence.

I **FIND** that no crime scene or command post was set up at the residence. I **FIND** that other than telling Dorio to call the Prosecutor's Office and Pellegrino prior to heading back to the station, Maglione provided Dorio no other directives. I further **FIND** that no BOLO was issued on the missing juvenile; the surrounding municipalities were not contacted and no additional resources were called in. I **FIND** that Maglione did not direct, question or look to see if any of that had been done.

I **FIND** that Maglione did not provide Dorio any directives or directions regarding CART or how to notify them. I further **FIND** that Maglione did not follow up on the lack of response by CART or whether the Detective Unit had been contacted. I **FIND** that other officers were available to assist in this matter but none were called in. I **FIND** that the K-9 unit was available, but not activated.

I **FIND** that Dorio's IR was reviewed and edited by Maglione several times. I further **FIND** that material information was missing from Dorio's IR, but it was still approved by Maglione.

I further **FIND** that no notification of the missing juvenile was sent to Maglione's superiors. I **FIND** that several times during his IAD interview, Maglione was not truthful.

LEGAL ANALYSIS AND CONCLUSION

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

Essex DOC Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, respondent bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954).

In the case at bar, appellant was determined to have violated the following DR&R:

1) 3.1.1a Police Officers shall take appropriate action to protect life and property;

2) 3.1.3 Police Officers shall abide by all rules, regulations and departmental and directives governing police officer employees;

3) 3.1.5 Police Officers shall coordinate their efforts with other employees of the department to achieve department objectives;

4) 3.1.10 Police Officers shall perform all related work as required;

5) 3.2.1 Supervisors in the Department shall enforce department rules and ensure compliance with department policies and procedures;

6) 3.2.3 Supervisors in the Department shall exercise the necessary control over their subordinates to accomplish the objectives of the Department;

7) 3.2.4 Supervisors in the Department shall guide and train subordinates to gain effectiveness in performing their duties;

8) 4.1.1 General Conduct—Performance of Duty—All employees shall promptly perform their duties as required or directed by law, departmental rule, policy or directive or by lawful order of a superior officer;

9) 4.1.5 General Conduct—Truthfulness—Employees are required to be truthful at all times to members of the Department, including supervisors unless it jeopardizes the confidentiality of an investigation. Any employee not being truthful will be required to justify his deception; and

10) 4.12.6 Judicial appearance and Testimony – Truthfulness – Employees are required to be truthful at all times whether under oath or not.

Appellant argues that the respondent has failed to satisfy its burden of proof to sustain the disciplinary charges lodged against him, specifically, the Department:

1) Failed to prove that he should be responsible for the deficiencies in contacting the CART and/or the on-call detective;

2) Failed to prove that he should be responsible for deficiencies in searching the missing juvenile's residence;

3) Has not established that he had an imperative obligation to contact the on-call detective and establish a command post and/or crime scene;

4) Failed to establish that he was untruthful during his investigation.

For the reasons cited below, I disagree.

Under Count 1—violation of Section 3.1.1a—respondent determined that appellant violated DR&R:

Specifically:

- not ensuring a complete and thorough missing person's investigation/search for an eleven-year-old child was done.

- not ensuring the Mercer County Prosecutor's Office, Child Abduction Response Team (CART) was contacted for the missing eleven-year-old missing child.

- not broadcasting or making sure a broadcast of a BOLO for the missing eleven-year child was completed on the Ewing Police Radio channel, Mercer County Crime Alert Radio Channel, phoning surrounding agencies such as but not limited to the Trenton Police Department or the Lawrence Police Department.

Departmental General Order "T," Section IV(C)(1) states in relevant part that if a child thirteen years old or younger is missing, the initial responders shall complete a search of the subject's residence which should include all storage areas, cellars, attics and outbuildings among other locations.

Appellant's testimony on this issue was all over the place and inherently contradictory. Appellant's testified that he told Dorio to search the interior of the residence prior to entering it and before the Dorio's body camera was turned on. When he left the residence, it was his assumption that Dorio was going to search the house when he went back inside to handle the paperwork. According to appellant, if he had had more time, he would have stayed to make sure that the house had been searched but he made a judgment call to return to the station based upon his experience and J.B.'s comments that he expected his son to return. Before heading back to the station however, he walked the block looking around for anything unusual. The residence was approximately five to ten minutes from the station. When he arrived back at the station, Dorio showed up a half hour later.

The residence is a three-story home that contained multiple rooms. (R-26.) Yet Dorio arrived back at the station within a half hour of appellant's return. Even factoring in the time appellant alleges to have spent looking around the block, the time line does not add up as Dorio would have had to have completed the necessary paperwork with J.D.'s parents; conducted a thorough search of the three-floor residence and arrived back at the station in less than a half hour. Dorio's presence back at the station so soon after leaving the residence, was never questioned by appellant. By his own admission, at no time was the exterior of the residence searched.

The inconsistencies on this issue continued when appellant testified that he asked Dorio if the residence had been searched and was told yes. This statement subsequently changed when he later testified that he saw that the residence had been searched when he read Dorio's IR. This was again modified when he stated that he told Dorio in the Line-up room to search the interior of the residence, including the basement when he went back for the second visit.

Based upon the credible evidence presented in this matter, it is clear that appellant and Dorio, as initial responders, did not conduct a search of the residence—interior or exterior—nor was there a directive by appellant to Dorio to do so prior to entering the residence. It is also clear that when Dorio and Cabell went back to the residence the

second time, no search of the residence, interior or exterior, was undertaken nor was there a directive to do so. As the lieutenant in charge of the shift, appellant was responsible to ensure that the residence (interior and exterior) was thoroughly searched to properly assess the situation and need for additional resources in accordance with General Order "T."

Under General Order "T," Section IV(C), and the Attorney General Law Enforcement Directive No. 2008-4, upon the report of a high-risk missing child, CART must be immediately notified.

It is undisputed that CART was not immediately notified as required under the guidelines or that Dorio, contacted ROIC not CART. Appellant argues that he properly relied upon Dorio's representation that CART had been notified.

In his testimony, appellant stated that he did not verify that Dorio had called CART commenting that he wasn't sure what he would verify. Other than receiving the guidelines, he has never had any training on CART. He himself did not contact the on-call detective and he wasn't sure if Dorio had. It was his assumption that all the necessary calls had been made. At no time did appellant reach out to his supervisor to determine if additional steps were required to be taken given his lack of experience in a high-risk missing child investigation. No flags went up with appellant when Dorio relayed his conversation with whom he believed to be CART. According to appellant, this was because he has never been involved in an investigation where CART had to be notified.

Ignorance is no excuse for failure to follow departmental protocol of which appellant received and signed off on. Had appellant followed the guidelines or at least looked at them, particularly since he never had to handle a high-risk missing juvenile before, he would have known what to do, how to do it, and would have been able to direct or further guide Dorio in the proper notification procedures.

Appellant was additionally charged with failing to broadcast or making sure a broadcast of a BOLO for the missing eleven-year-old child was completed on the Ewing Police Radio channel, Mercer County Crime Alert Radio Channel, phoning surrounding

agencies such as but not limited to the Trenton Police Department or the Lawrence Police Department.

It is undisputed that a BOLO was not issued in this matter or that the surrounding municipalities were not notified. In questioning Dorio, his statement was that he did not think to do one. During appellant's interview, he stated that he was unsure whether one had been issued but stated that sending out a BOLO was the responsibility of the officer. There was no guidance or follow-up by appellant on this notification, just an assumption that Dorio had sent out a BOLO in a high-risk missing-child investigation.

With the above in mind, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 3.1.1(a) of the DR&R.

Under Count 2—violation of Section 3.1.3—respondent determined that appellant violated DR&R:

Specifically:

- Failing to abide by the Ewing Police Department General Order: Handling Missing Persons.

- Failing to abide by the Ewing Police Department General Order: Handling Missing Persons, if the missing person is a child of thirteen years of age or younger, the Mercer County Prosecutor's Office Child Abduction Response Team (CART) shall be contacted in accordance with Attorney General Law Enforcement Directive No. 2008-4.

- Failing to abide by the Ewing Police Department General Order: Handling Missing Persons, as a first step, a complete search of the subject's residence should have been conducted which includes but not limited to all storage areas, cellars, attic and outbuildings.

- Failing to abide by the Ewing Police Department General Order: Handling Missing Persons by notifying the Ewing Police Criminal Investigation Bureau supervisor or the on-call Ewing Police Detective as instructed.

- Failing to abide by the Ewing Police Department General Order; Handling Missing Persons by not requesting that a K-9 come to the scene for a track of the eleven-year-old missing person.

- Failing to abide by the Ewing Police Department General Order: Handling Missing Persons by not notifying your command staff either by a phone, call, text or email or any other way, of the incident.

- Failure, by his own admission in the interview at Ewing Police Department on June 22, 2017, to wear the appropriate Body Armor Vest while in uniform, investigating the report of a missing eleven-year-old as required by the Ewing Police Department General Order: Body Armor.

Under General Order "T," Section IV(C), if a missing child is age thirteen and under, initial responders are required to refer to Attorney General Law Enforcement Directive No. 2008-4—CART.

Under this count, appellant is charged with failure to notify CART. It is undisputed that CART was not initially notified. Appellant asserts that he relied upon Dorio's representation that CART had been notified. Ordinarily, it would not be unreasonable for a supervisor to rely upon an officer's statement that a task had been completed. In this case however, it was not reasonable to rely upon Dorio's representation that CART had been contacted given Dorio's level of experience and after hearing the content of Dorio's conversation with "CART" or rather, the lack of response/assistance from the same. While appellant has never had to contact CART in his twenty-two years of service with the Department, he has received, reviewed, and signed off on both the General Order "T" and the Attorney General Law Enforcement Directive No. 2008-4 and should have realized that something was amiss.

At a minimum, even if he didn't realize that something was off, the guidelines should have been pulled and reviewed, particularly since this was his (Maglione's) first high-risk missing child investigation, so as to ensure that all protocol had been properly followed.

For the foregoing reasons and ones cited above, it is clear that Maglione failed to abide by General Order "T," Section IV(C).

Under General Order "T," Section IV(C)(1), a complete search of the residence should be conducted, including but not limited to all storage areas, cellars, attics and outbuildings.

In this case, neither appellant or Dorio, as initial responders, conducted a search of the residence—interior or exterior—nor was there a directive by appellant to Dorio to do so prior to entering the residence. It is also clear that when Dorio and Cabell went back to the residence the second time, no search of the residence, interior or exterior, was undertaken nor was there a directive by appellant to do so. As the lieutenant in charge of the shift, appellant was responsible to ensure that the residence (interior and exterior) were thoroughly searched to properly assess the situation and need for additional resources in accordance with General Order "T," which he failed to do.

For these reasons and the ones cited above, it is clear appellant failed to ensure that a thorough search of the residence was conducted in accordance with General Order "T," Section IV(C)(1).

Under General Order "T," Section IV(B)7, if a missing person is deemed a high-risk, the patrol supervisor will notify the Criminal Investigations Bureau supervisor (or "on-call detective" when after-hours).

Here, it is undisputed that neither appellant nor Dorio contacted the on-call detective. According to appellant, he assumed that Dorio made the necessary calls, including contacting the on-call detective; however, he admittedly failed to confirm that fact or question why he had not heard from the on-call detective.

For the reasons cited above, it is clear appellant, as the supervisor in charge of the investigation in a high-risk missing child, failed to contact the on-call detective as required under General Order "T," Section IV(B)7.

Under General Order "T," Section IV(C)(9) and Section IV(D), should the initial search actions fail to locate the lost subject, an early decision should be made to call in a K-9 unit. Under Section IV(D), should a K-9 unit be called in, appropriate measures are required to be put in place to secure the last place seen.

In this case, no K-9 was called in by appellant during any part of this investigation. While appellant directed Cabell to go to the residence a couple of hours after the initial call came in so that Dorio was not alone, he was not requested to go in his (Cabell's) capacity as the K-9 officer. According to appellant, while Cabell was not asked to use the K-9, he should know.

As appellant should be aware under the guidelines, K-9 officers work in two capacities—that of police officer and, when detailed, a K-9 officer. In this case, appellant gave no directive for the use of a K9, therefore, Cabell's assistance in this matter was that of a patrol officer.

For the reasons cited above, it is clear appellant failed to request the services of a K-9 initially, or thereafter, to assist in tracking J.D. in accordance with General Order "T," Section IV(C)(9) and Section IV(D).

Under General Order "T," Section IV(B)7, the patrol supervisor, in addition to notifying the on-call detective, is required to notify the command staff.

In this case, appellant testified that Muller received notification through the shift report. The shift report which is generated daily, was posted online and was posted prior to the end of Maglione's shift, almost seven hours after the initial call came in for a high-risk missing child. At the time the shift report was sent out, the child was still missing. Muller testified that he did not learn about the missing child until he received a call from Jacobs the

following morning. Maglione did not make any personal attempts to contact either Muller or Stemler regarding the missing child or progress, or lack thereof, in the investigation.

It is essential that unit supervisors and command staff be informed immediately of any critical and/or serious incidents. The report of a high-risk missing child clearly is a serious incident which should have been immediately brought to the attention of the unit supervisors and command staff. Sending out a Departmental email to the general staff that contains all incidents that occurred on the prior shift, falls far short of the type of notification which should have occurred in this instance.

For the foregoing reasons, it is clear appellant failed to notify command staff as required under General Order "T," Section IV(B)7.

Under General Order E, officers are required to where the appropriate body armor vest while in uniform and engaged in field activities. (R-146.)

By his own admission and as seen on the footage, appellant failed to wear his body armor vest while in uniform and responding to a call regarding a missing juvenile on May 20, 2017.

For the foregoing reasons, including those previously cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 3.1.3 of the DR&R.

Under Count 3—Section 3.1.5—respondent determined that appellant violated the DR&R by specifically: "not organizing police officers under your command to conduct a search for an eleven-year-old missing child."

Other than having Cabel go back to the residence so that Dorio would not be alone, no additional resources were called in to assist in the search of the missing juvenile despite the fact that other officers were available. No crime scene was set up because in appellant's judgment, based upon his years of experience and the statements of the

missing juvenile's father, no crime had been committed. Despite the fact that he has never been involved in a high-risk missing child investigation, appellant did not search the residence due to time constraints. Additional resources were not called in until Holt took over the investigation and within hours the missing juvenile was located.

For the foregoing reason including those previously cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 3.1.5 of the DR&R.

Under Count 4—Section 3.1.10—respondent determined that appellant violated DR&R:

Specifically:

> by not ensuring all work related to a missing eleven-year-old child was performed as required, such as a complete search of the home was never conducted, the proper notifications were not conducted, a BOLO was not completed, a K9 was never utilized, the investigation report by Police Officer Dorio was not thorough nor complete and yet approved by you.

It is undisputed that no search of the residence—interior or exterior— was performed by Dorio or appellant during the initial visit to the residence. Nor was there a directive by appellant to Dorio to do so. Also undisputed is the fact: that proper notifications were not sent out; a BOLO was not sent out; and the K9 was never called in.

With regard to the IR, by appellant's own admission it was deficient with material information missing. Despite this fact, and having reviewed and edited the IR multiple times, Maglione signed off.

Under General Order "R," Section II(C), a supervisor shall review all reports for spelling and grammatical errors, and to ensure that each report meets departmental standards as follows: (4) The report is complete and accurate. (R-100.) That did not happen in this instance.

For the foregoing reasons including those previously cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 3.1.10 of the DR&R.

Under Count 5—Section 3.2.1, respondent determined that appellant violated DR&R:

Specifically:

> By not ensuring that the Ewing Police Department General Order; Handling Missing Persons was followed;
>
> By not ensuring that the Mercer County Prosecutor's Office Child Abduction Response Team (CART) was contacted in accordance with Attorney General Law Enforcement Directive No. 2008-4, when a missing person is a child of thirteen years of age or younger;
>
> By not ensuring as a first step, a complete search of the subject's residence should have been conducted which includes, but is not limited to, all storage areas, cellars, attic and outbuildings in accordance with the Ewing Police Department General Order: Handling a Missing Persons;
>
> By not ensuring that the Ewing Police Criminal Investigation Bureau supervisor or the on-call Ewing Police Detective was notified as instructed in the Ewing Police Department General Order: Handling Missing Persons;
>
> By not ensuring that a K9 was requested for a track of the eleven-year-old missing person as instructed in the Ewing Police Department General Order: Handling Missing Persons;
>
> By not ensuring that the residence of the eleven-year-old missing child was treated as a crime scene as instructed in the Ewing Police Department General Order: Handling Missing Persons.

Appellant argues that respondent has failed to establish that he had an absolute obligation to contact the on-call detective and establish a command post and/or crime scene. This is based on the fact that the General Order uses the word "should" not "shall" in the applicable sections. I disagree.

In the DR&R policy, Section 2.7, the word "should" means "that the action indicated is expected and will be taken." Under Section 2.11 of the policy, the words shall/will as used, indicates that the action required is mandatory. Under Section 2.4 of the policy, a Directive, which includes General Orders, details the performance of a specific activity or method of operation and falls under the umbrella of the overall policy.

While the word "should" is not defined in General Order "T," the same definition as found under the DR&R is applicable. In looking at the policy as a whole, it is apparent that "should" is not a discretionary term, rather the next step in the investigative process. This is particularly evident when looking at Section IV(C) of the General Order "T," which provides a step-by-step breakdown of an initial responder's responsibilities.

For the foregoing reasons and ones cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 3.2.1 of the DR&R.

Under Count 6—Section 3.2.3—respondent determined that appellant violated the DR&R: "Specifically, by not ordering members of your patrol platoon to coordinate a search of an eleven-year-old missing child."

There appears to have been no follow-up or supervision by appellant in this matter. According to appellant, Dorio had enough experience between being a police officer for two years and a sheriff's officer prior to that, to know how to search a residence and handle the necessary calls and paperwork. While appellant himself, a twenty-three-year veteran had never handled a high-risk missing-child investigation or activated CART, he apparently felt that Dorio knew how.

While appellant had Dorio go back to the residence with Cabell, a more experienced officer, to speak to the brother, no other directives were given or resources pulled in. There was absolutely no follow-up by Maglione as the supervisor in charge to see what had or had not been done in the investigation and what additional resources could be utilized. It

appears that the search for a high-risk missing juvenile was not a priority and in fact, took a back seat when the auto accident occurred a couple of hours later.

For the foregoing reasons and ones cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 3.2.3 of the DR&R.

Under Count 7—Section 3.2.4—respondent determined that appellant violated DR&R:

> Specifically, by not guiding and training Police Officer Dorio on how to contact the Mercer County Prosecutor's office Child Abduction Response Team (CART) when needed for the missing eleven-year-old child or any missing child thirteen years of age or younger.

Other than telling Dorio to contact the Prosecutor's Office, there was no other guidance provided by appellant on what CART was and how it could be contacted. Dorio testified that he did not even know that he had to contact CART until Pellegrino told him. Even then, he called the wrong agency not knowing any better. There was no guidance or follow-up by appellant.

For the foregoing reasons and ones cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 3.2.4 of the DR&R.

Under Count 8—Section 4.1.1—respondent determined that Maglione violated departmental rules and regulations:

Specifically:

> By not conducting a missing person investigation in accordance with the Ewing Police Department General Order Title: Handling Missing Persons;

> By not ensuring the Mercer County Prosecutor's Office Child Abduction Response Team (CART) was activated in accordance with Attorney General Law Enforcement Directive No. 2008-4;
>
> By not notifying the Command Staff in accordance with Ewing Police Department Order: Notification Policy – On Call;
>
> By not notifying the Youth and Family Services Juvenile Detective in accordance with Ewing Police Department General Order: Notification Policy on Call.

For the foregoing reasons and ones previously cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 4.1.1 of the Department Rules and Regulations.

Under Count 9, Section 4.1.5 and Section 4.12.6, respondent determined that appellant violated the DR&R:

Specifically:

> By stating in your interview on June 22, 2017, with Ewing Police Detective Nicholas Muscente, that while you were inside the home at . . . with Police Officer Dorio, you instructed Police Officer Dorio to check the house, inside and outside of the home in an attempt to find the missing eleven-year-old child.
>
> By stating in your interview on June 22, 2017, with Ewing Police Detective Nicholas Muscente that you left the home at . . . while Police Officer Dorio was inside speaking to the family and you stated that you searched the exterior of the home, in an attempt to find the missing eleven-year-old child while Police Officer Dorio was speaking to the family.
>
> By stating in your interview on June 22, 2017, with Ewing Police Detective Nicholas Muscente, that when Police Officer Dorio and Police Officer Cabell came back to Ewing Police Headquarters after leaving the residence . . . they informed you that the inside and outside area revealed nothing more than the initial contact.
>
> By stating in your interview on June 22, 2017, with Ewing Police Detective Nicholas Muscente, that you asked Police Officer

> Dorio if he made the appropriate calls, which mean to you, calling the on-call detective and the Mercer County Prosecutor's Office Child Abduction Response Team (CART).
>
> By stating in your interview on June 22, 2017, with Ewing Police Detective Nicholas Muscente, that you asked Police Officer Dorio if he checked closets, the attic, basement and stating to Police Officer Dorio that he needed to check the inside, outside and every bit of the house . . . in an attempt to find the missing eleven-year-old child.
>
> By stating in your interview on June 22, 2017, with Ewing Police Detective Nicholas Muscente, that you instructed Police Office Cabell to return to [the residence] with Police Officer Dorio and speak to the brother of the missing eleven-year-old and to conduct a better search, inside, outside and surrounding area.

During his taped interview, the only consistent statement that appellant made was that he did not search the interior of the residence. Thereafter, his statements to Muscente repeatedly changed and once again changed at the hearing with appellant's testimony varying from his taped interview.

By way of example, during his interview, appellant initially stated that when he and Dorio were inside the residence, he told Dorio to search the interior and that he left to go outside to check the exterior. This is contrary to the footage and his testimony at the hearing.

Later in his interview, appellant stated that he could not recall if he told Dorio to search the residence the first time or the second time. A short time later in the interview, appellant stated that he specifically told Dorio to search the closets and attic when he went back on the second visit. He had Cabell go back to assist with the search both interior and exterior. Both statements were contrary to Dorio and Cabell who testified that no such requests was made by appellant.

Appellant also stated during the interview that he left to go back to the station after speaking with Dorio outside of the residence. During the hearing, appellant testified that when Dorio went back inside the residence to handle paperwork, he walked the block and

looked at vehicles. There was no search of the exterior of the residence or the garage. This statement is inconsistent with his interview.

At the hearing, eight months after the incident, appellant testified that prior to going into the residence and before Dorio's body camera was turned on, he told Dorio to do a thorough search of the interior and exterior of the residence. This version of events was not provided during his interview, despite being questioned repeatedly on whether he told Dorio to search the residence.

In sum, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant violated Section 4.1.5 and 4.12.6 of the DR&R.

Appellant also argues that the Department is holding him responsible for it's own shortcomings. Specifically, the Department is seeking to make him a scapegoat for a deficient investigation when it fails to take into consideration the magnitude of Dorio's actions; its own shortcomings in supervisory staffing; and its failure to keep the investigative tools such as the "on-call" book up to date.

This argument is specious at best given the credible evidence presented in this matter. While Dorio's actions were relied upon by appellant to some extent, for the reasons cited above, it was appellant's own actions, or lack thereof, as an officer and supervisor, that formed the basis for the disciplinary charges levied against him. Additionally, as appellant himself testified, the fact that there was only one supervisor working on May 21, 2017, happens occasionally. It is not a Departmental shortcoming. Lastly, the argument that the "on-call" book was out of date, which led Dorio to look elsewhere, is equally without merit and misses the underlying crux of the issue which is appellant's lack of supervision over the investigation as a whole.

Appellant further argues that the charges must be dismissed under the auspices of the 45-day rule.

Prior to the commencement of the hearings, appellant filed a Motion to Dismiss most of the charges for respondent's failure to bring the disciplinary charges within the time constraints set forth under N.J.S.A. 40A:14-147. N.J.S.A. 40:A14-147 is commonly referred to as the "45-day rule."

Through this motion, appellant asserts that respondent had sufficient knowledge and/or information to bring disciplinary charges against the appellant on May 22, 2017, yet failed to file the Preliminary Notice of disciplinary Action until July 14, 2017, approximately fifty-three days after the incident in violation of the 45-day rule.

In support of this argument, appellant cites Aristizibal v. City of Atlantic City, 380 N.J. Super. 405 (Law Div. 2005), where the court held that Atlantic City violated the 45-day rule under N.J.S.A. 40A:14-147 by failing to start an investigation into alleged violations of police department rules and regulations until seventy-two days after an incident in which over 100 police officers called out sick from work as part of a labor dispute. According to the court, there was an absence of "extraordinary circumstances" that justified the appointing authority's failure to promptly begin an investigation and "the investigation did not involve a complicated matter" because "[e]ither the police officers had valid excuses for failing to report to work, or, they did not. 380 N.J. Super. at 434.

Respondent argues that the disciplinary charges brought against Maglione were within the time constraints set forth. N.J.S.A. 40A:14-147. Specifically: 1) The department requires a full investigation to confirm whether there are sufficient documents and/or proofs to substantiate that a violation of departmental rules and protocols have occurred; 2) There was a concurrent criminal investigation by the Mercer County Prosecutor's Office regarding possible criminal law violations by appellant; and 3) When respondent was preparing to serve appellant with the disciplinary action, appellant requested additional time from respondent to discuss possible settlement with his family and attorney.

N.J.S.A. 40A:14-147 states in pertinent part:

> A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement

> unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation. . .

The 45-day rule applies only to alleged violations of internal rules and regulations and not to the general causes for major discipline listed under N.J.A.C. 4A:2-2.3(a). McElwee v. Bor. of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008).

A complaint charging a violation of internal rules and regulations may be dismissed if an appointing authority unnecessarily delays an investigation or fails to file the complaint within forty-five days of obtaining sufficient information. As the former Merit System Board explained in McCormick v. Lawrence Township, CSV 6319-00, Initial Decision (September 21, 2001), rejected, MSB (December 27, 2001), http://njlaw.rutgers.edu/collections/oal/:

> N.J.S.A. 40A:14-147 is designed to protect police officers from an appointing authority unduly and prejudicially delaying the imposition of disciplinary action. However, the statute does not prohibit an appointing authority from doing a proper investigation into a matter to determine whether disciplinary charges are necessary and appropriate. The fact that such normal and necessary investigation may span a period of time, which may exceed 45 days, does not automatically call for the dismissal of such charges. Rather, for the purposes of N.J.S.A. 40A:14-147, the charges much be brought within 45 days of the "person filing the complaint" obtaining sufficient information to bring such charges. The "person filing the complaint" is generally acknowledged to be the Chief of Police. See N.J.S.A. 40A:14-118. There, the 45 days start when the Chief of Police has sufficient knowledge to bring the charges against an officer. However, the Board does not interpret this provision to allow an appointing authority to unnecessarily delay the bringing of charges by not promptly attempting to obtain sufficient information to bring charges and promptly forwarding such information to the person responsible for filing the complaint. Under such circumstances, it would be appropriate to dismiss charges against a police officer based on the 45-day

> rule. Conversely, the statute is undoubtedly not designed to force an appointing authority, at the risk of being estopped, to prospectively bring ultimately valid, but unripe, disciplinary charges within 45 days of an incident without properly investigating the matter to ensure that sufficient information to bring such charges is obtained.

The instant matter is distinguishable from Aristizibal for a couple of reasons. First, the Department did not obtain "sufficient information" to bring charges until the IAD investigation was complete.

The incident occurred on May 20–21, 2017. Upon review of the IR, footage and phone logs by Stemler on May 22, 2017, he directed Muller to look further into the matter to determine why certain protocols were not followed. In so doing, a concern arose that there may be a criminal element to the matter. Thereafter the matter was formally turned over to IAD on May 31, 2017. Also on this date, the Prosecutor's Office was contacted.

Over the next couple of weeks, interviews were done by IAD, of which the Prosecutor's Office were kept apprised. Once the preliminary interviews were done, the targets of the investigation were interviewed, first Dorio and thereafter, appellant. After viewing Dorio's interview, the Prosecutor's Office made a determination not to proceed criminally however, the IAD investigation was not complete until appellant was interviewed and Dorio and Cabell were re-interviewed. This occurred on June 27, 2017, at which time the IAD investigation was complete and charges were ready to be filed.

With the above in mind, until the completion of the IAD investigation, there was insufficient information on May 22, 2017, to bring formal disciplinary charges against appellant.

Second, while appellant argues that respondent "concocted" the notion that there was a concurrent criminal investigation, laying great emphasis on the lack of written documentation and taped calls from the Prosecutor's Office, such argument is misguided.

The credible testimony presented in this matter finds that the Prosecutor's Office was notified on May 31, 2017 and thereafter, kept apprised of the progression of the IAD investigation, including the timing of the target interviews. After lengthy meetings on June 15, 2017, and June 20, 2017, which was after Dorio's interview, the Prosecutor's Office made a determination not to proceed criminally. The fact that no referral form or written communication from the Prosecutor's Office was presented at the hearing, does not negate or undermine the credible evidence presented to the contrary.

Third, the disciplinary charges were not immediately filed due to an administrative hold after good faith settlement discussions were undertaken between Maglione and respondent. Once those discussions fell through, charges were immediately brought on July 14, 2017, seventeen days after the IAD investigation was complete. Had the charges been filed on June 27, 2017, they would have been well within the 45-day rule.

For the reasons cited above, I **CONCLUDE** that there was no violation of the 45-day rule pursuant to N.J.S.A. 40A:14-147, and therefore **DENY** appellant's motion to dismiss.

The next question is the appropriate level of that discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523–24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See In re Herrmann, 192 N.J. 19, 33 (2007) (Division of Youth and Family Services worker snapped lighter in front of five-year-old), in which the Court stated:

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, 38 N.J. at 522–24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Respondent argues that Maglione knowingly and intentionally violated all departmental protocol, placing the Township at risk, in the investigation into a high-risk missing child. Compounding the matter was the fact that Maglione lied about his actions; took no responsibility as a supervisor; and his utter lack of concern about the missing child when he left his shift without verifying that some agency was searching for the missing child.

Appellant argues that over the course of a twenty-two-year career, he has had an exemplary and unblemished record, receiving numerous awards and commendations for his meritorious service to the community.[3] To terminate him would be harsh and excessive, and flies in the face of progressive discipline.

[3] Reference was made during the hearing about a prior disciplinary action against the appellant. That matter is currently pending appeal under OAL Docket No. 03275-17 with no final decision having been rendered. As such, it will not be considered for purposes of this matter as it relates to consideration of progressive discipline.

There is no question that Maglione has had an exemplary record over the course of his twenty-two years in law enforcement. Unfortunately, his actions or lack thereof, if not intentional, were grossly negligent in the handling of a high-risk missing child. This was compounded by his lack of candor in his IAD interview and calls into question his fitness to be a supervising officer. Such conduct places not only the public but the Department at risk.

Accordingly, I **CONCLUDE** that removal is the appropriate discipline for the violations of DR&R Sections: 3.1.1a (Take Appropriate Action to Protect Life and Property); 3.1.3 (Abide By All Rules, Regulations and Departmental Procedures and Directives Governing Police Officer Employees); 3.1.5 (Coordinate Their Efforts With Other Employees Of The Department to Achieve Department Objectives); 3.1.10 (Perform All Related Work as Required); 3.2.1 (Enforce Department Rules and Ensure Compliance With Department Policies And Procedures); 3.2.3 (Exercise Necessary Control Over Their Subordinates To Accomplish The Objectives Of The Department); 3.2.4 (Guide And Train Subordinates To Gain Effectiveness In Performing Their Duties); 4.1.1 (Peformance of Duty); 4.1.5 (Truthfulness); and 4.12.6 (Truthfulness). I further **CONCLUDE** that the disciplinary action taken by the Department be **AFFIRMED**.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Ewing Township Police Department against appellant, Joseph Maglione, is hereby **AFFIRMED**.

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

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

recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

Tama B Hughes

April 3, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 4/3/18

Date Mailed to Parties: 4/3/18

TBH/vj

APPENDIX

WITNESSES

For appellant:

Joseph Maglione

For respondent:

Nicholas Muscente
Patrick Holt
Larry Wayne Cabell
Jeff Jacobs
David Muller
William Lardieri
Paul Dorio
Michael Pellegrino

EXHIBITS

For appellant:

P-1 Email from Prosecutor Doris Galuchie, dated January 25, 2018 (3 pages)
P-2 Separation Agreement (2 pages)
P-3 Commendations

For respondent:

R-1 Investigation Report by Officer Dorio, dated May 21, 2017 (1 page)
R-2 Missing Person Report, dated May 20, 2017 (1 page)
R-3 Call for Service, dated May 20, 2017 (2 pages)
R-4 Supplemental Investigation Report, dated May 30, 2017 (3 pages)

R-5 Call for Service, dated May 21, 2017 (2 pages)

R-6 Picture of J.D. (1 page)

R-7 Trak Message, dated May 21, 2017 (1 page)

R-8 Trak Message, dated May 21, 2017 (1 page)

R-9 Ewing Police Department Facebook Alert (1 page)

R-10 Not in Evidence

R-11 Not in Evidence

R-12 Administrative Investigation Report, dated July 19, 2017 (17 pages)

R-13 General Order T-02 (12 pages)

R-14 General Order T-02 (signature) (4 pages)

R-15 General Order P-10 (6 pages)

R-16 General Order P-10 (signatures) (2 pages)

R-17 Attorney General Law Enforcement Directive No. 2009-4 (2 pages)

R-18 Attorney General Law Enforcement Directive No. 2009-4 (signatures) (4 pages)

R-19 Not in Evidence

R-20 Not in Evidence

R-21 Dorio's filed Report History of Investigation, dated May 20, 2017 (3 pages)

R-22 Line-Up, dated May 20, 2017 (1 page)

R-23 Line-Up, dated May 21, 2017 (1 page)

R-24 NJSP Missing person flyer (2 pages)

R-25 Consent to Search residence (1 page)

R-26 Rough sketch of residence (3 pages)

R-27 Activity Report for Vehicle 646 from May 20, 2017 - May 21, 2017 (16 pages)

R-28 Activity Report for all vehicles in the area of P.A. between May 20, 2017 – May 21, 2017 (17 pages)

R-29 Not in Evidence

R-30 Not in Evidence

R-31 IA Complaint Notification Form Private Messages (8 pages)

R-32 IA Complaint Notification Form Lt. Maglione, dated June 12, 2017 (1 page)

R-33 Use Immunity Grant Advisement from PO Dorio, dated June 15, 2017 (1 page)

R-34 Administrative Advisement Form PO Dorio, dated June 17, 2017 (1 page)

R-35 Administrative Advisement Form PO Dorio, dated June 27, 2017 (1 page)

R-36 Principal Statement Form PO Dorio, dated June 17, 2017 (2 pages)

R-37 Witness Acknowledgement Form PO Cabell, dated June 13, 2017 (1 page)

R-38 Sworn/Employee Witness Statement Form PO Cabell, dated June 13, 2017 (2 pages)

R-39 Witness Acknowledgement Form PO Cabell, dated June 27, 2017 (1 page)

R-40 Witness Acknowledgement Form Det. Holt, dated June 13, 2017 (1 page)

R-41 Sworn Employee Witness Statement Form Det. Holt, dated June 13, 2017 (2 pages)

R-42 Witness Acknowledgement from Lt. Jacobs, dated June 13, 2017 (1 page)

R-43 Sworn/Employee witness Statement Form Lt. Jacobs, dated June 13, 2017 (2 pages)

R-44 Witness Acknowledgement Form Sgt. Lardieri, dated June 13, 2017 (1 page)

R-45 Sworn/Employee Witness Statement Form Sgt. Lardieri, dated June 13, 2017 (2 pages)

R-46 Witness Acknowledgment Form Capt. Muller, dated June 14, 2017 (1 page)

R-47 Sworn/Employee Witness Statement Form Capt. Muller, dated June 14, 2017 (2 pages)

R-48 Sworn Witness Statement Form Jaiqualle Blackie, dated June 14, 2017 (2 pages)

R-49 Sworn Witness Statement Form Lorpue Suah dated, June 14, 2017 (2 pages)

R-50 Administrative Advisement Form Lt. Maglione, dated June 22, 2017 (1 page)

R-51 Principal Statement from Lt. Maglione, dated June 22, 2017 (2 pages)

R-52 Ewing Police Department Rules and Regulations, dated April 14, 2015 (22 pages)

R-53 Not in Evidence

R-54 Not in Evidence

R-55 Not in Evidence

R-56 Not in Evidence

R-57 Not in Evidence

R-58 Not in Evidence

R-59 Not in Evidence

R-60 Not in Evidence

R-61 Not in Evidence

R-62 Memo from A/Chief Maruca to All Police Personnel regarding Lt. Joseph Maglione Suspension, dated July 14, 2017 (1 page)

R-63 Memo from A/Chief Maruca to Lt. Maglione regarding Disciplinary Charges IAD# (17)-543, dated July 14, 2017 (8 pages)

R-64 Preliminary Notice of Disciplinary Action (8 pages)

R-65 Not in Evidence

R-66 Not in Evidence

R-67 Not in Evidence

R-68 Not in Evidence

R-69 Not in Evidence

R-70 Not in Evidence

R-71 Not in Evidence

R-72 Not in Evidence

R-73 Not in Evidence

R-74 Not in Evidence

R-75 Not in Evidence

R-76 Not in Evidence

R-77 Not in Evidence

R-78 Not in Evidence

R-79 Memo from Chief Stemler to Hilary Hyser, dated July 26, 2017 (6 pages)

R-80 Not in Evidence

R-81 Not in Evidence

R-82 Not in Evidence

R-83 Not in Evidence

R-84 Not in Evidence

R-85 Not in Evidence

R-86 1 DVD – containing phone conversations

R-87 1 DVD – PO Dorio's body camerage footage

R-88 1 DVD – taped interviews (Maglione; Dorio; Muller; Jacbos; Lardieri; Holt; Cabell; J.B. and L.S.)

R-89 1 DVD – Photos of J.D.'s residence

R-90 Not in Evidence

R-91 Not in Evidence

R-92 Not in Evidence

R-93 Not in Evidence

R-94 Not in Evidence

R-95 Not in Evidence

R-96 PO Dorio Oath of Office (2 pages)

R-97 Not in Evidence

R-98 Not in Evidence

R-99 General Order A-1 – Written Directive System Revision, dated November 16, 2016, with signature pages (11 pages)

R-100 General Order R-2 Report Procedures – Revision date May 22, 2015, with signature pages (31 pages)

R-101 Not in Evidence

R-102 Not in Evidence

R-103 Not in Evidence

R-104 Not in Evidence

R-105 Not in Evidence

R-106 Not in Evidence

R-107 Not in Evidence

R-108 Not in Evidence

R-109 Not in Evidence

R-110 Not in Evidence

R-111 Not in Evidence

R-112 Not in Evidence

R-113 Not in Evidence

R-114 NJ Civil Service Commission State of New Jersey Job Description Lieutenant (3 pages)

R-115 NJ Civil Service Commission State of New Jersey Job Description Police Officer (8 pages)

R-116 Not in Evidence

R-117 Not in Evidence

R-118 Not in Evidence

R-119 Not in Evidence

R-120 General Order P-27 Body Camera Worn Cameras (22 pages)

R-121 General Order P-27 Body Warn Cameras signature page (1 page)

R-122 Not in Evidence

R-123 Not in Evidence

R-124 General Order O-1 Office of Professional Review and Disciplinary Procedure (16 pages)

R-125 General Order O-1 Office of Professional Review and Disciplinary Procedures Signature page (1 page)

R-126 Not in Evidence

R-127 Ewing Police Department Rules and Regulations promulgated April 14, 2015, (22 pages)

R-128 Attorney General's Internal Affairs Policy and Procedures Revised July 2014, (114 pages)

R-129 Not in Evidence

R-130 General Order T-02 Handling of Missing Persons Revision Date May 2, 2014, (12 pages)

R-131 General Order T-02 Handling of Missing Persons signature page (4 pages)

R-132 General Order P-10 Notification Policy – on call (6 pages)

R-133 General Order P-10 Notification Policy signature report (2 pages)

R-134 Attorney General Law Enforcement Directive 2008-4 Child Abduction Response Team with signature report (6 pages)

R-135 Calls for Service (4 pages)

R-136 Detailed Calls for Service (8 pages)

R-137 IA Pro System – Agency Complaint Entry Log for Case NO. (17) IA-543 (1 page)

R-138 Not in Evidence

R-139 Not in Evidence

R-140 Google Calendar Entry, dated July 7, 2017, (1 page)

R-141 Captain Maruca's Personal Cell Phone Log (3 pages)

R-142 First Assistant Prosecutor Doris Galuchie's Cell Phone Log (4 pages)

R-143 Lt. Colanduoni's Cell Phone Log (1 page)

R-144 Maglione's Vacation Schedule May and June 2017 (2 pages)

R-145 Holt Log (5 pages)

R-146 Final Notice of Disciplinary Action (8 pages)

R-147 General Order E – Body Armor

5 / 18

A-1

STATE OF NEW JERSEY

In the Matter of Serge McKoczenski
New Lisbon Developmental Center,
Department of Human Services

CSC DKT. NO. 2018-712
OAL DKT. NO. CSV 13343-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 2, 2018 BW

The Civil Service Commission, at its meeting of May 2, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13343-17

AGENCY DKT. NO. 2018-712

IN THE MATTER OF SERGE McKOCZENSKI,
DEPARTMENT OF HUMAN SERVICES,
NEW LISBON DEVELOPMENTAL CENTER.

Lawrence E. Popp, Esq., for appellant (Gaylord Popp, LLC, attorneys)

Valeria Dominguez, Deputy Attorney General for respondent, (Gurbir S. Grewal, Acting Attorney General of New Jersey, attorney)

Record Closed: April 18, 2018 Decided: April 18, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter involves the appeal of Serge McKoczenski (McKoczenski) of the decision of respondent Department of Human Services (the Department) to remove him from employment at the New Lisbon Developmental Center, effective May 4, 2017, on charges of (1) physical abuse of a patient in violation of Administrative Order 4:08 C.3-1; (2)

inappropriate physical contact or mistreatment of a patient in violation of Administrative Order 4:08 C.5-1; (3) falsification in violation of Administrative Order 4:08 C.8-1; (4) conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12).

The Department notified McKoczenski of the above charges by a Final Notice of Disciplinary Action dated August 7, 2017. Upon receipt of McKoczenski's hearing request, the matter was transmitted on September 12, 2017, to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein. I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five

days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 18, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 4/19/18

Date Mailed to Parties: 4/19/18

TMC/nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement and General Release, dated April 18, 2018

OAL DKT. NO. CSV 13343-2017S
AGENCY DKT. NO. 2018-712
SETTLEMENT AGREEMENT

IN THE MATTER OF
MCKOCZENSKI, SERGE
AND
NEW LISBON
DEVELOPMENTAL
CENTER, DEPARTMENT OF
HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final Notice of Disciplinary Action** dated **August 7, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Administrative Order 4:08 C.3-1, Physical abuse of a patient	Removal	Effective May 4, 2017
2. Administrative Order 4:08 C.5-1, Inappropriate physical contact/mistreatment of a patient effective	Removal	Effective May 4, 2017
3. Administrative Order 4:08 C.8-1, Falsification	Removal	Effective May 4, 2017
4. N.J.A.C. 4A:2-2.3(a)6, Conduct unbecoming	Removal	Effective May 4, 2017
5. N.J.A.C. 4A:2-2.3(a)12, Other sufficient cause	Removal	Effective May 4, 2017

SM

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: **N/A**.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: **No back pay**.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: **N/A**.

4. Respondent will accept a General Resignation from Appellant, pursuant to N.J.A.C. 4A:2-6.3 effective May 4, 2017. Appellant agrees not to seek or accept employment with Respondent, or any of its subsidiaries, or with the developmental centers within the Department of Human Services, at any time in the future.

C. The Appellant Serge McKoczenski withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge listed in Paragraph A above: **The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).**

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

SM

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department of Human Services with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Serge McKoczenski's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

4/18/18
DATE

Smckoczenski
Serge McKoczenski, Appellant

4/18/18
DATE

ON BEHALF OF Appellant
Lawrence E. Lapp, Esq.

1/18/18
DATE

Richard Angelini
ON BEHALF OF Respondent
Richard Angelini
Employee Relations Coordinator
New Lisbon Developmental Center

CERTIFICATION

I, Serge McKoczenski , being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4/18/18
DATE

S McKoczenski
Serge McKoczenski

5-2-18

A-1

STATE OF NEW JERSEY

In the Matter of Roselee Nieves
Burlington County Jail

CSC DKT. NO. 2014-1307
OAL DKT. NO. CSV 16747-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 2, 2018 BW

The Civil Service Commission, at its meeting of May 2, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 16747-13
AGENCY DKT. NO. 2014-1307

IN THE MATTER OF ROSELEE NIEVES,
BURLINGTON COUNTY JAIL.

Mark W. Catanzaro, Esq. for appellant, Roselee Nieves

Carmen Saginario, Jr., Esq. for respondent (Capehart Scatchard, attorneys)

Record Closed: February 28, 2018 Decided: March 6, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeal of Roselee Nieves from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matter was transmitted to the Office of Administrative Law for determination as a contested case on November 20, 2013, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 6, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 3/12/18

Date Mailed to Parties: 3/13/18

tat/lam

RECEIVED

2018 MAR -2 A 10:53

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ROSALEE NIEVES

vs.

BURLINGTON COUNTY DEPARTMENT OF CORRECTIONS

STIPULATION OF SETTLEMENT AND RELEASE OF CLAIMS

OAL Docket No. CSV16747-2013S

WHEREAS, the County of Burlington and the Burlington County Department of Corrections ("County") served Rosalee Nieves ("Nieves") with a Final Notice of Disciplinary Action ("FNDA") dated November 4, 2013; and

WHEREAS, the matter involving Nieves's employment with the County is the subject of an appeal which was pending in the Office of Administrative Law under the above-referenced Docket Number (the "Appeal") and was the subject of a settlement conference conducted on January 8, 2018; and

WHEREAS, the County and Nieves have engaged in settlement discussions and have agreed upon the terms of an agreement which provides for a Stipulation of Settlement and Release of Claims ("Agreement") which will conclude this matter including any further appeals by either party in this matter, the salient terms of which was placed on the record before the Honorable Dorothy Incarvito-Garrabrant on January 8, 2018; and

WHEREAS, pursuant to the Agreement, the parties have agreed to forego the continuation of this matter before the Office of Administrative Law and/or Civil Service Commission; and

WHEREAS, this Agreement is not, and shall not be deemed, an admission by Nieves or the County of a violation of any statute or law or wrongdoing of any kind, and it is understood that the County expressly denies that it wrongfully terminated Nieves' employment and/or that such termination was in violation of any Department Rule or Regulations and/or any other law, rule, or regulation; and

WHEREAS, this Agreement is not, and shall not be deemed, an admission or finding that any claim the parties to this Agreement raised or might have raised against each other, including but not limited to those raised in the charges against Nieves as stated in the FNDA and Nieves's defenses thereto, be considered in any way valid or meritorious; and

WHEREAS, Nieves and the County acknowledge that this Agreement is a compromise of disputed claims and charges and that Nieves and the County are entering into this Agreement solely to avoid the inconvenience and expense of further protracted proceedings;

NOW THEREFORE, the parties hereto, intending to be legally bound, hereby stipulate and agree as follows:

1. Each reference to Nieves in this Agreement includes Nieves, and her agents, executors, administrators, heirs, beneficiaries, successors and assigns.
2. This Agreement sets forth the full and final settlement and resolution of any and all claims that Nieves may have or may have had against the County for any action that has occurred up to the date of the Agreement with regard to Nieves' employment with the County, the Appeal, and/or claims that the County may have or may have had against Nieves for any action that has occurred up to the date of this Agreement with regard to her employment with the County, including but not limited to all claims,

charges, and defenses that were or might have been raised in the disciplinary charges against Nieves in the FNDA or the Appeal.

3. For and in consideration set forth in this Agreement, the receipt and sufficiency of which is hereby acknowledged, Nieves knowingly and voluntarily dismisses and withdraws the appeal pending under Docket No. CSV16747-2013S and also waives, releases, and covenants not to sue the County and their present or former subsidiaries, affiliates, insurers, and any of their present or former officers, trustees, employees, volunteers, servants, agents, attorneys, representatives, predecessors, successors and assigns with respect to any and all claims of any kind or nature whatsoever based upon any action that has occurred up to the date of this Agreement with regard to her employment with the County, regardless of whether such claims are now known or are later discovered, including, but not limited to all claims or causes of action which were or might have been asserted in any civil action; all rights, claims or causes of actions under any other federal, state, or local law; and all other claims or causes of action (whether at common law or otherwise) arising out of his employment or the conclusion of that employment, with the County, regardless of whether such claims are now known or are later discovered, including but not limited to any alleged violations of the following:

   - The National Labor Relations Act;
   - Title VII of the Civil Rights Act;
   - Civil Rights Act of 1991;
   - Sections 1981 through 1988 of Title 42 of the United States Code;
   - The Employee Retirement Income Security Act;

- The Fair Credit Reporting Act;
- The Immigration Reform Control Act;
- The Americans with Disabilities Act;
- The Rehabilitation Act;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- The Family and Medical Leave Act;
- The Equal Pay Act;
- The Uniformed Services Employment and Reemployment Rights Act;
- Worker Adjustment and Retraining Notification Act;
- Employee Polygraph Protection Act;
- The New Jersey Law Against Discrimination;
- The New Jersey Family Leave Act;
- The New Jersey State Wage and Hour law;
- The New Jersey Conscientious Employee Protection Act;
- The New Jersey Equal Pay Law;
- The New Jersey Occupational Safety and Health Laws;
- The New Jersey Smokers' Rights Law;
- The New Jersey Genetic Privacy Act;
- New Jersey laws regarding political activities of employees, lie detector tests, jury duty, employment protection, consumer reports, and discrimination;
- Any other federal, state or local civil rights law or any other local, state or federal law, regulation or ordinance;
- Any public policy, contract (express, written or implied), tort, or common law;

- Any claims for vacation, sick or personal leave pay or payment pursuant to any practice, policy, handbook or manual of the County, except those referenced below;

- Any allegation for back-pay, costs, fees or other expenses including attorneys' fees;

4. The County agrees that Nieves will become employed with the Department of Corrections as a new employee as soon as practicable, with no seniority for time previously employed with the County. Nieves will become a new employee and will undergo all processes required of any other new employee/recruit, including but not limited to drug and alcohol screening, physical and psychological testing, and any other screening or testing applicable to new Corrections Officers.

5. Nieves will also be required, as any other new officer, to attend the Police Academy and successfully complete all of the requirements thereof, including but not limited to standard physical testing as well as weapons qualification training and testing. Nieves agrees that if she does not successfully complete any of the objective standards/requirements of the Academy, or is dismissed by the Academy for those reasons, that she waives any right to appeal and/or challenge said failure and/or dismissal.

6. The parties expressly agree that the Agreement and the provisions contained herein are not precedent setting, are unique to the facts and circumstances regarding Nieves, and will not be used in any subsequent proceeding involving Nieves or any other employee and/or be deemed an admission by the County that Nieves was wrongfully terminated on or about November 4, 2013 and/or that she or any other officer is entitled to reinstatement to the Department after having been dismissed therefrom except as required by law.

7. By executing this Agreement, Mark Catanzaro, Esq., represents and affirms that he will not use and/or seek to introduce the terms and/or conditions of this Agreement in any subsequent matter involving any County employee.
8. Nieves agrees not to disclose to anyone other than her spouse and/or her accountant and/or her attorney the terms and conditions of this Agreement. Nieves also agrees that she will not, in any way, disclose or publicize the facts or the terms of this Agreement unless required by law.
9. Nieves represents and agrees that the only consideration that she has received or which she will receive for executing this Agreement is that which is set forth in this Agreement.
10. It is further understood and agreed that neither the undersigned nor the parties' attorneys or other representatives, will in any way disclose or publicize, whether it be directly or indirectly, to any third party, or in any news, communications, or electronic media, including but not limited to newspapers, magazines, radio, television, or any social media outlet, the facts or terms and conditions of this settlement agreement unless required by law. This paragraph is intended to become part of the consideration for settlement of this claim.
11. In the event that Nieves breaches any portion of this Agreement, Nieves agrees that the County is entitled to seek injunctive relief and an award of damages and reasonable costs for any such breach.
12. Nieves and the County agree that this Agreement and its terms shall be governed by, construed and enforced under New Jersey Law, regardless of New Jersey's choice of law provisions. The parties agree that they have been represented by counsel. Any

dispute related to or involving this Agreement will be litigated in the Superior Court of New Jersey, either Law or Chancery Division, Burlington County.

13. By signing this Agreement, Nieves acknowledges that she has had the opportunity to consult her attorney and that Nieves fully understands the meaning and intent of this Agreement, including but not limited to its binding effect.

14. Nieves and the County agree that if any provision of this Agreement is declared or determined by any court of competent jurisdiction to be unenforceable or invalid for any reason, the validity of the remaining parts or provisions shall not be affected thereby, and the said part, term or provision declared or determined invalid or unenforceable shall be deemed not to be part of this Agreement.

15. This Agreement shall become effective and enforceable upon execution by the parties.

16. This Agreement may be signed in counterparts and shall be deemed fully executed when all parties have signed the Agreement. The parties agree to accept facsimile/scanned signatures in lieu of original signatures which shall have the same validity and effect of original signatures.

17. Nieves has read and understands the terms of this Agreement and by signing below acknowledges and voluntarily agrees to accept the terms of this Agreement with full knowledge of its significance. Nieves acknowledges that she has been given ample time to consider the terms of this Agreement. Nieves has been and is advised to review and discuss this Agreement with her attorney prior to signing it.

IN WITNESS WHEREOF, the parties have executed this Agreement intending to be legally bound hereby.

ROSALEE NIEVES

Dated: 2/7/18, 2018

Sworn to and subscribed before me on this 7th day of February 2018

Notary Public
State of New Jersey

Warden Mildred Scholtz
Burlington County Department of Corrections

Mark Catanzaro, Esq.

Angiulo, Nicholas

To: Angiulo, Nicholas
Subject: RE: Roselee Nieves v. Burlington County Jail - CSV 16747-13 - SETTLEMENT

-----Original Message-----
From: Carmen Saginario Jr. [mailto:csaginario@capehart.com]
Sent: Wednesday, April 11, 2018 9:05 AM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Cc: mark@catanzarolaw.com; Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: Re: Roselee Nieves v. Burlington County Jail - CSV 16747-13 - SETTLEMENT

Agreed.

Carmen Saginario Jr. | Shareholder | Chair, Labor & Employment Department

CAPEHART || SCATCHARD
ATTORNEYS AT LAW
New Jersey - Pennsylvania - New York
8000 Midlantic Dr, Ste 300S
Post Office Box 5016
Mount Laurel, NJ 08054
csaginario@capehart.com<mailto:csaginario@capehart.com>
856-914-2081 Phone
609-577-9257 Mobile

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On Apr 11, 2018, at 9:00 AM, Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov<mailto:Nicholas.Angiulo@csc.nj.gov>> wrote:

Mr. Saginario:

That is sufficient regarding the appeal waiver issue. Pleas advise regarding the first issue highlighted below.

Sincerely,
Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

-----Original Message-----
From: Carmen Saginario Jr. [mailto:csaginario@capehart.com]
Sent: Tuesday, April 10, 2018 7:32 AM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov<mailto:Nicholas.Angiulo@csc.nj.gov>>
Cc: mark@catanzarolaw.com<mailto:mark@catanzarolaw.com>; Messina, JoAnn
<joann.messina@csc.nj.gov<mailto:joann.messina@csc.nj.gov>>

Subject: Re: Roselee Nieves v. Burlington County Jail - CSV 16747-13 - SETTLEMENT

The County agrees that the term referred to does not apply to any appeal regarding removal or release subs went to the end of the working test period. Please advise if this is sufficient.

Carmen Saginario Jr. | Shareholder | Chair, Labor & Employment Department
CAPEHART || SCATCHARD
ATTORNEYS AT LAW
New Jersey - Pennsylvania - New York
8000 Midlantic Dr, Ste 300S
Post Office Box 5016
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csaginario@capehart.com<mailto:csaginario@capehart.com<mailto:csaginario@capehart.com%3cmailto:csaginario@capehart.com>>
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On Mar 28, 2018, at 3:49 PM, Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov<mailto:Nicholas.Angiulo@csc.nj.gov<mailto:Nicholas.Angiulo@csc.nj.gov%3cmailto:Nicholas.Angiulo@csc.nj.gov>>> wrote:

Mr. Catanzaro and Mr. Saginario:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Roselee Nieves from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Ms. Nieves "will be employed . . . as a new employee . . . with no seniority for time previously employed with the County." The settlement further states she will be required to, inter alia, attend the Police Academy and that she "waives any right to appeal and/or challenge [any] such failure and/or dismissal."

Please be advised that as Ms. Nieves was originally appointed from an open competitive list to a competitive career service title, she would not be permitted to return to employment as a "new employee." In this regard, Ms. Nieves is not actually being reemployed, but rather reinstated. Thus, any settlement terms that would involve her return to work must credit her prior tenure with the County for Civil Service seniority purposes (such as layoff, exam seniority, etc.; but not necessarily for non-Civil Service seniority purposes, such a contractual rights, bidding, etc.). Additionally, as she would be considered to be reinstated, the period of time from her removal to the date of her reinstatement must be accounted for. Such time periods are most commonly recorded as an approved leave of absence without pay.

With regard to the waiver of her appeal rights, the Civil Service Commission does not generally permit individuals to agree to forfeit potential future appeal rights in disciplinary matters. However, the term in question seems to deal with dismissal from a Police Academy which is appealable to the Police Training Commission. If it only pertains to that right to appeal, the Commission has no jurisdiction to object to that term. However, clarification is necessary to indicate that the term does not pertain to any future appeal of any subsequent removal or release at the end of the working test period from employment with the County.

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties. Absent sufficient clarification, this matter cannot be acknowledged by the Commission and instead would be returned to the Office of Administrative Law for further proceedings.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs New Jersey Civil Service Commission

5-2-18

A-1

STATE OF NEW JERSEY

In the Matter of Boniface Osuagwu
Grestone Park Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2017-2900
OAL DKT. NO. CSV 05297-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 2, 2018 BW

The Civil Service Commission, at its meeting of May 2, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05297-17
CSC DKT NO 2017-2900

IN THE MATTER OF BONIFACE OSUAGWU, DEPARTMENT OF HUMAN SERVICES, GREYSTONE PARK PSYCHIATRIC HOSPITAL.

Ashley V. Whitney, Esq., for appellant (Law Offices of Gina Mendola Longarzo, LLC)

Andy Jong, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 29, 2018 Decided: April 3, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 29, 2011, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Settlement Agreement and Release were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 3, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 4-6-18

Date Mailed to Parties: APR 6 201

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. 05297-2017 N

RECEIVED
2018 MAR 29 P 3:22

OAL DKT. NO. CSV 05297-2017 N
AGENCY DKT. NO. 2017-2900

SETTLEMENT AGREEMENT

IN THE MATTER OF
BONIFACE OSUAGWU
AND
DEPT. OF HEALTH,
GREYSTONE PARK PSYCH. HOSP.

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated February 27, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	Removal (for all charges)	8/8/13
2. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		
3. Admin. Order 4:08, C-3.1 Physical or mental abuse of patient, client, resident or employee		
5. Admin Order 4:08, C-5.1 Inappropriate physical contact or mistreatment of a patient, client,		

resident or employee

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: 0.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. Respondent Department of Health will accept a General Resignation from Appellant Boniface Osuagwu, pursuant to N.J.A.C. 4A:2-6.3 effective August 8, 2013. Appellant Boniface Osuagwu agrees not to seek or accept employment with the Department of Health or Department of Human Services or any of their subsidiaries at any time in the future.

C. The Appellant Boniface Osuagwu withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Health agrees that: the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	General Resignation (resolving all charges)
2. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause	
3. Admin. Order 4:08, C-3.1 Physical or mental abuse of patient, client, resident or employee	
4. Admin Order 4:08, C-5.1	

Inappropriate physical contact
or mistreatment of a patient, client,
resident or employee

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to reflect that he resigned his employment, effective August 8, 2013. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department of Human Services from releasing information on this matter to anyone who has a release executed by appellant, or as otherwise consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department of Health with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Boniface Osuagwu's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this

agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/22/2018
DATE

Boniface Osuagwu, Appellant

2/22/18
DATE

ON BEHALF OF Appellant

3/9/18
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Boniface Osuagwu, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/22/2018
DATE

Boniface Osuagwu

5-2-18

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of James Reyes, City of Paterson

CSC Docket No. 2017-2772
OAL Docket No. CSR 03407-17

ISSUED: MAY 25, 2018 (HS)

The appeal of James Reyes, a Fire Captain with the City of Paterson (Paterson), of his removal effective February 23, 2017, on charges, was heard by Administrative Law Judge Barry E. Moscowitz (ALJ), who rendered his initial decision on March 20, 2018. Exceptions were filed on behalf of Paterson and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 2, 2018, adopted the ALJ's recommendation to reverse the removal but ordered the appellant to undergo a pre-reinstatement fitness for duty examination.

DISCUSSION

Paterson removed the appellant on charges of incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause. Specifically, it asserted that the appellant had been absent from work on Workers' Compensation, receiving full pay, since June 22, 2016 based upon his representation that he was in too much pain to return to work when he was, in fact, able to return to work. Paterson identified 12 separate instances between December 13, 2016 and January 11, 2017, captured by video surveillance, that allegedly demonstrated the appellant's misrepresentation and fraud. In the video surveillance, the appellant was observed shoveling snow and lifting water cases, among other things. Upon the appellant's

appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

Based on the testimonial and documentary evidence presented, the ALJ set forth in his initial decision that the appellant was injured on June 22, 2016. Robert Kayal, M.D., his treating doctor and an orthopedist, excused him from all duty. Kayal operated his own orthopedics practice, Kayal Orthopedic Center. Paterson alleged that the appellant could have returned to work on modified or light duty, that it had informed him that modified or light duty was available to him, and that he intentionally withheld this information from Kayal to perpetuate the fraud that he was in too much pain to return to work. However, the ALJ found that Gabriel Abouyan, the Battalion Chief who served as the sick-injury officer, did not tell the appellant, Kayal or Sulayka Perez, the staff person at Kayal Orthopedic Center responsible for the administration of all Workers' Compensation claims at the orthopedic office, that modified or light duty was available to the appellant or that modified or light duty could be made available to him. Similarly, no one else from Paterson told the appellant, Kayal, Perez or anyone else from Kayal's office that modified or light duty was available to the appellant or how modified or light duty could be made available to him.

The ALJ stated that, in the alternative, Paterson alleged that it never told the appellant that modified or light duty was available to him, but that it was generally known among all firefighters that modified or light duty is always available, and that he intentionally withheld this information from Kayal to perpetuate the fraud that he was in too much pain to return to work. However, the ALJ found that a preponderance of the evidence did not exist that it was generally known among Paterson firefighters that modified or light duty was available or could be made available to Paterson firefighters at any time. Paterson had not, in fact, made modified or light duty available to the appellant and had acted, instead, upon Kayal's medical advice that the appellant was incapable of returning to work on full duty and, as a result, excused the appellant from all duty. Likewise, Paterson never required the appellant to undergo a fitness evaluation. The ALJ found that modified or light duty was not offered to the appellant in December 2016 when the video surveillance of him was obtained, and Kayal had not cleared him for any.

The ALJ found that the appellant was honest about his symptoms and his pain and what he could and could not do; that he had not lied to anyone about his symptoms and his pain and what he could and could not do; and that the video surveillance did not contradict or contraindicate that the appellant was honest about his symptoms and his pain, and had not lied to anyone about what he could and could not do. In this regard, David Weiss, D.O., a board-certified orthopedist and board-certified independent medical examiner, testified that none of the

activities the appellant was seen to perform in the video surveillance contradicted his medical profile.

The ALJ found that the appellant cannot return to work on full or heavy duty but that he can return to work on modified or light duty and that he is willing to return to work on modified or light duty, which Paterson has still not offered or made available to him. In short, the ALJ found that Paterson had not proven any of the specifications alleged by a preponderance of the evidence. As such, the ALJ recommended that the charges be dismissed and that the appellant be reinstated to his position of Fire Captain.

In its exceptions, Paterson argues that even if the initial decision were to be upheld, back pay or benefits are not due pursuant to *N.J.A.C.* 4A:2-2.10(d)9, which provides that "[a] back pay award is subject to reduction for any period of time during which the employee was disabled from working." It maintains that if the appellant was actually disabled as of December 2016 and not able to perform modified or light duty, there is no record evidence that his condition has improved to the point where he could perform modified or light duty; that he has been cleared for modified or light duty; or that he is no longer taking opioids. It states that the only record evidence is that of Weiss, who indicated that the appellant's condition had deteriorated between December 2016 and August 2017.

In his reply to exceptions, the appellant notes his agreement with the initial decision and requests that it be affirmed without modification.

Upon its *de novo* review, the Commission affirms the ALJ's recommendation to dismiss the charges and reverse the removal. However, the Commission disagrees with the ALJ's determination that the appellant is able to return to work on modified or light duty and his recommendation that the appellant be reinstated to modified duty. Rather, it is for Paterson to determine whether it can provide the appellant the reasonable accommodation of such duty. Therefore, the Commission orders that Paterson provide the appellant with a pre-reinstatement fitness for duty examination. If the appellant is found able to perform full or modified duty that *can be accommodated*, he is to be reinstated. If he is found not able to perform full or modified duties or Paterson cannot accommodate temporary or permanent modified duties, Paterson should initiate a *new* disciplinary charge for the appellant's removal due to his inability to perform duties based on his current unfitness, with a current date of removal. Upon receipt of a Final Notice of Disciplinary Action on that charge, the appellant may appeal that matter to the Commission in accordance with *N.J.A.C.* 4A:2-2.8. Upon timely submission of any such appeal, the appellant would be entitled to a hearing regarding the current finding of unfitness only. In either case, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant would be entitled to mitigated back pay, benefits and seniority from February 23, 2017 until the time he is either reinstated or removed. The Commission further orders that, pursuant to

N.J.A.C. 4A:2-2.10(d)9, the appellant is not entitled to back pay for any period of time he was medically unable to work.[1]

Since the charges have been dismissed, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by Paterson. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* should the appellant pass the pre-reinstatement fitness for duty examination ordered herein, Paterson shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that Paterson's action in imposing a removal was not justified and therefore reverses that action. The Commission also orders that the appellant undergo a pre-reinstatement fitness for duty examination. The outcome of that examination shall determine whether the appellant is entitled to be reinstated or removed, as outlined previously. In either case, the appellant is entitled to back pay, benefits and seniority from February 23, 2017 through the date of his actual reinstatement or removal. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to Paterson within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10(d)9, the appellant is not entitled to back pay for any period of time he was medically unable to work.

The Commission further awards reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to Paterson within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fees dispute.

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[1] It is noted that *N.J.A.C.* 4A:2-2.10(d)9 presupposes full duty.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of the issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties, and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 03407-17

IN THE MATTER OF JAMES REYES,
CITY OF PATERSON FIRE DEPARTMENT.

Christopher A. Gray, Esq., for appellant (Sciarra & Catrambone, attorneys)

Steven S. Glickman, Esq., for respondent (Lite DePalma Greenberg, attorneys)

Record Closed: February 20, 2018 Decided: March 20, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On June 22, 2016, James Reyes, a fire captain, was injured, and his treating physician, an orthopedist, excused him from all duty. Although Reyes could work modified or light duty, no such duty was ever offered to Reyes or made known to his treating physician. Should Reyes be terminated for failure to perform duties or conduct unbecoming? No. Such violation requires the ability to perform a duty and the decision to disregard that duty.

PROCEDURAL HISTORY

On January 23, 2017, Paterson served Reyes with a Preliminary Notice of Disciplinary Action. In its notice, Paterson charged Reyes with incompetency, inefficiency, and failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); inability to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(3); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). Paterson also charged Reyes with violation of Paterson's Injury/Sick-Leave Policy, Reissue of General Order 2004-13, dated September 23, 2014, including Section VIII, entitled, "Sick Leave Policy," and the statutory standard of behavior required of firefighters under N.J.S.A. 40A:14-17, and Karins v. City of Atlantic City, 152 N.J. 532 (1998).

In its specifications, Paterson alleged that that Reyes had been absent from work on workers' compensation, receiving full pay, since June 22, 2016, based upon his representation that he was in too much pain to return to work, when Reyes was, in fact, able to return to work. In support of these specifications and allegations, Paterson identified twelve separate instances between December 13, 2016, and January 11, 2017, captured by surveillance, that allegedly demonstrate Reyes's misrepresentation and fraud. As a result, Paterson suspended Reyes without pay on January 23, 2017.

On February 10, 2017, Paterson sustained the charges and specifications and removed Reyes from its employ effective February 23, 2017. Notice was given in a Final Notice of Preliminary Disciplinary Action of the same date. On March 11, 2017, Reyes filed this appeal and the case was assigned to me for hearing.

Hearing dates were scheduled for June 21, 23, and 26, 2017, but then adjourned on June 15, 2017, at Reyes's request, until October 10, 11, and 20, 2017, which proceeded as scheduled.

At the hearing, Paterson further specified and alleged that Reyes could have returned to work on modified or light duty, that it had informed Reyes that modified or light duty was available to him, and that Reyes intentionally withheld this information from his

treating doctor, Robert Kayal, M.D., to perpetuate the fraud that he was in too much pain to return to work.

In the alternative, Paterson specified and alleged that it never told Reyes that modified or light duty was available to him, but that it was generally known among all firefighters that modified or light duty is always available, and that Reyes intentionally withheld this information from Kayal to perpetuate the fraud that he was in too much pain to return to work.

Since the specifications could be fairly read to include these more specific allegations, the hearing was held, and this decision was written, with these two alternatives in mind.

By February 20, 2018, the parties submitted their closing briefs, and on that day I closed the record.

DISCUSSION AND FINDINGS OF FACT

Reyes

Reyes was born and raised in Paterson. He became a firefighter with the Paterson Fire Department in 1993 and rose to captain seven years later. From 2000 to 2016, Reyes served as captain in different roles. More specifically, Reyes served as the captain or supervisor of the engine company, the ladder company, and the rescue company.

On June 22, 2016, the date Reyes was injured, Reyes was serving as the captain or supervisor of the EMS unit. On that date, Reyes injured himself when he stepped out of his vehicle, landed on uneven pavement, and twisted his torso. On June 23, 2016, the following day, Reyes went to the ImmediCenter in Clifton, New Jersey, for treatment. Reyes testified that this urgent-care facility is where all Paterson firefighters are sent when they are hurt on the job.

On July 11, 2016, Reyes underwent an MRI of the lumbar spine, which revealed a disc bulge at L5-S1, and Reyes was referred to an orthopedist, Robert Kayal, M.D., for treatment.

On August 10, 2016, Reyes saw Kayal for the first time.

Kayal (Part I)

Kayal is a board-certified orthopedist. He operates his own orthopedics practice under the eponymous Kayal Orthopedic Center in no less than three locations. Kayal treated Reyes for his injuries and prided himself on the fact that he seldom treats patients who are out of work on workers' compensation. In fact, Kayal boasted that the treatment of patients out of work on workers' compensation is only 2 percent of his practice.

Kayal testified that Reyes had slipped and fallen coming out of a fire truck, and that he subsequently treated Reyes for pain in his back and hips. His treatment notes state that Reyes slipped when he stepped out of the truck onto uneven pavement. Kayal further testified that Reyes complained of pain in his low back consistent with sciatica, and that an x-ray and an MRI of his low back revealed a degenerative condition. Kayal testified that later subjective complaints of pain in the neck were also confirmed by objective tests revealing a degenerative condition.

Yet Kayal explained that an MRI of the left hip was equivocal for a labral tear. Kayal specified that an MRI of the right hip revealed only a contusion, but that the MRI of the left hip revealed neither a tear nor a detachment. "It was fluid," Kayal said. Nevertheless, Kayal put Reyes out of work for August, September, October, November, and December 2016. The exact nature of the dysfunction did not matter.

Letters

After each visit, Kayal wrote a letter to Reyes, excusing him from all work. Those letters were admitted into evidence as R-9. After Reyes received these letters, he submitted them to Paterson.

August 2016

Kayal's first letter, dated August 10, 2016, states, "Please excuse JAMES REYES from ***all work*** **through 9/2/16**, due to medical reasons. Please do not hesitate to call my office should you have any questions." Paterson accepted the letter, excused Reyes from all duty, and never called Kayal to question him.

September 2016

Kayal's second letter, dated September 2, 2016, states, "Please excuse JAMES REYES from ***all work*** until he can be re-evaluated on 10/14/16. Please do not hesitate to call my office should you have any questions." Paterson accepted the letter, excused Reyes from all duty, and never called Kayal to question him.

October 2016

Kayal's third letter, dated October 14, 2016, states, "Please excuse JAMES REYES from ***all work*** through **November 16th, 2016**, due to medical reasons. Please do not hesitate to call my office should you have any questions." Paterson accepted the letter, excused Reyes from all duty, and never called Kayal to question him.

November 2016

Kayal's fourth letter, dated November 16, 2016, states, "Please excuse JAMES REYES from ***all work*** until December 7th, due to medical reasons. Please do not hesitate to call my office should you have any questions." Paterson accepted the letter, excused Reyes from all duty, and never called Kayal to question him.

December 2016

Kayal's fifth letter, dated December 9, 2016, states, "Please be aware that James is actively treating with our practice. **Please excuse JAMES REYES from *all work* until**

further notice, due to medical reasons. Please do not hesitate to call my office should you have any questions." Paterson accepted the letter, excused Reyes from all duty, and never called Kayal to question him.

Abouyan

Paterson, however, did question Reyes. Gabriel Abouyan, the battalion chief who serves as the sick-injury officer for Paterson, testified that he called Reyes after he received each of these letters, and that he asked Reyes how he was doing. Abouyan explained that the handwritten notes on the letters admitted into evidence as R-9 are his handwritten notes, which memorialize the conversations he had with Reyes on each of the dates he wrote that he spoke to Reyes.

On Kayal's first letter, dated August 10, 2016, Abouyan wrote, "Spoke to [Reyes] 8/10/16; Capt. stated in serious pain."

On Kayal's second letter, dated September 2, 2016, Abouyan wrote, "Spoke to [Reyes] 9/6/16; no change in injury."

On Kayal's third letter, dated October 14, 2016, Abouyan wrote, "Spoke to [Reyes] 10/26/16; no change."

On Kayal's fourth letter, dated November 16, 2016, Abouyan wrote, "Spoke to [Reyes] 11/18/16."

On Kayal's fifth letter, dated December 9, 2016, Abouyan wrote, "Spoke to [Reyes] 12/7/16; Asked him how injury is doing (no better/worse); Suggested see another doctor; Said he is going to Mamood."

Nowhere in his handwritten notes does Abouyan question whether Reyes was sincere or honest in his response about his pain or injury or whether Reyes could return to work on modified or light duty.

Goow

Samir Goow is the risk manager for Paterson. Goow testified that he was hired by Paterson almost three years ago and is responsible for overseeing all the workers' compensation claims filed with the City. Goow explained that Paterson has a history of abuse and neglect concerning workers' compensation claims, and that he has been very aggressive in closing out those claims against the City and returning its employees to work. Goow was an assertive witness who was insistent on providing his opinions about Reyes, including his medical condition, even though Goow had no medical expertise to do so. Goow did not even have any judicially-recognized expertise in risk management.

First, Goow testified that he had known nothing about Reyes until the third-party administrator for Paterson, the Claims Resolution Corporation (CRC), had called him because the fire chief had wanted Reyes surveilled, and the CRC needed Goow to approve the surveillance. Goow explained that he deals with hundreds of workers' compensation claims at a time and that he relies heavily on his insurance adjusters to apprise him of them. Goow continued that he approved the surveillance, forwarded the video to Kayal for his review, and was shocked by what he saw on the recording.

Next, Goow testified that Reyes had been lying about his medical condition. Goow opined that six months was too long for Reyes to have been out of work, especially when no other firefighter in Paterson had been out of work for that long, and that Reyes should have been returned to work on at least modified or light duty. Notwithstanding the fact that Goow had no medical expertise, or any judicially recognized expertise in risk management, Goow admitted on cross-examination that he never even reviewed the medical record. More expansively, Goow conceded that he never spoke to anyone about whether what he saw on the video was consistent with what Reyes complained of, whether it was consistent with his medical condition, whether Reyes should get a second opinion, whether Reyes should undergo a functional-capacity evaluation, whether Reyes could return to work on modified or light duty, or whether Reyes should not return to duty at all.

Ultimately, Goow conceded that Kayal had, in fact, excused Reyes from all duty in August, September, October, November, and December 2016, and that the parties were, as a result, obligated to follow that medical advice.

Surveillance

Paterson, through the CRC, hired Confidential Security Associates (CSA), a surveillance company, to surveil Reyes. Jeffrey Eisenberg is the employee from CSA who recorded the surveillance. Eisenberg has worked in the surveillance business for the past ten years and at CSA for the past two. His video recording was admitted into evidence as R-6 and his written findings were admitted into evidence as R-4 and R-5. At the hearing, Eisenberg was professional in his presentation and matter-of-fact in his testimony.

Eisenberg testified that he was given no information about Reyes or this case before or during the surveillance and was simply instructed to perform the surveillance. Eisenberg explained that he assumed that the case had something to do with a personal injury, so he parked his car outside Reyes's home and videoed Reyes on a digital recorder when Reyes left his home. Eisenberg further explained that he then dictated what he saw in another recorder and turned in all his recordings to the owner of CSA, who produced the video footage and written reports for the hearing. A review of the written reports reveals that Eisenberg dictated what he saw without embellishment.

Similarly, at the hearing, Eisenberg simply repeated what he saw on the video as we watched the excerpts of the footage, resisting calls for embellishment when asked.

Video

Eisenberg surveilled Reyes on eleven days in December—Friday, December 9, 2016; Saturday, December 10, 2016; Monday, December 12, 2016; Tuesday, December 13, 2016; Wednesday, December 14, 2016; Saturday, December 17, 2016; Monday, December 19, 2016; Tuesday, December 20, 2016; Wednesday, December 21, 2016;

Thursday, December 22, 2016; and Friday, December 23, 2016— for ten to twelve hours each day.

Yet Paterson alleged only thirteen instances of fraud from the 110–132 hours of surveillance. Once again, all the surveillance takes place outside the home and does not capture what Reyes did once he returned inside his home. For easy reference, the allegations are reproduced below:

- On December 10, 2016, James Reyes was observed dragging a garbage can to the curb at his residence.
- On December 13, 2016, James Reyes was observed vigorously sweeping the front of his residence.
- On December 14, 2016, James Reyes was observed dragging and carrying a garbage can onto his property.
- On December 17, 2016, James Reyes was observed lifting the hood of a Toyota, believed to be his vehicle.
- On December 17, 2016, James Reyes was observed brushing snow off the two vehicles, a Toyota and an Audi, believed to be his vehicles.
- On December 17, 2016, James Reyes was observed [connecting] jumper cables to his Toyota. He was then observed getting into the Audi and starting it up, pulling the Audi near the Toyota, and connecting the jumper cables to the Audi. After jump starting the Toyota, James Reyes parked the Audi and closed both vehicles.
- On December 17, 2016, James Reyes was observed bending down to pick up a garbage can lid and then dragging the garbage can onto the side of his property.
- On December 17, 2016, James Reyes was observed shoveling snow on the side and front of his property [and on the] steps and front porch [of his property]. He was observed throwing salt down on the steps and walkway.
- On December 17, 2016, James Reyes was observed using a broom to clean the tops of the Toyota and Audi and his steps.
- On December 21, 2016, James Reyes was observed exiting his residence carrying a garbage bag to the curb. He was then observed bending over to move the garbage bag. James Reyes was then observed walking to the side of his property, dragging a garbage can to the curb, and then lifting the garbage bag and placing it in the garbage can.
- On December 22, 2016, James Reyes was observed at the Costco in Clifton, New Jersey pushing a shopping cart.

He then opened the rear trunk of his vehicle, lifting five (5) cases of water and placing them in his trunk.

- On December 22, 2016, James Reyes was observed back at his residence lifting several cases of water from his trunk and carrying each one up his stairs and into the front door of his residence.
- On January 11, 2017, James Reyes saw Dr. Kayal, stating that he was unable to be active at all at home due to continuing lower back and leg pain. James Reyes informed Dr. Kayal that his wife was required to perform many of his "chores," including shoveling snow because the pain was too severe. James Reyes further indicated that he was unable to return to work.

Kayal (Part II)

Like Goow, Kayal was outraged by what he saw in the video. In a letter to the CRC dated January 11, 2017, Kayal summarized his treatment for Reyes, but wrote that after he reviewed the video, he no longer believed Reyes. As a result, Kayal cancelled all future appointments and all further treatment.

First, Kayal wrote that he saw Reyes six times between August 10, 2016, and December 21, 2016, and that he had prescribed physical therapy for Reyes throughout this period, but that Reyes's pain did not subside. Second, Kayal wrote that on three of those six visits, Reyes received local injections into his low back to alleviate his pain. Third, Kayal wrote that the last visit was for a pre-op history and a physical exam so Reyes could receive fluoroscopically guided injections into his left hip.

At the hearing, Kayal explained that the injections were to provide additional diagnostics as well.

Kayal then wrote that when he saw Reyes for the last time, on January 11, 2017, Reyes continued to complain of low-back pain and bilateral hip pain, that Reyes was still unable to be active at all at home, and that his pain was interfering with his quality of life.

Similarly, Kayal wrote that Reyes told him that his wife still did many of the household chores because his pain was too severe, that he still had numbness and tingling in his left foot, and that his pain was still a 10 out of 10 in severity.

But Kayal did not believe him:

> It is evident after reviewing these videos of my patient Mr. James Reyes, that he can work and that his subjective pain levels that he reports during his office visits with me are not consistent with the activities he's able to perform on the videos I've reviewed. Furthermore, Mr. Reyes was willing to receive medical treatment including multiple local injections, MRI studies and physical therapy, all modalities typically reserved for patients that are severely injured and incapable of performing the activities observed on these videos.
>
> [P-7.]

As a result, Kayal cancelled the physical therapy, the hip injections, and the diagnostic surgery.

At the hearing, Kayal testified that he had kept Reyes out of work because of his subjective complaints of pain, and that the video is what changed his mind about him. Kayal further testified that he had brought Reyes into his office on January 11, 2017, to confront him and confirm what he saw on the video. Specifically, Kayal testified that he asked Reyes if he still could not shovel snow or sweep steps and if he still could not perform other activities of daily living, and that Reyes answered that he still could not do any of these and that his wife still had to do all of them for him.

But Kayal wrote in his office note that Reyes had told him that his wife had to do "many" of the chores, including shoveling snow, not that his wife had to do "all" of the chores.

Kayal was even unwilling to consider the possibility that Reyes had only shoveled the few inches of snow from his front porch and steps (which could be seen in the video), but that his wife had to shovel the entirety of snow from the driveway and sideway (which

could not be seen in the video), or that she had to shovel the seven inches of snow that had fallen on a different date in December and was not captured by video.

Kayal also did not know whether Reyes was on any medication when he performed the activities of daily living that he saw on the video, whether those activities aggravated Reyes's condition, whether Reyes had to take any medication after he performed the activities of daily living that he saw on the video, or whether those activities were consistent with the ones Reyes performed at physical therapy.

To explicate, Kayal testified that he did not care whether the activities of daily living that he saw on the video were consistent with the ones Reyes performed at physical therapy, and that he did not even review the physical-therapy notes, because he is an orthopedist, and he was going to make his own determination whether the activities of daily living that he saw on the video were consistent with Reyes's condition.

As such, it was just Kayal's self-assured belief that if Reyes had truly been in pain, then he would not, and could not, have performed any of the activities of daily living that he saw Reyes perform on the video.

Most damaging to Kayal and his credibility, however, was the fact that Kayal had made up his mind about Reyes before Reyes even returned to his office on January 11, 2017. Kayal had testified on direct examination that he had brought Reyes into his office on January 11, 2017, to confront him about what he had seen on the video and give Reyes a chance to explain himself. As it turns out, Kayal never did confront Reyes about the video or give Reyes a chance to explain himself. In fact, Kayal admitted as much on cross-examination.

Incredibly, Kayal also admitted on cross-examination that he had drafted his letter dated January 11, 2017, which terminated all treatment for Reyes, on January 5, 2017, six days before he was supposed to confront Reyes about the video and give him a chance to explain himself.

Upon review, the only difference between the draft dated January 5, 2017, and the letter dated January 11, 2017, is the paragraph in which Kayal memorialized Reyes's continued complaints of pain as of that date.

Kayal tried to minimize this discovery by cloaking it in medical opinion, but his explanation merely revealed that he was chapped because he thought he had been duped by a patient out of work on workers' compensation, the very kind of patient Kayal tries to avoid for this very reason.

To be clear, Kayal testified that he saw himself as a "traditional orthopedic surgeon," not a "workers' compensation doctor," and he even went so far as to change the percentage of patients he said he treats on workers' compensation from "2 percent of his practice" to "1½ percent of his practice," and later still to "less than 1 percent of his practice."

Finally, Kayal confirmed that he never spoke to anyone at Paterson about whether Reyes could return to work on modified or light duty.

Reyes (Part II)

Reyes testified that Kayal only saw him on his first office visit on August 10, 2016, when Kayal administered the sciatic injections and prescribed the pain medication, and on the last office visit on January 11, 2017, when Kayal asked him who had shoveled the snow during the most recent accumulation. Reyes explained that he saw physician's assistants on all the other office visits in between. Reyes also testified that he was truthful about his symptoms and compliant with his treatment. Reyes explained that he attended physical therapy three times a week until Kayal cut him off, and that he was forthcoming about his physical activity with all of his healthcare providers throughout his treatment with them.

For example, Reyes testified that he told both the physician's assistant and the physical therapist that he had lifted the cases of water out of the shopping cart and placed them into the trunk of his car, one at a time, and that he had lifted them out of the trunk

of his car and carried them into his house, one at a time. Ryes explained that the physical therapist was angry with him—not because he had lifted and carried the cases of water—but because Reyes had thought he was not allowed to do so. In short, Reyes testified that the physical therapist had encouraged him to be physically active. "That's why you come to physical therapy," Reyes recounted the physical therapist telling him; "I expect you to do that!"

Reyes also clarified what he and Kayal discussed during the last office visit on January 11, 2017, when Kayal supposedly confronted Reyes about shoveling snow. Reyes explained that he and Kayal had talked about two different things. Reyes noted that the snow he had shoveled on the video was in December 2016 and was not the most recent snowfall, so when Kayal asked him about who had shoveled the snow, Reyes naturally thought that Kayal was asking about the most recent snowfall in January 2017, so he answered that his wife had shoveled it. In fact, Reyes asserted that he could not have shoveled the snow in January 2017 because he had been doing too much at that time and was in pain.

Reyes continued that when he did shovel the snow on the porch and on the walkway in December 2016, he had been in so much pain afterward that he had to lie down once he returned inside, and put heat packs on his affected areas. Reyes explained that he had shoveled the snow because his wife had been doing so much around the house during that time and he did not want her to keep having to do everything. He said he felt "useless" so he "sucked it up." Reyes noted that the walkway he shoveled is only four feet long, but that that the driveway and walkway his wife shoveled is much longer. Reyes further explained that he can be seen shoveling the walkway because it is in the front of the house, and that his wife cannot be seen shoveling the driveway and sideway because they are to the side and back of the house and out of view.

Reyes then offered that he brushed the snow off the cars on the video because his mother-in-law is elderly and his wife looks after her, so he wanted his wife's car to be ready in case she needed it to help her mother after the snowfall.

Reyes testified that Kayal cut off his physical therapy in December, that he cancelled his injections scheduled for January before he saw him in January, and that he received no further treatment because he had no insurance. Reyes's condition then began to deteriorate. For example, Reyes said that he had to start using a cane his cousin gave him because his legs began to weaken, and that he needed the cane for stability and confidence when he walked.

Reyes admitted that he did speak to Abouyan about returning to work on modified or light duty in December 2016, but that he had been in too much pain at the time to do so, and that Kayal had not cleared him for modified or light duty anyway. Reyes explained that he had worked modified duty during a prior injury, but that he had been cleared for it. Reyes said that he would have worked on modified or light duty if Kayal had cleared him for it, and that he would still be willing to work on modified or light duty if it were offered to him.

Weiss

David Weiss, D.O., is a board-certified orthopedist and a board-certified independent medical examiner. He is also a diplomate of the American Academy of Pain Management. Weiss works for Regional Independent Medical Evaluations and has significant experience performing medical evaluations in workers' compensation claims, writing reports, and testifying in court proceedings like this one. He also has served on the medical expert advisory panel for the State Board of Medical Examiners. As a result, Weiss was offered and accepted as an expert in orthopedic medicine and disability impairment without objection.

History

On August 1, 2017, Weiss performed an independent medical evaluation of Reyes and wrote a report. In his report, Weiss recounts that on June 22, 2016, Reyes was injured at work while stepping out of his vehicle, landing on uneven pavement, twisting his torso, and causing injury to his lumbar spine and bilateral hips. He was first seen at

ImmediCenter, where an MRI was recommended, and on July 11, 2016, an MRI of the lumbar spine revealed a disc bulge at L5-S1.

On August 10, 2016, Reyes was evaluated by Kayal, who recommended injections, and on an unspecified date Reyes received ultrasound-guided bilateral sciatic injections.

On August 29, 2016, Rahul Sood, D.O., a pain-management specialist, recommended physical therapy and additional injections.

On September 6, 2016, Sood performed transforaminal epidural injections with steroids at left L4-L5 and L5-S1 under fluoroscopy, and on September 21, 2016, Sood performed lumbar facet injections with local anesthetic and steroids at left L3-L4, L4-L5, and L5-S1 under fluoroscopy.

On October 19, 2016, an MRI of the cervical spine revealed disc bulge at C3-C4, C4-C5, C5-C6, and C6-C7; an MRI of the right hip revealed a bone contusion versus a stress reaction along the right superior acetabular rim; and an MRI of the left hip revealed a posterior superior labral tear.

Reyes was to receive ultrasound-guided left-hip injections in January 2017, but Kayal canceled the procedure.

To remind, Kayal never consulted with the physical therapist who had been treating Reyes for his dysfunction, and he never consulted with Sood, who had been treating Reyes for his pain.

Complaints

Weiss testified that when he examined Reyes on August 1, 2017—more than six months after Kayal had cancelled all his treatment, including the physical therapy, the pain medication, the hip injections, and the diagnostic surgery—and that Reyes had deteriorated. At the hearing, Weiss referred to his report. In his report, Weiss wrote that

Reyes complained of low-back pain and stiffness, which was daily and constant, and radicular pain, which radiated into the left lower extremity. Weiss also wrote that changes in the weather, and coughing and sneezing, exacerbate or aggravate the pain.

In addition, Weiss wrote that Reyes complained of right-hip pain and stiffness, which was daily, but that it waxed and waned and was also exacerbated by changes in the weather.

Similarly, Weiss wrote that Reyes complained of left-hip pain, stiffness, and weakness, which was daily and constant and exacerbated by changes in the weather.

Regarding activities of daily living, Weiss wrote that Reyes complained that he could no longer work as a firefighter, that he needed his wife's help to complete household tasks, and that he even had difficulty with self-care. Examples included washing the dishes, washing himself, and getting dressed. Weiss continued that Reyes can sit comfortably for only fifteen minutes in an hour and can stand comfortably for only ten minutes at a time. As a result, Reyes can only walk no more than two blocks and now needs a cane to ambulate.

Weiss also wrote that Reyes noted difficulty sleeping, climbing stairs, and moving from a seated to a standing position. Similarly, Weiss wrote that Reyes noted difficulty bending, twisting, and lifting. More specifically, Weiss wrote that Reyes has difficulty lifting weights greater than ten to fifteen pounds; that Reyes has difficulty kneeling and squatting on his left side; and that Reyes has difficulty squatting (but not kneeling) on his right side. As such, Reyes can no longer exercise.

Finally, Weiss wrote that Reyes noted that he can no longer drive or ride in a motor vehicle without difficulty, and that he can no longer have sex without difficulty or dysfunction.

Weiss reported that Reyes stated that his pain was 6–10 on a scale of 1–10 involving the lumbar spine, 1–6 on a scale of 1–10 involving the right hip, 4–10 on a scale of 1–10 involving the left hip, and 3–8 on a scale of 1–10 involving the left lower extremity.

Meanwhile, Patient Reported Outcomes Measurement Information Systems (PROMIS) revealed a moderate pain disability, namely, a chronic low-back disability. Weiss further reported that the PROMIS revealed a 62 percent bilateral lower-extremity disability.

Examination

Physical examination revealed paravertebral muscle spasm and tenderness over the posterior midline, iliolumbar ligamentous tenderness bilaterally, and tenderness over the L4-L5 and L5-S1 facet joint on the left and over the L5-S1 facet joint on the right. Facet-joint compression testing was positive too. Range of motion of the lumbar spine revealed forward flexion of 80/80 degrees, backward extension of 10/30 degrees, left lateral flexion of 10/30 degrees, and right lateral flexion of 20/30 degrees. All ranges of motion were carried though with pain at the extremes.

The sitting root sign was positive on the right at 90 degrees, producing axial low pain, and was positive on the left at 75 degrees, producing pain in the left-hip joint. Straight leg raising was positive on the left at 90 degrees, producing axial low-back pain, and the extensor hallucis longus muscles were graded 5/5. At the hearing, Weiss noted that straight leg raising produced pain in the low back and in the left-hip joint, that the left quadricep had atrophied, and that both the leg rolling and the Patrick's test produced pain in the left inguinal region.

Weiss made other physical findings (which he detailed in his report) and he reviewed the medical record (which he explained at the hearing) to diagnose Reyes with the following:

- Chronic post-traumatic lumbosacral sprain and strain
- Bulging lumbar disc L5-S1
- Post-traumatic lumbar facet joint syndrome
- Aggravation of pre-existing quiescent degenerative disc disease L5-S1
- Post-traumatic interventional pain management with lumbar epidural block and facet joint block
- Post-traumatic left hip strain and sprain

- Post-traumatic acetabular labral tear to the left hip confirmed by MRI on 10/19/16
- Post-traumatic femoral acetabular impingement syndrome to the left hip
- Chronic post-traumatic right hip strain and sprain

Explication

Most important, Weiss explained at the hearing that his physical findings meant that Reyes could bend forward, but not backward, without pain, and that none of the activities he saw Reyes perform on the video, including the shoveling of snow and the lifting of water cases, contradicted his medical profile, because the shoveling of snow and the lifting of water cases involved bending forward, not backward. In addition, Weiss explained that the labral tear in the left hip has nothing to do with forward or backward flexion. Moreover, Weiss explained that he saw nothing in the video demonstrative of the moderate to heavy duty that Reyes would have to perform as a firefighter. Finally, Weiss explained that no evidence existed of any symptom magnification.

Thus, Weiss concluded that there was no fraud:

> There is no evidence of comparative fraud on this claimant's part nor is there any evidence contradicting this claimant's symptomatology in light of the objective orthopaedic findings in both the orthopaedic examination and the neurodiagnostic imaging (MRI lumbar spine, MRI left hip and MRI right hip).
>
> [P-6.]

Weiss testified that based on the video he saw, Reyes could have returned to work in December 2016 on modified or light duty—provided it did not involve anything physical and Reyes was no longer taking class-two opioids, which affect cognitive ability—but none was offered, so none was considered. Toward this end, Weiss noted that Paterson could have had Reyes undergo a functional-capacity evaluation, but never required him to do so. As a final comment, Weiss said that he would not have recommended the epidural blocks and facet-joint blocks Sood performed so soon without more information,

but he would have recommended the diagnostic injection Kayal cancelled to obtain that additional information.

Kayal (Part III)

On rebuttal, Kayal confirmed that modified or light duty was never offered, so it was never considered, but that he disagreed with Weiss that the activities of daily living he saw on the video did not involve backward flexion. Kayal then conceded that he never checked the left quadricep for atrophy, that he only examined Reyes on the first and last visits (and that physician's assistants examined Reyes in between), and that he did not (nor did any of the physician's assistants) test Reyes for symptom magnification. Remarkably, Kayal admitted that even though he was going to cut Reyes off from further treatment because he thought Reyes had been lying to him about his symptoms, Kayal (the doctor) kept this information to himself and did not share it with Reyes (his patient) at the follow-up office visit on January 11, 2017.

Then Kayal lied in the medical record that he was going to continue treatment as planned by writing that he was going to perform the hip injections, that Reyes should schedule another follow-up visit in six weeks, that he was going to refer Reyes to another doctor for facet-joint injections, and that Reyes should schedule an appointment with yet another doctor for his lower back pain:

PLAN

- Other
  Appointment
  F/U 6 Weeks
  Appointment
  Scheduled appointment with pain management for lower back pain
  ROBERT A. KAYAL, MD, FAAOS ordered the following therapy
- Transition in care, clinical summary provided

  Lumbar MRI is significant for acute HNP at L5-S1 Causing B/L foraminal Narrowing L>R
  -He continues to complain about back pain and left leg pain

> -EMG of B/L lower extremities is unremarkable
> -He has had 2 LESI with only minimal relief
> -He received SI joint injections with little relief
> *After his hip joint injections I will consider referral to Dr. Aydin for facet joint injections
>
> Left hip—MRI remarkable for labral tear
> -I will now offer him a hip injection for therapeutic and also diagnostic purposes since his pain is very diffuse in regards to the back/hip.
> -He understands that should he get relief with the hip joint injection then we will schedule an arthroscopy for labral debridement.
>
> C Spine—Mild degeneration with muscle spasm
> -He will continue with PT
> -We have authorization for MF TP trigger point injections but he would like to focus on the back
>
> He will continue with Oral NSAIDS as needed for pain
>
> Due to his persistent pain and inability to perform physical duties he will remain out of work until further notice.
>
> [P-3.]

If the record is not clear by now, I believe that Kayal is not a trustworthy witness and I will not credit his testimony.

Injury/Sick-Leave Policy

Brian McDermott is the deputy fire chief for Paterson Fire Department and serves as its executive officer. McDermott was a straightforward and honest witness. In short, McDermott testified that Reyes is in violation of the Injury/Sick-Leave Policy for lying about his injuries and for failing to report for modified or light duty.

McDermott explained that modified or light duty is offered to anyone who is qualified for it, and that Reyes could have been accommodated for it, but McDermott did not testify that Reyes was qualified for modified or light duty or that any accommodation was made for him. Nor did McDermott testify that Reyes was required to report for any. To be sure, McDermott admitted on rebuttal that Kayal had not cleared Reyes for modified

or light duty, and that Paterson could not have put Reyes on modified or light duty without such clearance.

McDermott's testimony aside, a review of the Injury/Sick-Leave Policy readily reveals that the policy does not support the position Paterson asserts. Nowhere in the Injury/Sick-Leave Policy does it say that modified or light duty is available to any or all firefighters; nowhere in the Injury/Sick-Leave Policy does it say that it is the duty or responsibility of the injured or sick firefighter to request or seek modified or light duty; and nowhere in the Injury/Sick-Leave Policy does it say that it is the duty or the responsibility of the injured or sick firefighter to apprise any or all treating physicians about the possibility of modified or light duty.

To the contrary, the Injury/Sick-Leave Policy states that it is the responsibility of the tour commander/division commander to obtain all information necessary to complete the Reporting Sick/Injured form, to obtain specifics about the sickness or injury, or, if unknown, a description of the symptoms. It is the responsibility of the tour commander/division commander to monitor and enforce the policy and procedure. Indeed, it is the responsibility of the tour commander/division commander to check every sick/injured report for correctness and content. Finally, in evaluating fitness for duty, if practical, it is the responsibility of the chief of the Department to require a member to undergo a fitness evaluation.

These are Command's responsibilities, not Reyes's responsibilities, and no one at Command discharged them.

Duty

Abouyan testified that he suggested to Reyes that he return to work on modified or light duty and that Reyes told him that he was in too much pain to do so. Abouyan, however, did not remember when he had this conversation with Reyes. Reyes later testified that Abouyan had this conversation with him in December 2016, and that he did in fact tell Abouyan that he was in too much pain to return to work on modified or light duty, but that he also told Abouyan that Kayal had not cleared him to do so.

Significantly, Abouyan did not testify that he told Reyes to return to work on modified or light duty or that modified or light duty was even available to Reyes.

Abouyan testified that he also spoke to Kayal about Reyes returning to work on modified or light duty, but a preponderance of the evidence does not exist that this conversation ever occurred. First, on cross-examination, Abouyan changed his testimony and stated that he spoke to Kayal's office, not Kayal, about Reyes returning to work on modified or light duty, and that he informed Kayal's office that modified or light duty was available to Reyes. Abouyan said that he even explained to Kayal's staff what he meant by modified or light duty.

Abouyan then guessed that he called Kayal's office in October 2016, before Reyes's follow-up office visit on October 14, 2016, to talk to Kayal's staff about Reyes returning to work on modified or light duty, but Sulayka Perez, the staffperson at Kayal Orthopedic Center who is responsible for the administration of all workers' compensation claims at the orthopedic office, conceded on cross-examination that Abouyan never spoke to her about Reyes or returning him to work on modified or light duty.

Moreover, Perez admitted on cross-examination that she never spoke to Kayal about modified or light duty being available to anyone at Paterson, let alone to Reyes.

Given this discussion, I **FIND** that Abouyan did not tell Reyes, Kayal, or Perez that modified or light duty was available to Reyes or that modified or light duty could be made available to him.

Similarly, I **FIND** that no one else from Paterson told Reyes, Kayal, Perez, or anyone else from Kayal's office that modified or light duty was available to Reyes or how modified or light duty could be made available to him.

In addition, I **FIND** that a preponderance of the evidence does not exist that it was generally known among Paterson firefighters that modified or light duty was available or could be made available to Paterson firefighters at any time.

Indeed, I **FIND** that Paterson had not, in fact, made modified or light duty available to Reyes and had acted, instead, upon Kayal's medical advice that Reyes was incapable of returning to work on full duty and, as a result, excused Reyes from all duty.

Likewise, I **FIND** that Paterson never required Reyes to undergo a fitness evaluation.

To be clear, I **FIND** that Reyes could have returned to work on modified or light duty in December 2016 when the video surveillance was obtained—provided that the work did not involve any physical activity and that Reyes did not need to take any opioids to do it—but modified or light duty was not offered to Reyes and Kayal had not cleared Reyes for any.

Above all, I **FIND** that Reyes was honest about his symptoms and his pain, and what he could and could not do; that Reyes had not lied to anyone about his symptoms and his pain, and what he could and could not do; and that the video did not contradict or contraindicate that Reyes was honest about his symptoms and his pain, and had not lied to anyone about what he could and could not do.

On this score, I **FIND** that Weiss, not Kayal, was a credible witness, and I credit Weiss and his testimony, not Kayal and his testimony.

Finally, I **FIND** that Reyes cannot return to work on full or heavy duty, but that he can return to work on modified or light duty, and that he is willing to return to work on modified or light duty, which Paterson has still not offered or made available to him.

In short, I **FIND** that Paterson has not proven by a preponderance of the evidence any of the specifications it alleges in its Final Notice of Disciplinary Action, or at the hearing, and that Reyes did not engage in any of the misconduct with which he is charged.

DISCUSSION AND CONCLUSIONS OF LAW

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, In re Carter, 191 N.J. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578, (1982) (internal quotes omitted)). Indeed, progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest—such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. 19, 33 (2007).

Since I found that Paterson has not proven by a preponderance of the evidence any of the specifications it alleges in its Final Notice of Disciplinary Action, or any of the additional specifications it alleged at the hearing, and that Reyes did not engage in any of the misconduct with which he is charged, I **CONCLUDE** that Paterson has not proven by a preponderance of the evidence any of charges contained in its Final Notice of Disciplinary Action, that the charges against Reyes should be dismissed, and that Reyes should be reinstated to his position of fire captain.

As a result, I further **CONCLUDE** that Reyes should be awarded all requisite back pay, benefits, attorney fees, and costs associated with this case.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that all the charges against Reyes be **DISMISSED**, that Reyes be **REINSTATED** to his position of captain, and that Reyes be **AWARDED** all requisite back pay, benefits, attorney fees, and costs associated with this case.

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

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

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

3/20/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

MAR 22 2018

Date Mailed to Parties:

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Appellant:

David Weiss
James Reyes

For Respondent:

Robert Kayal
Gabriel Abouyan
Jeff Eisenberg
Samir Goow
Sulayka Perez
Brian McDermott

Documents

Appellant:

P-1 Letter from Kayal to To Whom it May Concern dated December 21, 2016

P-2 Physical Therapy/Occupational Therapy RX's from Kayal dated August 10, 2016, October 14, 2016, and November 16, 2016, together with physical-therapy notes from Totowa Center for Pain Management & Physical Therapy dated August 16, 2016, August 22, 2016, August 30, 2016, September 7, 2016, September 22, 2016, September 28, 2016, and October 5, 2016

P-3 Follow-Up Examination by Kayal dated January 11, 2017

P-4 Letter from Kayal to To Whom it May Concern dated January 5, 2017

P-5 Curriculum Vitae of Weiss revised June 22, 2016

P-6 Independent Medical Evaluation by Weiss dated August 1, 2017

Respondent:

R-1 Final Notice of Disciplinary Action dated February 23, 2017

R-2 Preliminary Notice of Disciplinary Action dated January 23, 2017

R-3 General Order 2014-06, Injury/Sick-Leave Policy, dated September 23, 2014

R-4 Report from Confidential Security Associates dated December 15, 2016

R-5 Report from Confidential Security Associates dated December 24, 2016

R-6 Surveillance video from Confidential Security Associates

R-7 Report from Kayal dated January 11, 2017

R-8 Curriculum Vitae of Kayal

R-9 Letters from Kayal to To Whom it May Concern dated August 10, 2016, September 2, 2016, October 14, 2016, November 16, 2016, and December 9, 2016

R-10 Job description for Fire Captain dated March 7, 2000

5-2-18

A-10

STATE OF NEW JERSEY

In the Matter of Purvis Ricks
Burlington County Jail

CSC DKT. NO. 2018-997
OAL DKT. NO. CSR 15058-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 4, 2018 BW

The appeal of Purvis Ricks, County Correction Officer, Burlington County Jail, removal effective September 26, 2017, on charges, were heard by Administrative Law Judge Mary Ann Bogan, who rendered her initial decision on March 20, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 2, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Purvis Ricks.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 15058-17

IN THE MATTER OF PURVIS L. RICKS,
BURLINGTON COUNTY JAIL.

Mark W. Catanzaro, Esq., for appellant Purvis L. Ricks (Law Offices of Mark W. Catanzaro, attorneys)

Andrew C. Rimol, Special County Counsel, for respondent Burlington County Jail (Capehart Scatchard, attorneys)

Record Closed: March 5, 2018 Decided: March 20, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Appellant Purvis Ricks, a county correction officer with respondent Burlington County Jail (County), appeals from disciplinary action removing him for incompetency, inefficiency, or failure to perform duties; conduct unbecoming; neglect of duty; other sufficient cause—violation of Policy and Procedures Manual sections 1009, 1022, 1023, 1038; N.J.A.C. 4A:2-2.5(a)(2), opportunity for hearing before the appointing authority; N.J.A.C. 4A:2-2.7(a)(2), actions involving criminal matters; N.J.A.C. 4A:2-2.7(c), actions involving criminal matters. The allegation relating to these charges is that appellant pled guilty to N.J.S.A. 2C:20-3(a), theft of movable property. Appellant admits that he pled

guilty, but contends that he has not been convicted, the notice does not set forth the underlying conduct, and therefore removal is not the appropriate discipline.

PROCEDURAL HISTORY

On December 12, 2016, the respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth charges for an incident that allegedly occurred on November 11, 2016. On September 26, 2017, the respondent issued a Final Notice of Disciplinary Action (FNDA), sustaining the charges and removing the appellant.

After issuance of the FNDA the appellant filed a direct appeal of this matter with the Office of Administrative Law (OAL) on October 10, 2017. The hearing was originally scheduled for December 19, 2017, and adjourned at the request of the respondent. The hearing was again scheduled for January 12, 2018, and was adjourned this time at the request of the appellant. The hearing was held on February 6, 2018, although the appellant did not appear. The record remained open for the submission of briefs. After the briefs were filed on March 5, 2018, the record closed. The appellant waived his right to restoration of pay in the event a disposition of this matter under N.J.S.A. 40A:14-201, otherwise known as the 180-day rule, specifically (b)(4), for a period from January 12, 2018, to February 6, 2018. All parties agree that the County is responsible for the corresponding time period from December 19, 2017, to January 12, 2018, due to adjournment of the hearing at the County's request.

FACTUAL DISCUSSION

Testimony

T.G. Blango (Blango) is the administrative lieutenant for the County. His responsibilities include conducting background checks and determining appropriate disciplinary action for employee wrongdoing. It is his job to collect and review incident reports and videos, and to conduct investigations. Based upon his investigation and review, Blango makes disciplinary recommendations to the warden with respect to employee conduct.

Blango reviewed the complaint/warrant which sets forth that on November 11, 2016, appellant obtained a credit card from a person without the cardholder's consent when he took and concealed a wallet at Old Navy belonging to a customer in violation of N.J.S.A. 2C:21-6(c)(1), a fourth-degree crime. (R-1.) The Washington Police Department Incident Report indicates that the customer reported she mistakenly left her wallet on the counter at Old Navy. The store camera footage depicts a black male with a sweatshirt taking the wallet off the counter and placing it in his pocket. (R-2.) On December 9, 2017, the appellant issued a voluntary written statement to the police admitting that he noticed a wallet similar to the wallet his daughter carries on the store counter, and then mistakenly picked up the wallet thinking it was his daughter's wallet. (R-3.) On August 9, 2017, appellant pled guilty to N.J.S.A. 2C:20-3(a), theft of movable property, in Washington Township Municipal Court. (R-4.) On December 12, 2016, the County issued a PNDA setting forth charges for the plea of guilty to the theft on November 11, 2016. (R-5.) The FNDA, sustaining the charges and removing the appellant, was issued on September 26, 2017. (R-6.)

On September 27, 2012, appellant certified that he received the County's Standard Operating Policies and Procedures Disk or Manual for Burlington County Detention Facility and Corrections and Work Release Center. (R-7.) Among the charges, the appellant was terminated for violating specifically:

Section 1009, in part:

> [A]ll County Correction Officers after having met all requirements shall be qualified as Peace Officers, therefore a bona fide Law Enforcement Officer and expected to uphold the highest standards of professionalism both on duty and off duty.

[R-8.]

Section 1022, in part:

> No officer shall violate the laws, statutes or ordinances of the United States . . . . Violation of any law shall subject the officer or employee to prosecution.

[R-9.]

Section 1023, in part:

> All officers of the Burlington County Department of Corrections shall be responsible to observe, comply strictly adhere and enforce all rules, regulations and to follow the policies and procedures contained herein and any amendment promulgated and approved by the Warden.

[R-9.]

Section 1038, in part:

> No officer shall act or behave, either in an official or private capacity, to the officer's discredit, or to the discredit of the department.

[R-9.]

Appellant's disciplinary history was also made part of the record. (R-10.)

Blango acknowledged that he did not interview the victim, he did not speak to Detective Meyer, who prepared the complaint/warrant, and he did not attend municipal court on August 9, 2017. He did view the footage of the incident on the store camera, and determined that a theft occurred when the appellant took the wallet off the store counter.

Based on the testimonial and documentary evidence presented, I **FIND** the following **FACTS**:

1. Appellant was employed as a correction officer with the Burlington County Jail.

2. On December 6, 2016, appellant was charged with credit-card theft, N.J.S.A. 2C:21-6(c)(1), a fourth-degree crime.

3. Appellant was then charged by the respondent with N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. Appellant was also charged with N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violation of Policy and Procedures Manual sections 1009, 1022, 1023, and 1038, for failure to uphold the highest standards of professionalism both on duty and off duty; for violating the laws; and for engaging in conduct that brings discredit to himself and the Department.

4. On August 9, 2017, appellant pled guilty to N.J.S.A. 2C:20-3(a), theft of movable property, before Judge Martin W. Whitcraft, JMC, in the Washington Township Municipal Court.

5. Appellant was then suspended on August 16, 2017, without pay.

6. Appellant was served with an FNDA relating to the charges and ordering his removal as a correction officer with the Burlington County Jail as of September 26, 2017.

7. Appellant was offered entry into the conditional-dismissal program.

8. At no time was appellant convicted of the offense contained in the complaint.

LEGAL ANALYSIS

The Civil Service Act, N.J.S.A. 11A:1-1 et seq., governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act sets forth that State policy is to provide appropriate appointment, supervisory, and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). To carry out this policy, the Act authorizes the discipline (and termination) of public employees. N.J.S.A. 11A:2-6.

A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In appeals concerning major disciplinary actions, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The preponderance may be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Here, the appellant challenges the sufficiency of the disciplinary notice served upon him because the FNDA does not set forth that he committed a theft. The respondent submits that the specifications provided appellant with "plain notice" of the disciplinary charges filed against him. The respondent, pursuant to N.J.A.C. 4A:2-2.7(b)(1), served a second PNDA after appellant pled guilty to criminal charges in municipal court.

Ultimately, the FNDA was served after the appellant decided not to request a departmental hearing.

In Sabia v. City of Elizabeth, 132 N.J. Super. 6, 14 (App. Div. 1974), the Appellate Division held that a disciplinary proceeding for a public employee is in no way a criminal or quasi-criminal proceeding and, consequently, the employee in such a proceeding does not come within the shield of the various constitutional guarantees accorded persons accused of a crime. Departmental disciplinary proceedings are civil in nature; requirements of due process are satisfied so long as proceedings are conducted with fundamental fairness, including adequate procedural safeguards. See also In re F.P., Dep't of Corr., No. A-1368-13 (June 10, 2015), https://njlaw.rutgers.edu/collections/courts/.

Accordingly, I **CONCLUDE** that appellant was served with sufficient notice of the charges against him.

Moreover, even though the appellant does not dispute the fact that he pled guilty to N.J.S.A. 2C:20-3(a), theft of movable property, he submits that the charges cannot be sustained because he was not convicted. The appellant was charged administratively with pleading guilty to an offense in municipal court, but he had not been convicted of anything since he was admitted to the conditional-dismissal program,[1] which is not a conviction. Appellant argues that this procedural nuance, which allows for a later dismissal of the criminal charge, negates his act of pleading guilty to the underlying conduct upon which the administrative charges are based, especially since after appellant's successful completion of the conditional-dismissal program, the charges will be dismissed.

Respondent argues that appellant's participation in the conditional-dismissal program does not preclude the County from seeking the appellant's termination, because he pled guilty to the underlying conduct. Respondent submits that these disciplinary charges apply to the conduct of appellant underlying the criminal charges. (Resp't's Br.,

[1] N.J.S.A. 2C:43-13.1.

March 2, 2018 (citing Reno v. Dep't of Corr., CSV 9685-00, Initial Decision (December 26, 2002), adopted, MSB (March 5, 2003), http://njlaw.rutgers.edu/collections/oal/).)

Here, the respondent brought disciplinary action and seeks removal of the appellant because of the underlying conduct that brought forth his arrest, the charges, the guilty plea, and appellant's subsequent admission into the conditional-dismissal program. The fact that the charges could ultimately be dismissed after he successfully completed the conditional-dismissal program is not relevant. "Where the conduct of a public employee which forms the basis of disciplinary proceedings may also constitute a violation of the criminal law, . . . the absence of a conviction, whether by reason of non-prosecution or even acquittal, bars neither prosecution nor finding of guilt for misconduct in office in the disciplinary proceedings." Sabia, 132 N.J. Super. at 12.

I **CONCLUDE** that the charges against appellant are founded upon the conduct underlying the criminal charges against him. I also **CONCLUDE** that appellant's participation in the conditional-dismissal program does not preclude the respondent from pursuing disciplinary action against the appellant based upon the underlying conduct.

The County seeks to impose major discipline, namely removal, on the appellant for violations of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(7), neglect of duty. Appellant was also charged with N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, for violation of Policy and Procedures Manual sections 1009, 1022, 1023, 1038, for failure to uphold the highest standards of professionalism both on duty and off duty, for violating the laws, and for engaging in conduct that brings discredit to himself and the County.

As to the charges of incompetency, inefficiency, or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1), the Administrative Code does not define these grounds for disciplinary action. However, case law has determined that incompetence is a "lack of the ability or qualifications necessary to perform the duties required of an individual [and] a consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield

Police Dep't, CSV 9921-98, Initial Decision (December 6, 1999) (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980)), adopted, MSB (January 24, 2000), http://njlaw.rutgers.edu/collections/oal/. "Inefficiency" has been defined as the "quality of being incapable or indisposed to do the things required of an officer" in a timely and satisfactory manner." Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), adopted, MSB (May 23, 2005), http://njlaw.rutgers.edu/collections/oal/. Appellant has been inefficient in his duties, as he is no longer capable of performing his duties. It was appellant's duty to observe and obey all laws, rules, and regulations, and orders of the Department. Instead he conducted himself in a manner that caused harm to other citizens, while in public, which resulted in a criminal plea. Accordingly, he can no longer uphold the integrity of the County and he remains inefficient in his duties. I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Conduct unbecoming a public employee has been interpreted broadly as conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "'be such as to offend publicly accepted standards of decency.'" Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not "'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior.'" Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Appellant pled guilty to theft of movable property, and the conduct he pled guilty to is unbecoming to a public employee. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Appellant was also charged with neglect of duty, violating N.J.A.C. 4A:2-2.3(a)(7). Neglect of duty can arise from an omission to perform a duty or failure to perform or discharge a duty, and includes official misconduct or misdoing, as well as negligence. Steinel v. City of Jersey City, 7 N.J.A.R. 91, 95 (1983), modified on other grounds, Civ.

Serv. Comm'n, 7 N.J.A.R. 100 (1983), modified on other grounds, 193 N.J. Super. 629 (App. Div. 1984), aff'd, 99 N.J. 1 (1985). Generally, the term neglect connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). Appellant neglected to uphold the policies and procedures of the County when he did not follow the policies and procedures and conduct himself with the highest standards of professionalism, both on duty and off duty. Therefore, respondent has proven that appellant has committed an act of neglect of duty, and I do so **CONCLUDE**.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Other sufficient cause is conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Asbury Park v. Dep't of Civil Serv., 17 N.J. 419 (1955). As to the charge of other sufficient cause, appellant conducted himself in a manner that violated standards of good behavior when he violated Policies and Procedures sections 1009, 1022, 1023, and 1038. As such, I **CONCLUDE** that the respondent has met its burden of proof on this charge.

I also **CONCLUDE** that the charges of violation of N.J.A.C. 4A:2-2.5(a)(2), N.J.A.C. 4A:2-2.7(a)(2), and N.J.A.C. 4A:2-2.7(c) are not conduct charges; these are regulations set forth for purposes of procedural guidelines.

PENALTY

Once a determination is made that an employee has violated a statute, regulation, or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). In re Herrmann, 192 N.J. 19, 33–34 (2007). The principal of progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

In this case, the appellant's misconduct is serious, as he pled guilty to theft of movable property. The charges are particularly egregious, in that a law-enforcement officer is held to a higher standard of conduct than other employees and, more than other employees, is expected to act in a responsible manner, honestly, and with integrity, fidelity, and good faith. In re Phillips, 117 N.J. 567, 576 (1990); Reinhardt v. E. Jersey State Prison, 97 N.J.A.R.2d (CSV) 166. It is settled that suspension or removal may be justified where the misconduct occurred off-duty; were it otherwise, "the desired goal of upholding the morale and discipline of the force, as well as maintaining public respect for its officers, would be undermined." In re Emmons, 63 N.J. Super. 140.

Furthermore, the policies and procedures that appellant failed to adhere to, as a paramilitary organization, are to be strictly followed. Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority are not to be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

The County relies principally on the egregiousness of the conduct to support termination. In addition, appellant has a history of thirteen sustained major disciplines beginning in 2003 to present, including a 100-day suspension. (R-10.)

Having considered all of the proofs offered in this matter, and the impact upon the institution of the behavior of the appellant herein, I **CONCLUDE** that appellant's misconduct was so egregious as to warrant removal, and respondent's action of removing the appellant from his position is appropriate. Appellant betrayed his official duties for personal gain, and deprived a fellow citizen of their rights and benefits in direct contradiction to the conduct expected of him.

I **CONCLUDE** that the action of the appointing authority removing appellant for his actions should be affirmed.

ORDER

It is **ORDERED** that the charges against the appellant for violations of N.J.A.C. 4A:2-2.3(a)(1), Incompetency, Inefficiency or Failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming; N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause including appellant's failure to perform his duties in accordance with Department Rules and Regulations 1009,1022,1023, and policy 1038 for engaging in conduct which brings disrepute on the Department are **AFFIRMED**. (The charges for N.J.A.C. 4A:2-2.5(a)(2), 4A:2-2.7(a)(2); 4A:2-2.7(c) are regulations set forth for purposes of procedural guidelines, and are not conduct charges).

Accordingly, I **ORDER** that the action taken by the County in removing appellant from his position as a county correction officer is **AFFIRMED**, and the appeal is hereby **DISMISSED**.

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

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

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

March 20, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: March 20, 2018

Date Mailed to Parties: March 20, 2018

MAB/cb

APPENDIX

WITNESSES

For appellant:

None

For respondent:

T.G. Blango

EXHIBITS

For appellant:

None

For respondent:

R-1 Complaint/Warrant, dated December 6, 2016

R-2 Washington Police Department Incident Report, dated November 21, 2016

R-3 Statement of Purvis Ricks

R-4 Washington Township Municipal Court Transcript of Docket, dated August 10, 2017

R-5 Preliminary Notice of Disciplinary Action, dated August 16, 2017

R-6 Final Notice of Disciplinary Action, dated September 26, 2017

R-7 Standard Operating Policies and Procedures, dated September 27, 2012

R-8 Burlington County Department of Corrections Policies and Procedures Section 1007

R-9 Burlington County Department of Corrections Policies and Procedures Sections 1022, 1023, 1038

R-10 Ricks, Purvis Disciplinary History

R-11 Preliminary Notice of Disciplinary Action, dated December 12, 2016

5-2-18

A-1

STATE OF NEW JERSEY

In the Matter of Tia Rodgers
Department of Children and Families,
Camden Central Local Office

CSC DKT. NO. 2018-364
OAL DKT. NO. CSV 11979-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 2, 2018 BW

The Civil Service Commission, at its meeting of May 2, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11979-17

AGENCY DKT. NO. 2018-364

IN THE MATTER OF TIA RODGERS,
DEPARTMENT OF CHILDREN AND FAMILIES,
(CAMDEN CENTRAL LOCAL OFFICE).

Robert Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jerome Jackson, Employee Relations Officer, for respondent Department of Children and Families, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: April 11, 2018 Decided: April 12, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter involves the appeal of Tia Rodgers (Rodgers) of the decision of respondent Department of Children and Families (DCF) to impose on her a thirty-working day suspension from her position at the Camden Central Local Office, effective August 7-11, 2017, with the remainder of the suspension held in abeyance pending the conclusion of these

proceedings, on charges of (1) insubordination in violation of N.J.A.C. 4A:2-2.3(a)2; (2) conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6; (3) neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)7; and (4) other sufficient cause, specifically violation of public policy, practice and/or protocol, pursuant to N.J.A.C. 4A:2-2.3(a)12.

DCF notified Rodgers of the above charges by a Final Notice of Disciplinary Action dated July 13, 2017. Upon receipt of Rodger's hearing request, the matter was transmitted on August 18, 2017, to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five

days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 12, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 4/16/18

Date Mailed to Parties: 4/16/18

TMC/nd

STATE OF NEW JERSEY
DEPARTMENT OF CHILDREN AND FAMILIES
DISCIPLINARY ACTION APPEAL - SETTLEMENT AGREEMENT (hereinafter, this "Agreement")
DCF FILE NO.: DCFD2018-6669 and DCFD2017-6361(OAL Docket No.: CSV-11979-2017S)

1. Institution/Agency: NJ Department of Children and Families ("DCF")	2. Name/Title Representative: Douglas Banks, Director Office of Employee Relations
3. Name and Title of Employee/Appellant: Tia Rodgers, Assistant Family Service Specialist 2 (hereinafter, "Employee" or "Appellant")	
4. Name/Title Representative of Employee: Bob Little, AFSCME Staff Representative	
5. Disciplinary Action Appealed: a. ☐ Removal b. ☒ Suspension **Thirty (30) day and Forty-Five (45) day** c. ☐ Official Written Reprimand d. ☐ Demotion e. ☐ Fine or restitution of _____	
6. a. Offense(s): N.J.A.C. 4A:2-2.3 (a) 2, 4, 6, 7, 12 b. Offense Date(s): 12/14/16, March through December 2017 c. Date(s) Disciplinary Actions appealed: 8/18/2017 and 12/29/18	

7. DCF agrees to amend the appealed disciplinary action in # 5 above to:

a. ☐ Oral Counseling; b. ☐ Oral Warning; c. ☐ Written Warning; d. ☐ Official Written Reprimand;
e. ☒ Suspension as follows: **DCF, Employee, and the Union agree that the forty-five (45) day suspension (DCFD2018-6669) and the thirty-day (30) day suspension (DCFD2017-6361) that is on appeal to the Office of Administrative Law (OAL), Docket No.: CSV-11979-2017 S, are being consolidated into a fifty (50) day suspension without pay. Employee has already served five (5) suspension days without pay on August 7, 8, 9, 10 and 11, 2017 and will serve the remaining forty-five (45) days on dates to be determined by DCF based on its operational needs and the dates are subject to change.**

f. ☐ Demotion;
g. ☐ Fine or restitution in the amount of

8. a. ☒ Not-Applicable;
b. ☐ Applicable: State of New Jersey/DCF agrees to pay Employee backpay in the amount of _____;
c. ☐ Applicable: Employee agreed to pay State of New Jersey/DCF Restitution in the amount of _____.

9. Employee agrees to withdraw this appeal and agrees not to initiate and/or pursue other appeals based on the subject matter of this Agreement.

10. a. ☒ Not Applicable b. ☐ Applicable: Employee agrees to a General Resignation with stipulation as listed in 7(e) above.

11. Employee waives all claims against the State of New Jersey/DCF including but not limited to counsel fees, and/or other monetary relief and/or any award of back pay, except as specifically noted in paragraph 8b above.

12. This Agreement shall not constitute a precedent in any other matter involving any other NJ State or DCF employee.

13. Appellant/Employee waives all appeals, claims, suits, actions, demands for damages, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Children and Families, their Divisions, Offices, Units, employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this Agreement, including but not limited to, all claims which have been or could have been brought, under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991,

the Americans with Disabilities Act, 42 USC § 1983, the New Jersey Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Civil Service Act, the Age Discrimination in Employment Act, Title 11A- the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wage and hour laws, public works statutes, unemployment compensation laws, disability benefits laws, any Workers Compensation claims, retaliation pursuant to Workers Compensation laws, the U.S. Constitution, the New Jersey Constitution, tort law, common law, and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims.

14. DCF shall amend Employee's personnel record to conform to the terms of this Agreement, and as consistent with all applicable laws, rules and regulations, including but not limited to N.J.A.C. 4A:1-2.2. All internal records of DCF shall be maintained intact. Nothing herein will preclude DCF from releasing information on this matter to anyone who has an executed release by Employee or as consistent law, rule or regulation. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to all applicable laws, rules and regulations, including but not limited to N.J.S.A. 43:1-3.3.

15. *If this matter involves Reinstatement of Employee to State service*, then any such Reinstatement of Employee is contingent upon Employee first successfully clearing any and all DCF Human Resources' (re)hiring prerequisites, including but not limited to all background checks, fingerprinting, driver's license checks, etc.

a. ☐ Applicable b. ☒ Not Applicable

16. **TO BE SIGNED BY EMPLOYEE:**

I, **Tia Rodgers** , being the moving party/appellant in this matter, hereby certify that I have reviewed this Settlement Agreement and I fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all of my questions regarding this Agreement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement freely and voluntarily.

Tia Rodgers — 3/8/18

Employee:
Tia Rodgers

Date

Robert Little — 3-8-18

Representative of Employee:
Robert Little, AFSCME NJ, Staff Representative

Date

[signature] — 3/29/18

Institution/Agency Representative:
Douglas Banks, Director Office of Employee Relations
Department of Children and Families

Date

5-2-18

A-1

STATE OF NEW JERSEY

In the Matter of Carlton Sankoh
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2017-2276
OAL DKT. NO. CSV 1463-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 2, 2018 BW

The Civil Service Commission, at its meeting of May 2, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2ND DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 1463-17
AGENCY DKT. NO. 2017-2276

IN THE MATTER OF CARLTON SANKOH, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., appearing for appellant (Nash Law Firm, LLC, attorneys)

Aimee Blenner, Deputy Attorney General, appearing for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 12, 2018 Decided: April 16, 2018

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 31, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 16, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 4/18/18

Date Mailed to Parties: 4/17/18

/cb

OAL DKT. NO. 01463-2017S
AGENCY DKT. NO. 2017-2276
SETTLEMENT AGREEMENT

IN THE MATTER OF
CARLTON SANKOH
AND
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL

RECEIVED
2018 APR 12 P 1:08
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

The parties in this appeal have voluntarily resolved all disputed matters and entered into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated February 9, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee – removal effective January 20, 2017
2. N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty – removal effective January 20, 2017
3. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective January 20, 2017
4. Admin. Order 4:08 B-2.2 Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to person or property – removal effective January 20, 2017
5. Admin. Order 4:08 E-1.3 Violation of a rule, regulation, policy, procedure, order or administrative decision – Removal effective January 20, 2017.

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: n/a.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: none.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: n/a.

C. The Appellant Carlton Sankoh withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge:

Without admitting liability, this matter is resolved via general resignation pursuant to N.J.A.C. 4A:2-6.3(b). Sankoh agrees not to seek reemployment with the Department of Health, including but not limited to hospitals run by the Department of Health.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Carlton Sankoh's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act

CERTIFICATION

I, Carlton Sankoh, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

02/20/2015
DATE

Carlton Sankoh
Carlton Sankoh

of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

02/20/2018
DATE

Carlton Sankoh
Carlton Sankoh

2/25/18
DATE

ON BEHALF OF Appellant
William A. Nash, Esq

3-16-18
DATE

ON BEHALF OF Respondent
Marc Malfara

5-21-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

May 25, 2018

Deborah A. Spencer
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Robert Piaskowsky, Director
New Jersey City University
2039 Kennedy Boulevard
Jersey City, New Jersey 07305

Re: *Terrence Statham v. New Jersey City University* (CSC Docket No. 2018-2788 and OAL Docket No. CSV 5725-18) - **SETTLEMENT**

Dear Ms. Spencer and Mr. Piaskowsky:

The appeal of Terrence Statham, a Senior Building Maintenance Worker, New Jersey City University, of his removal effective March 9, 2018 on charges, was before Chief Administrative Law Judge and Acting Director Lisa James-Beavers (ALJ), who issued her initial decision on May 21, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on May 22, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on July 6, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and,

per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective July 7, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05725-18
AGENCY DKT. NO. 2018-2788

IN THE MATTER OF
TERRENCE STATHAM,
NEW JERSEY CITY UNIVERSITY.

Deborah A. Spencer, Local 195, IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Robert Piaskowsky, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: May 15, 2018 Decided: May 21, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Terrence Statham from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on April 23, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 21, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 5/22/18

Date Mailed to Parties: 5/22/18

cmo

OAL DKT. NO. CSV 5725-18
AGENCY DKT. NO. 2018 - 2788

SETTLEMENT AGREEMENT

IN THE MATTER OF

Terrence Statham

AND

NJCU

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 3/6/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	Excessive Absenteeism		
2.	Violation of Last Chance		
3.			
4.			
5.			

B. The Appellant Terrence Statham withdraws his/her appeal and request for a hearing, and the Respondent appointing authority NJCU agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.		Resignation in good standing	
3.			
4.			
5.			

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

X resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

Eligible to reapply at later date

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. _____ (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority _____ will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of _____'s disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, _____, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 5725-18

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5-15-18
DATE

Appellant

5/15/18
DATE

Respondent

5/15/18
DATE

ON BEHALF OF Local 195 IFPTE

DATE

ON BEHALF OF

OAL DKT. NO. CSV 5725-18

CERTIFICATION

I, Terrene Statham, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-14-18
DATE

T Statham
NAME

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Orlando Alicea
New Jersey State Parole Board

CSC DKT. NO. 2018-774
OAL DKT. NO. CSV 17317-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17317-17

AGENCY NO. 2018-774

IN THE MATTER OF ORLANDO ALICEA,
NEW JERSEY STATE PAROLE BOARD.

Robert A. Fagella, Esq., for appellant Orlando Alicea (Zazzali Fagella Nowak Kleinbaum and Friedman, attorneys)

Adam Verone, Deputy Attorney General, for respondent New Jersey State Police (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 18, 2018 Decided: April 24, 2018

BEFORE **SARAH G. CROWLEY** ALJ:

This matter concerns the appeal of Orlando Alicea from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on November 14, 2017.

The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 30, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 5/2/18

Date Mailed to Parties: 5/2/18

RECEIVED
2018 APR 26 A 11: 27
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

PHILIP D. MURPHY
Governor
SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
NEW JERSEY STATE PAROLE BOARD
P.O. BOX 862
TRENTON, NEW JERSEY 08625
TELEPHONE NUMBER: (609) 292-4257

SAMUEL J. PLUMERI, JR.
Chairman

April 20, 2018

The Honorable Sarah G. Crowley, ALJ
Office of Administrative Law
PO Box 049
Trenton NJ 08625

Subject: Orlando Alicea v. NJ State Parole Board, OAL Dkt. No. CSV 17317-2017S

Dear Judge Crowley,

Please be advised that Appellant Orlando Alicea and Respondent State Parole Board have resolved the above captioned matter.

The State Parole Board hereby withdraws all disciplinary charges and penalty in the above captioned matter, pursuant to a settlement agreement reached in another matter under OAL Dkt. No. CSV 01968-2018S. For your records, I have attached said settlement agreement.

Please let me know whether I need to provide any additional information.

Respectfully submitted,

Adam Verone, Esq.
Manager Employee Relations
(609) 292-2849

Cc: Robert A. Fagella, Esq.

OAL DKT. NO. 01968-2018S
AGENCY DKT. NO.
SETTLEMENT AGREEMENT

IN THE MATTER OF
ORLANDO ALICEA
AND
NEW JERSEY STATE PAROLE BOARD

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated January 8, 2018 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee - removal effective October 3, 2017.
2. NJSPB Human Resources Policy 02.007F-B(2) Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to person and/or property – removal effective October 3, 2017.
3. NJSPB Human Resources Policy Number 02.007F –B(7) Serious mistake due to carelessness, which could result in danger and/or injury to person and/or property – removal effective October 3, 2017.
4. NJSPB Human Resources Policy Number 02.007F-C(7b) Personal Conduct; Failure to provide complete candor or to divulge relevant information of which the employee is aware in any report, investigation or proceeding, or failure to provide such information to manager/supervisor who is attempting to ascertain the facts of a particular matter – removal effective October 3, 2017.
5. NJSPB Human Resources Policy Number 02.007F-C(11) Conduct unbecoming a public employee – removal effective October 3, 2017.
6. NJSPB Human Resources Policy Number 02.007F-D(1) Loss or careless control of firearms – removal effective October 3, 2017.

7. NJSPB Human Resources Policy Number 02.007F-E(1) General Violation of a rule, regulation, policy, procedure, order or administrative decision – removal effective October 3, 2017.

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Orlando Alicea withdraws his appeal and request for a hearing, and the Respondent Appointing Authority New Jersey State Parole Board agrees that the following result will occur with regard to each charge: NJ State Parole Board will withdraw each charge. State Parole Board will withdraw disciplinary action pending before office of Administrative Law, including CSV 17317-20175. Orlando Alicea will accept a general resignation.

1. Mr. Alicea will agree not to seek or accept another position with the State Parole Board.
2. Mr. Alicea will agree not to seek or accept another law enforcement position. ~~3. Mr. If Mr. Alicea~~ If SPB is contacted by a law enforcement agency, SPB may disclose that he resigned in lieu of termination. He will receive a neutral reference for any other prospective employer.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. New Jersey State Parole Board shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the New Jersey State Parole Board will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

1. State Parole Board shall record Mr. Alicea's suspension time served as a personal leave without pay starting October 6, 2017. The time period between October 26, 2017 through March 23, 2018 shall be recorded as unpaid medical leave due to his documented injury. The remainder shall be personal leave without pay.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

1. State Parole Board shall pay Mr. Alicea for any accrued, unused paid time off to which he is entitled.

F. Except for the assessment of Orlando Alicea's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey State Parole Board, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

K. If anything in this agreement is deemed unenforceable, the remainder of the agreement remains enforceable.

4.12.18
DATE

Orlando Alicea

4/12/18
DATE

ON BEHALF OF Appellant

4/12/18
DATE

ON BEHALF OF Respondent

RECEIVED
2018 APR 26 A 11:27
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CERTIFICATION

I, Orlando Alicea, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4 12 18

DATE

Orlando Alicea

RECEIVED
2018 APR 26 A 11:27
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Orlando Alicea
New Jersey State Parole Board

CSC DKT. NO. 2018-2021
OAL DKT. NO. CSR 01968-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 01968-18

AGENCY DKT. NO. N/A

2018-2021

IN THE MATTER OF ORLANDO ALICEA,
NEW JERSEY STATE PAROLE BOARD.

Kevin D. Jarvis, Esq., for Orlando Alicea, appellant (O'Brien, Belland and Bushinski LLC, attorneys)

Aimee Blenner, Deputy Attorney General, for New Jersey State Parole Board, respondent (Gurbir S. Grewal, Attorney General of Jew Jersey, attorney)

Record Closed: May 9, 2018 Decided: May 10, 2018

BEFORE **JUDITH LIEBERMAN,** ALJ:

This matter concerns the appeal of Orlando Alicea from the action of the respondent/New Jersey State Parole Board. The appeal was filed with the Civil Service Commission on January 25, 2018, and filed with the Office of Administrative Law on February 1, 2018, pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 10, 2018
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: 5/10/18

Date Mailed to Parties: 5/10/18

/vj

7. NJSPB Human Resources Policy Number 02.007F-E(1) General Violation of a rule, regulation, policy, procedure, order or administrative decision – removal effective October 3, 2017.

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Orlando Alicea withdraws his appeal and request for a hearing, and the Respondent Appointing Authority New Jersey State Parole Board agrees that the following result will occur with regard to each charge: NJ State Parole Board will withdraw each charge. State Parole Board will withdraw disciplinary action pending before office of Administrative Law, including CSV 17317-20175. Orlando Alicea will accept a general resignation.

1. Mr. Alicea will agree not to seek or accept another position with the State Parole Board.
2. Mr. Alicea will agree not to seek or accept another law enforcement position. 3. ~~If Mr. Alicea~~ If SPB is contacted by a law enforcement agency, SPB may disclose that he resigned in lieu of termination. He will receive a neutral reference for any other prospective employer.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. New Jersey State Parole Board shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the New Jersey State Parole Board will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

1. State Parole Board shall record Mr. Alicea's suspension time served as a personal leave without pay starting October 6, 2017. The time period between October 26, 2017 through March 23, 2018 shall be recorded as unpaid medical leave due to his documented injury. The remainder shall be personal leave without pay.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

1. State Parole Board shall pay Mr. Alicea for any accrued, unused paid time off to which he is entitled.

F. Except for the assessment of Orlando Alicea's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey State Parole Board, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

K. If anything in this agreement is deemed unenforceable, the remainder of the agreement remains enforceable.

4.12.18
DATE

Orlando Alicea

4/12/18
DATE

ON BEHALF OF Appellant

4/12/18
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Orlando Alicea, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4/12/18 _____ _____

DATE Orlando Alicea

5-23-18

A-2

STATE OF NEW JERSEY

In the Matter of Karshawn Batie
Burlington County Jail

CSC DKT. NO. 2018-1585
OAL DKT. NO. CSR 18164-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 25, 2018 BW

The appeal of Karshawn Batie, County Correction Officer, Burlington County Jail, removal effective November 13, 2017, on charges, were heard by Administrative Law Judge Patricia M. Kerins, who rendered her initial decision on April 16, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 23, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Karshawn Batie.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 18164-17
AGENCY DKT. NO. N/A

IN THE MATTER OF KARSHAWN J. BATIE,
BURLINGTON COUNTY JAIL.

Daniel M. Rosenberg, Esq., for appellant Karshawn J. Batie (Daniel M. Rosenberg and Associates, LLC, attorneys)

Andrew C. Rimol, Esq., for respondent Burlington County (Capehart and Scatchard, attorneys)

Record Closed: March 6, 2018 Decided: April 16, 2018

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Karshawn J. Batie (Batie) appeals his termination from his position as a Burlington County correction officer for failing to conduct required security checks and for making false entries in the facility's logbook that he had performed those security checks. Batie does not dispute that he falsified the entries and failed to conduct the required security checks, but asserts that the penalty of termination is excessive.

Respondent Burlington County (Burlington) terminated Batie on November 13, 2017, by two Final Notices of Disciplinary Action (FNDA). On August 4, 2017, Burlington had issued two Preliminary Notices of Disciplinary Action (PNDA) against Batie charging him with N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violations of Policies and Procedures Manual sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, 1192, and 1250, for failure to conduct required security checks and making false entries regarding those security checks. The first PNDA cited events occurring on June 27 and 28, 2017, while the second cited the same conduct occurring on June 30 and July 1, 2017. Batie had waived a departmental hearing, and Burlington then issued two Final Notices of Disciplinary Action, each terminating appellant effective November 13, 2017. His appeal was received at the Office of Administrative Law on December 4, 2017 (N.J.S.A. 40A:14-202(d)), and scheduled for hearing on January 3, 2018. However, when he filed his appeal form, the FNDA for the June 30 and July 1, 2017, charges was attached, but only the PNDA for the June 27 and 28, 2017, charges, not the FNDA, was attached.

During a telephone status conference held on January 2, 2018, the parties requested an adjournment of the January 3, 2018, hearing date, and the matter was rescheduled for February 8, 9, and 13, 2018, and a letter was received from appellant's counsel regarding the excludable time under N.J.A.C. 4A:2-2.13(h)(8). The hearing date of February 8, 2018, was adjourned at the parties' request, and the matter was heard on February 9, 2018. At the hearing on February 9, 2018, respondent for the first time raised the issue of whether the matter was moot due to Batie's failure to attach the second FNDA to his appeal. Burlington contended that since only the second PNDA was attached to the appeal, Batie's termination on the charges regarding incidents on June 27 and June 28, 2017, was uncontested and therefore final. As such, it asserted that his appeal on the other FNDA was moot. The appellant disagreed, and the hearing proceeded on both FNDAs, with a decision on Burlington's argument reserved.

Testimony concluded on February 9, 2018, and the record remained open for post-hearing submissions. The record closed on March 6, 2018, after the receipt of the submissions and the appellant's disciplinary history.

FACTUAL DISCUSSION

The material facts in this matter are not in dispute. Batie was employed as a correction officer by Burlington County. On two shifts in 2017, June 27–28, and June 30–July 1, he did not perform required periodic tours of I Wing, the section of the Burlington County Detention Center ("the facility") to which he was assigned. Despite not having performed the inspections, he documented that he had performed the inspections in the facility's log. Batie's failure to perform the inspections came to light following an examination of video recordings of I Wing that had resulted from a request made by the attorney for another officer facing disciplinary action in an unrelated matter. Batie was charged in two separate Preliminary Notices of Disciplinary Action (PNDA), one for each shift, with violations of the New Jersey Administrative Code, as well as violation of various internal policies. Batie does not deny that he did not perform the inspections set forth in the specifications.

At the hearing, Burlington presented the testimony of Captain Matthew Leith (Leith), the current administrative captain of the facility. He testified as to the investigation conducted by Captain McDonnell, who reviewed video recordings on the unit for the shifts in question. That review showed that Batie failed to conduct security tours on the 1800–0600 (6-p.m.-to-6-a.m.) shift on June 27–28, 2017, at 2130, 2202, 2225, 2301, 2331, 0001, 0028, 0128, 0201, 0206, 0224, 0303, 0324, 0401, 0429, and 0501. He then entered false entries into the official logbook for these security checks, when in fact he had not performed them. Additionally, on the 1800–0600 shift on June 30–July 1, 2017, Batie failed to perform security tours at 1800, 1925, 2131, 2158, 2201, 2227, 2301, 0058, 0130, 0150, and 0328. In each instance he again entered false entries into the logbook showing that he had conducted the inspections.

Leith also testified as to the importance of the periodic tours that officers are required to conduct during their time assigned to a wing. I Wing is a small wing which

houses new admissions to the facility. He described it as a dormitory-like area with bunks. As there is no desk for an officer directly on the wing, officers must be buzzed in and out of the control room to make their rounds. On cross-examination, Leith admitted that two superior officers assigned to I Wing during this period were not disciplined when a review of the videos showed that they had not conducted their required tours as set forth in P-3 and P-4, duties for sergeant and lieutenant, respectively. He was also questioned about discipline imposed in 2014 by Burlington on an officer for infractions similar to those of Batie. Those charges only resulted in a suspension (P-1; P-2). Leith stated that the new administration of the facility has chosen to impose a harsher penalty for such infractions.

Leith identified several policies and procedures of the facility that are applicable and that spell out the responsibilities of correction officers—policies and procedures that the County charges Batie violated. Policies and Procedures Manual section 1007 provides that officers are to listen for unusual sounds in cell blocks, changes in noise levels, and calls for help; detect unusual odors; prevent escapes and suicides; and patrol cell-block areas to check for safety-and-security hazards such as fires, smoke, broken pipes or windows, etc. This is all done in order to "protect the security and safety of the inmates and the institution." (J-7.)

Burlington's Policies and Procedures Manual sections 1012–1074 provide that officers are subject to discipline, including dismissal, for any violation of the policies and procedures. Policy 1023 specifically requires such compliance with the policies. Policy 1030 holds officers responsible for "the efficient performance of duties assigned and for the proper supervision of any inmate in his/her custody." Policy 1031 requires that officers "promptly obey any lawful order." Policy 1038 prohibits officers from acting in any manner that is to the officer's, or the department's, discredit. Policy 1065 prohibits any officer from making "any false or misleading statements or written reports by intentional omission or misrepresentation of facts or information known to the officer." And Policy 1066 provides that "[n]o officer shall . . . enter, in any official book or record, any false or misleading statements." (J-8.)

Policy 1172 specifically provides for the maintenance of logbooks, in which are to be recorded any events, inmate movements, incidents, and situations of special circumstance. Officers are trained in the use and maintenance of these logs. Section C.15 of this Policy provides that the logbook contains "Officer security/touring wing (30 min general security check)." Section A.4 of this Policy provides that "falsification of these documents will not be tolerated; offender(s) are subject to disciplinary action and/or criminal charges (Official Misconduct)." (J-9.) Leith noted that the jail's logbooks are legal documents used for official purposes, even becoming evidence in legal proceedings.

Policy 1190, section C, provides that "Security tours will be made approximately every thirty (30) minutes at irregular intervals. An accounting of inmates is also done during security tours, which enables the shift to accomplish the dual requirements of security and count procedures." (J-10.) Policy 1250, section A.15, requires "routine tours of the entire tier or post" to be made "approximately every thirty (30) minutes. This duty requires the officer to physically walk around to make an inspection. The officer will document in the post logbook when such duty was performed and note findings of each tour." (J-11.)

Burlington also entered into evidence a 2012 receipt signed by Batie confirming that the Policies and Procedures Manual had been received and was in effect. (J-12.)

Based on the record in this matter, I **FIND** that Officer Batie did not perform the required walking inspections of I Wing on June 27–28, 2017. He made false entries in the logbook to indicate that he had performed these inspections. Further, I **FIND** that on June 30–July 1, 2017, he failed to perform the required walking inspections and, again, he made false entries in the logbook to show that he had performed the tours.

LEGAL DISCUSSION

In a civil-service disciplinary action, the appointing authority bears the burden of establishing alleged violations of Administrative Code provisions that subject the employee to disciplinary sanction. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). The

proof must be by a preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982).

Burlington asserts that Batie violated N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. This latter charge alleges violations of Policies and Procedures Manual sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, 1192, and 1250. During the hearing, Burlington withdrew the charge of violation of Policy 1192.

The first issue that must be addressed is the procedural motion made by Burlington that the matter is moot, as Batie did not include the FNDA for the June 27–28, 2017, charges with his appeal form. Rather, he admittedly only included the PNDA for those charges. Burlington contends that since that FNDA for the June 27–28, 2017, charges—which was issued on the same day as the FNDA for the June 30–July 1, 2017, charges—was not included in the appeal transmittal, that termination was effective, and any appeal of the other FNDA is moot. Appellant disagrees, disputing whether he was even served with the second FNDA, pointing out that Burlington has not presented a certified mail receipt for the June 27–28, 2017, FNDA.

It should be noted that in determining whether appellant perfected the appeal for the FNDA relating to the events of July 27–28, 2017, both parties admitted on the first day of hearing that they had just noticed the discrepancy in the appeal documents. No motion regarding the mootness of the appeal had been made prior to that time and respondent had filed no objection to the appeal going forward. Additionally, the matter had been transmitted to the OAL for hearing without the discrepancy being noted. Further, both FNDAs were issued on the same day and, other than the date of the incident, mirror each other in specifications and charges.

Appellant's inclusion of the PNDA for the July 27–28, 2017, charges, rather than the FNDA, shows an intent to appeal both sets of charges. While his inclusion of the wrong form was in error, there was no prejudice to either side, and the error was likely

the result of confusion engendered by Burlington's choice to file two sets of identical charges for the same conduct that took place over two shifts. As such, Burlington's request to dismiss the appeal as moot is **DENIED**.

Appellant has readily acknowledged that on June 27, 28, and 30, and July 1, 2017, he did not conduct required walking-tour inspections of his assigned post on I Wing. Further, he admitted that his entries in the logbook make it appear that he had in fact performed the required tours. He therefore does not contest that he violated the several policies and procedures discussed above.

I **CONCLUDE** that Batie violated N.J.A.C. 4A:2-2.3(a)(1), failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, in that he entered false information and neglected his vital duties in a correctional setting, acts that have the ability to undermine the public's trust in government and its employees and bring discredit to the institution, Karins v. Atlantic City, 152 N.J. 532, 557 (1998); N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, in that he violated Policies and Procedures Manual sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, and 1250.

DISCIPLINARY HISTORY

Appellant's disciplinary history is contained in R-1. It shows three suspensions, consisting of one, three, and five days, respectively, as well as several reprimands and warnings.

SANCTION

While Batie does not deny that he is guilty of failing to perform his duties on the two days in question, he argues that removal is too harsh a penalty. He claims that he is the subject of disparate treatment as to the penalty imposed, and in even being charged with these violations. He cites two bases for his assertion. The first is that Burlington's review of video recordings of the facility's wings first focused upon I Wing, his assigned post. As a result, other officers assigned to other wings of the jail, who

may have similarly failed to perform the required tours, were not identified, as the video recordings of the other wings of the institution were not reviewed.

Additionally, the recordings showed that a Sergeant Hernandez, also assigned to I Wing, and a lieutenant, also assigned to that wing, failed to perform their required inspection tours, and yet they were not disciplined. Further, Batie cites In re Cox, Mercer County Department of Public Safety, No. A-02471-14 (App. Div. December 7, 2016), https://njlaw.rutgers.edu/collections/courts/, a matter involving a Mercer County correction officer found guilty of the same offenses as Batie who was only given a forty-five-day suspension by the appointing authority, which was upheld by the Civil Service Commission and then affirmed by the Appellate Division.

The appellate courts of New Jersey have analyzed the factors to be considered in determining the proper penalty when a correction officer fails to perform required security checks, thereby neglecting his/her duty, including the additional complication of the officer falsifying records. In Henry v. Rahway State Prison, 81 N.J. 571 (1980), the Civil Service Commission reduced a penalty imposed from removal to a ninety-day suspension where a correction officer had falsified a report. On appeal, the Supreme Court held that the Civil Service Commission had acted arbitrarily when it failed to consider a relevant factor, namely, the seriousness of a single instance of a State correction officer's falsification of a report, particularly in the context of a prison setting, where order and discipline are necessary for safety and security. As the Court said, "The falsification of a report can disrupt and destroy order and discipline in a prison." Henry, 81 N.J. at 580.

In In re Warren, 117 N.J. 295 (1989), the Court considered an appeal of Warren's thirty-day suspension. The appointing authority had removed him, but the administrative law judge (ALJ) imposed only a thirty-day suspension. On appeal, the Appellate Division split over whether the Merit System Board (then the name of the current Civil Service Commission) had properly chosen to suspend, and not remove, Warren from his position as a correction officer. As that court explained, there was some uncertainty as to the exact charges against Warren, for the Board had expressed concern as to whether the case was limited to neglect of duty or also involved

falsification. In upholding the Appellate Division's majority opinion affirming the suspension, as opposed to the dissent, which argued that removal should have been imposed, the Supreme Court stated that in the context of the case, the penalty imposed by the Board was not arbitrary, capricious, or unreasonable. However,

> [i]n the clearer context of a corrections officer's trial for intentional falsification of a report, there can be no doubt that the Board must consider this as an offense striking at the heart of discipline within the corrections system. Failure to accord due consideration to that factor in the prison setting would violate implied legislative policies regarding prison security.
>
> [Warren, 117 N.J. at 299.]

The Merit System Board had an opportunity to apply those rulings when it ruled in In re Castillo, CSV 4472-05, Initial Decision (October 11, 2007), modified, MSB (January 18, 2008), http://njlaw.rutgers.edu/collections/oal/. Castillo had been charged with neglect of duty and falsification, resulting in his termination. On de novo review, the ALJ determined that he had performed the required security tours, although not at the times that he had entered in the logbook. While the ALJ dismissed the neglect charge, the Board concluded that Castillo had neglected his duty when he failed to perform these tours at the required times, and concurred that he had falsified the records. The ALJ had reduced the removal to a thirty-day suspension. However, the Board imposed a six-month suspension, the maximum suspension allowable. As the Board noted,

> [i]n determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. George v. North Princeton Developmental Center, 96 N.J.A.R. 2d 463, 465 (CSV) 1996. Although the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. Henry v. Rahway, 81 N.J. 571, 580 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that

> some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. In this regard, the Board emphasizes that a law enforcement officer is held to a higher standard than a civilian public employee. See Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). See also In re Phillips, 117 N.J. 567 (1990). In the instant matter, the Board emphasizes that the appellant is employed in a paramilitary setting and is charged with maintaining security, discipline and order in a correctional facility. The precise requirements of such a position are not mere technicalities but are established and must be adhered to in order to ensure the utmost security of the facility. The appellant's admitted failure to perform his duties in a timely manner and his falsification of official records are, indeed, egregious infractions, whether or not it has been established that grave consequences resulted.

In determining the appropriate penalty for an offense, each case must be assessed on its own facts. As the cited cases show, there is no fixed, immutable penalty for the offenses charged here. Unlike Mercer County in Cox, here Burlington imposed the maximum penalty of removal on Batie. Unlike in Castillo, where the officer performed at least some of his mandated tours but did not do so at required times, and then falsified the record, here Batie did not even conduct the tours. Further, the falsification of records is especially "egregious," Castillo, CSV 4472-05, Initial Decision (October 11, 2007), modified, MSB (January 18, 2008), http://njlaw.rutgers.edu/collections/oal/, and "strik[es] at the heart of discipline within the corrections system." Warren, 117 N.J. at 299. While Cox may suggest some doubt as to how the Commission may view the seriousness of these charges, that decision provides no reliable guide for the current case. In Cox, the appointing authority chose, for reasons that the record does not reveal, to suspend a neglectful and untruthful correction officer for forty-five days. While acknowledging the seriousness of Cox's violations, the Board chose to not upgrade the penalty. Given that the original penalty was a suspension, the Board could not have removed Cox on the de novo appeal. Had

Mercer County removed Cox, or imposed a stiffer suspension, it seems clear enough that the Commission would have affirmed that sanction.

In his request for a sanction lesser than termination, Batie contends that he has been the victim of disparate treatment. He makes no allegation that he was charged as a result of some invidious discrimination due to race, sex, age, or other such classification. "Disparate treatment," which involves enforcement of the law "applied and administered by public authority with an evil eye and an unequal hand," State of N.J., Twp. of Pennsauken v. Schad, 160 N.J. 156, 183 (1999) (quoting Cox v. Louisiana, 379 U.S. 536, 538–41 (1965)), raises concerns of a "constitutional" nature. However, both the United States Supreme Court and the New Jersey Supreme Court have limited claims of "disparate treatment" to situations involving differing treatment arising due to such distinctions. Oyler v. Boles, 368 U.S. 448 (1962); Schad, 160 N.J. at 183 ("The conscious exercise of some selectivity in enforcement is not a constitutional violation unless the decision to prosecute is based upon an unjustifiable standard such as race, religion, or other arbitrary classification.").

Batie does raise other facts, however, as a basis for his claim of disparate treatment. They include the fact that other officers stationed on other wings may have escaped detection for their infractions, as Burlington chose not to review their conduct on videos of their wings. While it might be argued that a more complete review of other officers' conduct may have been appropriate in the management of the facility, that does not justify ignoring the inappropriate conduct of appellant.

More germane to the determination of the appropriate penalty, however, is the conduct by Burlington not to impose discipline on higher ranking officers for conduct similar to that of Batie. As noted earlier, Burlington chose not to impose discipline on a sergeant and a lieutenant identified through the videos as not performing their security checks. The issue is not so much a disparate-treatment argument as an issue of a fair and proportionate penalty for the offense charged. While it is concerning that officers of a higher rank were not disciplined for similar conduct, there is not enough in the record to determine the reasoning used by Burlington in its decisions to forgo discipline in their cases. The record does not show whether the two superior officers also falsified their

records, nor does it show that they were aware of the failure of those they supervised to conduct their security checks. Without more, it is not possible to determine if the penalty imposed on Batie was so disproportionate as to call for a lesser penalty than termination.

While differing penalties have been meted out for offenses similar to those of Batie, his offenses were serious. They involved a failure to perform his required duties necessary for the safety of the inmates and the facility. He compounded that failure by his falsification of records. As such, the penalty of termination was warranted.

It is hereby **ORDERED** that the appeal filed by Officer Karshawn J. Batie is **DENIED**, and that Batie be **REMOVED** from his position as a correction officer. Officer Batie's removal is effective as of November 13, 2017.

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

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

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

April 16, 2018
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: April 16, 2018 (emailed)

Date Mailed to Parties: April 16, 2018 (emailed)

/mel

WITNESSES

For Appellant:

None

For Respondent:

Matthew Leith

EXHIBITS

Joint:

J-1 Preliminary Notice of Disciplinary Action (Incident Dates: June 30 and July 1) (31-A) to Karshawn Batie

J-1a Preliminary Notice of Disciplinary Action (Incident Dates: June 27 and June 28) (31-A) to Karshawn Batie

J-2 Final Notice of Disciplinary Action (Incident Dates: June 30 and July 1) (31-C) to Karshawn Batie

J-2a Final Notice of Disciplinary Action (Incident Dates: June 27 and June 28) (31-C) to Karshawn Batie

J-3 July 6, 2017, Memo/Incident Report by Cpt. McDonnell to Warden M. Scholtz

J-3a July 21, 2017, Memo/Incident Report by Cpt. McDonnell to Warden M. Scholtz

J-4 Burlington County Jail I-Wing Post Log Book (Incident Dates: June 30 and July 1)

J-4a Burlington County Jail I-Wing Post Log Book (Incident Dates: June 27 and June 28)

J-5 June 30, 2017, Burlington County Officer Assignment List

J-5a June 27, 2017, Burlington County Officer Assignment List

J-6 Incident Report

J-7 Burlington County Detention Center Policies and Procedures Section 1007

J-8 BCDC Policies and Procedures Sections 1012–1074

J-9 BCDC Policies and Procedures Section 1172

J-10 BCDC Policies and Procedures Section 1190

J-11 BCDC Policies and Procedures Section 1250

J-12 BCDC Standard Operating Policies and Procedures Acknowledgement by Karshawn Batie dated September 27, 2012

J-13 Certified Mail Receipts

For Appellant:

A-1 Redacted Preliminary Notice of Disciplinary Action to Officer "A.C."

A-2 Redacted Final Notice of Disciplinary Action to Officer "A.C."

A-3 BCDC Policies and Procedures Section 1005

A-4 BCDC Policies and Procedures Section 1006

For Respondent:

R-1 Disciplinary History of Appellant

5-23-18

B-031

STATE OF NEW JERSEY

In the Matter of Tia Bragg
Vineland Developmental Center,
Department of Human Services

CSC Docket No. 2018-2103

DECISION OF THE
CIVIL SERVICE COMMISSION

Reconsideration

ISSUED: May 25, 2018 (BW)

Tia Bragg, a former Human Services Assistant with Vineland Developmental Center, Department of Human Services, petitions the Civil Service Commission (Commission) for reconsideration of the attached administrative decision, rendered on January 11, 2018, in which the Director of the Division of Appeals and Regulatory Affairs denied her request for a hearing with respect to her removal.

By way of background, in an November 28, 2017 Final Notice of Disciplinary Action (FNDA), the petitioner was removed, effective September 11, 2017, on charges of violation of a rule, regulation, policy, procedure, order or administrative decision, insubordination, intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority, and disrespect or use of insulting or abusive language. Specifically, the appointing authority asserted that the petitioner conducted herself in an insubordinate and unprofessional manner towards her supervisors and neglected to provide appropriate care to clients under her care. In this regard, the petitioner was seen by the Head Cottage Training Supervisor talking loudly on her cell phone while having consumers in her care, and not performing her assigned tasks of monitoring and interacting with the consumers.

The record indicates that the petitioner's FNDA was sent by certified mail on November 29, 2017 to her address on file. Ultimately, the mail was returned to the appointing authority on December 4, 2017 as the forwarding time for her mail had expired. This notice returning that mailing indicated the petitioner's correct address on the label. No attempt was made by the appointing authority to resend the FNDA to the correct address or to contact the petitioner by phone. The appointing authority has

provided proof that both the certified and regular mail was returned to it. As the certified mail was returned on December 4, 2017, and the petitioner's appeal was postmarked January 3, 2018, her request for a hearing was denied.

In her request for reconsideration, the petitioner claims she only became aware of her termination on January 3, 2018, when she saw on the State of New Jersey's website a message stating she was no longer employed as of December 8, 2017. The petitioner then went to Vineland Developmental Center on January 3, 2018 and spoke to the Employee Relations Coordinator. It is unclear by the record if petitioner was given her FNDA on this date, but she was advised of the termination. By letter postmarked January 3, 2018, the same day she was advised of the termination, the petitioner submitted an appeal to the Commission. She argues that she should be given a new hearing and be reinstated.

Further, the petitioner states that in October 2016 she gave her change of address form to Ms. Marylnn Colon-Zamot in Human Resources who also signed the book. She has provided documents sent to her with her correct address from Vineland Developmental Center dating back to as far as March 1, 2017.

In response, the appointing authority states that appellant did not change her address. It references that on October 17, 2017, a letter was sent to the address on file regarding her departmental hearing and petitioner signed for the letter and appeared for the hearing making no mention of the change of address. It also indicates that petitioner went to Human Resources on January 3, 2018 to confirm her address which was listed as her old address. Petitioner requested another change of address.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding, which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. A review of the record in the instant matter reveals that reconsideration is justified.

N.J.S.A. 11A:2-15 provides that appeals from major disciplinary matters shall be made in writing to the Commission no later than 20 days from receipt of the final written determination of the appointing authority. This 20-day time limitation is jurisdictional and cannot be relaxed or waived. *See Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 46 (1956); *See also, Mesghali v. Bayside State Prison*, 334 *N.J. Super.* 617 (App. Div. 2000), *cert. denied*, 167 *N.J.* 630 (2001); *Murphy v. Department of Civil Service*, 155 *N.J. Super.* 491, 493 (App. Div. 1978).

N.J.A.C. 4A:2-2.8(b) states that "If the appointing authority fails to provide the employee with a Final Notice of Disciplinary Action, an appeal may be made directly to the Commission within a reasonable time".

In the matter at hand, the appellant claims that she did not receive the FNDA. The appointing authority confirms that both the certified and regular mail was returned unable to forward. While it is an employee's responsibility to maintain a current address with his or her employer, in this case, it is clear that the appointing authority had the petitioner's current address. In this regard, the petitioner has provided documents with her proper current address from the appointing authority dated months before the issuance of the FNDA. Further, while the Commission usually will deny a hearing where it is shown that an employee has not appealed within 20 days of certified mail being returned, to do so in this case, under the circumstances outlined above, would be unjust. Further, the petitioner promptly appealed after she received the actual notice of her removal. Accordingly, her petition is granted.

ORDER

Therefore, it is ordered that this petition for reconsideration be granted and the matter be referred to the Office of Administrative Law for a hearing.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Tia Bragg
Bernadette Musiwa
Kelly Glenn
Records Center
Beth Wood w/file

5-22-18

A-1

STATE OF NEW JERSEY

In the Matter of Miguel Cintron
Woodbine Developmental Center,
Department of Health

CSC DKT. NO. 2017-3814
OAL DKT. NO. CSV 08220-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08220-17
AGENCY DKT. NO. 2017-3814

IN THE MATTER OF MIGUEL CITRON,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVEMENTAL CENTER.

William Nash,Esq., for appellant Micguel Citron (Nash Law Firm, attorneys)

Jessica Saxon, Deputy Attorney General, for respondent (Gurbir Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 25, 2018 Decided: April 26, 2018

BEFORE **CATHERINE A. TUOHY,** ALJ:

This matter concerns the appeal of Miguel Citron from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on June 12, 2017 pursuant to N.J.S.A. 40A:14-202(d).

The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 26, 2018
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 4/27/18

Date Mailed to Parties: 4/27/18

NASH
LAW FIRM LLC
ATTORNEYS AT LAW

1001 MELROSE AVENUE, SUITE A
BLACKWOOD, NJ 08012

TEL: (856) 228-2206
FAX: (856) 228-1885
Email: wnash@thenashlawfirm.com

March 20, 2018

Deputy Attorney General Jessica Saxon
Department of Law
P.O. Box 112
Trenton NJ 08625

Re: MIGUEL CINTRON V. DHS, WOODBINE DEVELOPMENTAL CENTER
OAL Docket Number: CSVET 08220-2017S

Dear Ms. Saxon:

This firm is counsel to Miguel R. Cintron in connection with the above referenced matter.

Please find enclosed the Settlement agreement in this matter which contains the original signatures of the Appellant and the undersigned. Kindly execute the same and forward to the chambers of The Honorable Catherine A. Tuohy, ALJ, for filling.

Please do not hesitate to contact me if I can be of any assistance.

Very truly yours
Nash Law Firm LLC
William A. Nash
By: William A. Nash, Esquire

Enc.

cc: Mr. Miguel R. Cintron (w/o Enc.)

OAL DKT. NO. CSV 08220-2017 S
AGENCY DKT. NO. CSC 2017-3814
SETTLEMENT AGREEMENT

IN THE MATTER OF
MIGUEL CINTRON
AND
WOODBINE DEVELOPMENTAL CENTER,
DEPARTMENT OF HEALTH

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated May 1, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)2 Insubordination	Removal (for all charges)	5/1/2017
2. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee		
3. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		
4. Admin. Order 4:08, A-12.1 Leaving assigned work area without permission creating a danger to		

persons or property

5. Admin Order 4:08, C-9.2
   Insubordination; intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor

B. The parties have agreed to the following:

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.
4. Respondent, Department of Health, will accept a General Resignation from Appellant, Miguel Cintron, pursuant to N.J.A.C. 4A:2-6.3(b), effective May 1, 2017. Appellant, Miguel Cintron, agrees not to seek or accept employment with the Department of Health, or any of its subsidiaries, at any time in the future.

C. The Appellant, Miguel Cintron, withdraws his appeal and request for a hearing, and the Respondent, Appointing Authority, Department of Health agrees that the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).

The parties acknowledge that under N.J.A.C. 17:2-4.5 (b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Health shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent, Department of Health, with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied.

This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

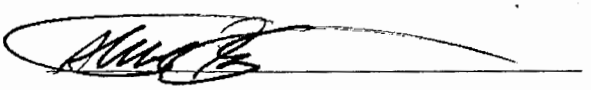
3.20.18 DATE	Miguel Cintron, Appellant
3-20-18 DATE	William Nash, ON BEHALF OF Appellant
4/25/18 DATE	Jessica Saxon, ON BEHALF OF Respondent, NJ Department of Health
DATE	Stephen Katz, On BEHALF OF Respondent, NJ Department of Health

Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE	Miguel Cintron, Appellant
DATE	William Nash, ON BEHALF OF Appellant
DATE	Jessica Saxon, ON BEHALF OF Respondent, NJ Department of Human Services/Health
2/28/18 DATE	 Steven Katz, On BEHALF OF Respondent, NJ Department of Human Services/Health

CERTIFICATION

I, Miguel Cintron, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3.20.18

DATE

Miguel Cintron

Angiulo, Nicholas

From: Jessica Saxon <Jessica.Saxon@law.njoag.gov>
Sent: Wednesday, May 9, 2018 11:56 AM
To: Angiulo, Nicholas; wnash@thenashlawfirm.com
Cc: Messina, JoAnn
Subject: RE: In the Matter of Miguel Citron, Department of Human Services, Woodbine Developmental Center - OAL Docket No. CSV 8220-17 and CSC Docket No. 2017-3814 - SETTLEMENT

Good afternoon, Mr. Angiulo,

Mr. Nash and I spoke and we are in agreement that the removal should be effective September 13, 2016 as reflected on the FNDA. I apologize for that mistake. If you need anything else on our end, please let me know!

Thank you,

Jessica M. Saxon, Deputy Attorney General
Employment Counseling & Labor Section
Department of Law and Public Safety, Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625
T: 609.633.0487 F: 609.292.6239
E: jessica.saxon@law.njoag.gov

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Wednesday, May 09, 2018 11:35 AM
To: wnash@thenashlawfirm.com; Jessica Saxon
Cc: Messina, JoAnn
Subject: In the Matter of Miguel Citron, Department of Human Services, Woodbine Developmental Center - OAL Docket No. CSV 8220-17 and CSC Docket No. 2017-3814 - SETTLEMENT
Importance: High

Mr. Nash and DAG Saxon:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Miguel Citron from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Mr. Citron's removal was effective May 1, 2017 and he is settling to a general resignation effective May 1, 2017, the Final Notice of Disciplinary Action in this matter indicates that his removal was effective September 13, 2016. In this regard, while it is perfectly acceptable for the parties to agree to the general resignation effective date of May 1, 2017, the time period from September 13, 2016 to May 1, 2017 must be accounted for. Before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be specifically accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

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PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

June 25, 2018

Lynsey Stehling, Esq.
Law Offices of Daniel Zirrith
241 Forsgate Drive – Suite 109
Monroe Township, New Jersey 08831

Joyce Clayborne, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Latoya Daniels v. City of Newark, Department of Public Safety* (CSC Docket No. 2018-1212; OAL Docket No. CSV 16599-17) – **SETTLEMENT**

Dear Ms. Stehling and Ms. Clayborne:

The appeal of Latoya Daniels, a Public Safety Telecommunicator, City of Newark, Department of Public Safety, of her six-month suspension on charges, was before Administrative Law Judge Jude Anthony Tiscornia (ALJ), who issued his initial decision on May 23, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on May 25, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on July 9, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective July 10, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Jude Anthony Tiscornia, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16599-17

AGENCY REF. NO. 2018-1212

IN THE MATTER OF LATOYA DANIELS, CITY OF NEWARK, DEPARTMENT OF PUBLIC SAFETY.

Lynsey Stehling Esq., for appellant Latoya Daniels (Law Offices of Daniel J. Zirrith, attorneys)

Joyce Clayborne, Esq., Assistant Corporation Counsel for respondent City of Newark, Department of Public Safety

Record Closed: May 18, 2018 Decided: May 23, 2018

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Civil Service Commission on November 8, 2017, for hearing as a contested case, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties reached an amicable resolution of the matter, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

May 23, 2018
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

MAY 29 2018
Date Mailed to Parties:

id

OAL DOCKET NO. CSV 16599-2017N

LATOYA DANIELS,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
v.	:	**OAL DOCKET NO. CSV 16599-2017N**
CITY OF NEWARK,	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Public Safety Tele-Communicator, Latoya Daniels ("Daniels" or "Appellant"), Newark Council 21 ("Union") and the City of Newark ("City "or "Respondent") (collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Daniels by the City. This Agreement is made and entered into by the Parties in full settlement of Daniels' appeal regarding the above matter.

On December 9, 2016, the Newark Department of Public Safety, Police Division ("Department of Public Safety") brought departmental disciplinary charges against Daniels in the form of a Preliminary Notice of Disciplinary Action ("PNDA") stemming from her abuse of sick leave. Daniels plead not guilty, waiving her opportunity for Hearing before the Trial Board. On September 26, 2017, Final Notice of Disciplinary Action and Specifications (hereinafter referred to as "FNDA") were issued with the following charges: in violation of Newark Police Department Rules and Regulations Chapter 18:29.1; Official Inefficiency or Incompetency and New Jersey Civil Service Rule N.J.A.C. 4A:2-2.3(a)1, Incompetency or Inefficiency. A copy of the September 26, 2017 FNDA is attached herein as Exhibit A. Based on these charges, the Department of Public Safety suspended Daniels for six months (6), a period of (180) days beginning January 1, 2018 to June 29, 2018 pursuant N.J.A.C. 4A:2-2.4 (e).

After further negotiations, the Parties have agreed to resolve this matter as follows:

1. The charges listed in the FNDA are upheld.
2. Daniels' suspension is reduced from one hundred and eighty (180) days to fifteen (15) days. The City will amend her FNDA to reflect fifteen (15) days suspension.
3. The City's Public Safety Director will provide a return date back to work for Daniels.
4. The City will calculate back pay based upon the date of return, anticipated no later than June 29, 2018 as per the FNDA.
5. The City will make the appropriate adjustments to her pension and seniority based upon the return date.
6. Daniels waives any and all right or claim which she has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/ or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA, except to the extent necessary to enforce terms of this agreement, or as required by law.
7. Daniels and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
8. Daniels and the Union each further agree that there is no consideration due Daniels, her counsel and/or Union, including, but not limited to, any claim for additional back pay and/or counsel fees, arising from her employment and/or the execution of this Agreement, except as otherwise provided herein.
9. Except for the assessment of Daniels's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either Party.
10. Daniels and the Union acknowledge that this Agreement precludes them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or the United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any

manner grounded, based upon, or related to the FNDA, except to the extent necessary to enforce terms of this agreement, or as required by law.

11. Daniels is bound by this Agreement. Anyone who succeeds to Daniels's rights and responsibilities, such as heirs or the executor of her estate, shall also be bound.
12. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees or the Union.
13. Daniels and the Union each agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
14. This Agreement contains the sole and entire agreement between Daniels, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Daniels specifically represents and acknowledges that in executing this Agreement, she has not relied upon any representations, with regard to the subject matter in this Agreement, which are not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
15. Daniels agrees and acknowledges that she has been fully and fairly represented by her Union and counsel in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.
16. Daniels agrees and acknowledges that she has had a full opportunity to review this Agreement with her counsel and/or union representative and she enters into this Agreement knowingly and voluntarily.
17. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
18. This Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the Civil Service Commission shall not interfere with the rights of either Party to pursue the matter further.
19. By signing this Settlement Agreement, Daniels states that:

a) She has read it;

b) She understands it and knows that she is giving up important rights, and any and all other federal and state employment causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or other State;

c) She accepts everything in it;

d) Her representative negotiated this Agreement with her knowledge and consent;

e) She has been advised to consult with her attorney prior to executing this Agreement, and has in fact done so;

f) She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

5-14-2018
Date

BY: _____
City of Newark
Department of Public Safety, Police Division

May 7, 2018
Date

BY: _____
Union Representative/Attorney Lynsey Sechling

5/7/18
Date

_____
Latoya Daniels

Approved as to Form and Legality:

May 7, 2018
Date

_____
City of Newark Law Department
Asst. Corp. Counsel

CERTIFICATION

I, Latoya Daniels, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement and General Release by signing below. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement and General Release voluntarily.

I also understand that if this Settlement Agreement and General Release are approved by the **CIVIL SERVICE COMMISSION**, then my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/7/18
DATE

Latoya Daniels

A-1

STATE OF NEW JERSEY

In the Matter of Paulo DeCaldas
Township of Kearny Fire Department

CSC DKT. NO. 2017-2674
OAL DKT. NO. CSV 05254-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 05254-17
AGENCY DKT. NO. 2017-2674

IN THE MATTER OF PAULO DECALDAS, TOWNSHIP OF KEARNY, FIRE DEPARTMENT.

Patrick M. Metz, Esq., for appellant Paulo DeCaldas (Dario, Albert, Metz & Eyerman, attorneys)

Arthur R. Thibault, Esq., for Township of Kearny (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: April 12, 2018 Decided: April 19, 2018

BEFORE **MARGARET M. MONACO**, ALJ:

Appellant Paulo DeCaldas filed an appeal contesting his release at the end of his working test period by respondent Township of Kearny Fire Department. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case. Following prior adjournments of the hearing at the parties' request, the hearing was scheduled for April 12, 2018 and June 12, 2018. The parties appeared at the OAL on April 12, 2018 and engaged in discussions toward an amicable resolution. Prior to the commencement of the hearing, the parties reached

an amicable resolution and submitted the attached Settlement Agreement and Release, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Apr. 19, 2018
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency:

Date Mailed to Parties: APR

jb

Ann James Bezanson
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE

PAULO DECALDAS, on his own behalf and on behalf of his heirs, executors, administrators, and assigns (hereinafter collectively referred to as "Paulo DeCaldas" or "DeCaldas"), and the **TOWN OF KEARNY,** on its own behalf and on behalf of its successors, assigns, departments, elected and appointed officials, employees, agents, representatives, attorneys, and insurance carriers (hereinafter collectively referred to as "Town"), have reached the within Settlement Agreement and Release (hereinafter "Agreement") in final settlement of any and all disputes between and among them from the beginning of time until the present.

NOW THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, the parties hereby agree as follows:

1. **Paulo DeCaldas**, on his own behalf and on behalf of his heirs, executors, administrators, successors and assigns hereby releases and forever discharges the Town**,** and all related entities, its successors, assigns, departments, and its appointed officials, employees, agents, representatives, attorneys, and insurance carriers, including but not limited to their heirs, executors, administrators, successors and assigns, and the estates and/or heirs thereof from any and all claims, demands, damages, and causes of action, known and unknown, relating to or arising out of his employment or any other alleged conduct of the **Town**, and resulting from anything which has happened from the beginning of time up to the date **DeCaldas** executes this Agreement, including claims for attorneys' fees and cost of suit.

Without limiting the foregoing provision in any way, DeCaldas releases all claims, benefits, demands, damages, and causes of action relating to or arising out of his employment or

any other conduct of the Town, including, but not limited to, all claims, benefits, demands, and damages arising under Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. § 1981, et. seq.; the Civil Rights Statutes contained in 42 U.S.C. §§ 1983, 1985, and 1986 and any related laws; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq.; the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et. seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; [illegible], et seq.; the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Rehabilitation Act of 1973, the False Claims Act, 31 U.S.C. § 3729, et seq.; the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., the False Claims Act, 31 U.S.C. §3729, et seq., and any other Federal, State or local laws, regulations, collective negotiations agreement, or ordinance; or claims of quasi-contract, tort, negligence, intentional act, civil conspiracy, harassment, fraud, defamation, intentional and/or negligent infliction of emotional distress; or any common law claim; or any claim for punitive damages, and any other duty or obligation of any kind or description to the fullest extent permissible by law. This Release waives any and all claims for discovery, whether asserted or unasserted, relating to materials or events that predate the execution of this Agreement. This Release shall apply to all known, unknown, unsuspected, and unanticipated claims, liens, injuries, and any contractual benefits and wages from the beginning of time up to and including the day of the date of this Agreement.

Paulo DeCaldas represents that as of the date he executes this Agreement, he has not filed any charge, complaint, claim, or action with any court, organization, governmental entity, or administrative agency, or directed or authorized such charge, complaint, claim, or action to be filed on his behalf against the Town, except the appeal referred to in paragraphs 2 and 5 in this

Agreement and any claim, if any, for worker's compensation benefits. DeCaldas does not hereby waive (1) his right to enforce the terms of this Agreement; (2) the right to file any unwaivable charge or complaint (although DeCaldas does waive and release any right to recover damages or obtain reinstatement in connection with any such charge or complaint relating to anything which has happened up to the date he signs this Agreement); and (3) rights or claims that cannot lawfully be released.

2. In consideration of the above Release, the Town agrees to settle DeCaldas' appeal of his removal at the end of the working test period as follows:

a. DeCaldas' removal on February 2, 2017 will be converted to a resignation in good standing;

b. The final notice of disciplinary action dated February 2, 2017 and amended on January 16, 2018 will be withdrawn with prejudice, together with the preliminary notice of disciplinary action dated January 9, 2017;

c. DeCaldas waives all other claims against the Town with regard to these matters, including any award of counsel fees or other monetary relief.

d. Between January 7, 2017 and February 2, 2017 DeCaldas will be placed on a leave of absence without pay.

3. In consideration of the terms of this Agreement, DeCaldas acknowledges that he is not owed any further monies or benefits from the Town, whether by way of collective bargaining agreement, Town policy, or otherwise, and that he specifically waives any claim for further benefits or monies, and agrees that the Town is not obligated to make any further payment or provide any further benefit to DeCaldas. DeCaldas waives all the claims against the

Town with regard to this matter including any award of back pay, counsel fees, or any other monetary relief.

4. In further consideration of this Agreement, DeCaldas agrees that he will not apply for or otherwise seek employment with the Fire Department and agrees that the Fire Department has no obligation, whether arising under the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq., under contract or policy, or otherwise, to hire or employ him in the future.

5. In accepting this Settlement, DeCaldas acknowledges that he is waiving his right to proceed to a hearing on his appeal to the New Jersey Civil Service Commission pending at the Office of Administrative Law under Docket No. CSV 05254-2017N. DeCaldas understands that this Agreement is contingent upon the approval of the Civil Service Commission and further understands that, once approved by the Civil Service Commission, the aforementioned appeal will be deemed resolved and the matter closed with prejudice.

6. If contacted by a future prospective employer for a reference the Town will provide DeCaldas' dates of employment, his title, his rate of pay if asked, and that he resigned in good standing.

7. This Agreement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement.

8. If any of the provisions, terms, clauses, or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum, such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed

severable, such that all other provisions, terms, clauses, and waivers and releases of claims and rights contained in this Agreement shall remain valid and binding upon all parties.

9. This Agreement shall inure to the benefit of, and may be enforced by, the parties hereto and all of their respective heirs, legal representatives, successors and assigns.

10. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement. The parties further agree that this Agreement shall not be filed with any court except in an action to enforce or challenge its terms.

11. Paulo DeCaldas acknowledges that he has had ample time to consult with his attorney, Patrick Metz, Esq., throughout the negotiations that preceded his execution of this Agreement; that he has been represented by his attorney during the entirety of this matter; that he has carefully read and fully understands all of the provisions of this Agreement, including the Release; that he is voluntarily executing this Agreement without coercion or duress and in consultation with his attorney; that he has had adequate time to review this Agreement and the release contained in this Agreement; and that he understands and acknowledges that he is waiving any right to proceed to a hearing at the Office of Administrative Law by signing this Agreement.

12. The parties acknowledge that this Agreement is a joint product and shall not be construed for or against any party on the ground of sole authorship. This Settlement may be executed in multiple originals, each of which shall be considered an original instrument, but all

of which shall constitute one (1) agreement, and shall bind the parties hereto and their successors, heirs, assigns, and legal representatives.

13. This Agreement is confidential and shall not be disclosed by either party without authorization of the other party, unless required by law.

Date: 4/14/18

PAULO DECALDAS

ACKNOWLEDGEMENT

STATE OF NEW JERSEY :
ss.:
COUNTY OF ESSEX :

I certify that on 4/12/18, 2018, Paulo DeCaldas personally came before me and acknowledged under oath to my satisfaction, that he:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his act and deed.

Notary Public of the State of New Jersey
Patrick M. McTee
Attorney at Law
State of N.J.

TOWN OF KEARNY

By: Steven M Dyl

Print Name: STEVEN M. DYL

Title: FIRE CHIEF

Date: APRIL 12, 2018

S:\CML\Kearny\DeCaldas\SETTLEMENT AGREEMENT AND RELEASE.docx

3-23-18

A-3

STATE OF NEW JERSEY

In the Matter of Robert Figliuolo
Borough of Ringwood, Department of Public Works

CSC DKT. NO. 2017-3657
OAL DKT. NO. CSV 07672-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 25, 2018 BW

The appeal of Robert Figliuolo, Laborer 1, Borough of Ringwood, Department of Public Works, 30 working day suspension and demotion on charges, was heard by Administrative Law Judge Jude-Anthony Tiscornia, who rendered his initial decision on April 10, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 23, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07672-17
AGENCY DKT. NO. 2017-3657

IN THE MATTER OF ROBERT FIGLIUOLO, BOROUGH OF RINGWOOD, DEPARTMENT OF PUBLIC WORKS.

Matthew P. Rocco, Esq., for appellant (Rothman Rocco La Ruffa, attorneys)

Justin D. Santagata, Esq., for respondent (Kaufman Semeraro & Leibman, attorneys)

Record Closed: March 26, 2018 Decided: April 10, 2018

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Robert Figliuolo (Figliuolo/appellant) appeals demotion to step-one building maintenance worker and thirty-day suspension due to his careless operation of a municipal vehicle.

ISSUE

May the Borough of Ringwood (respondent) demote and suspend appellant based

on his careless use of municipal vehicles while at work?

PROCEDURAL HISTORY

On April 25, 2017, appellant was served with a Final Notice of Disciplinary Action (FNDA) indicating a thirty-day suspension effective March 3, 2017, and a demotion to step-one building maintenance worker effective May 1, 2017. (R-1.) Appellant was found to have violated the following New Jersey Administrative Code:

> N.J.A.C. 4A:2-2.3(a): Neglect of duty, incompetency, failure to perform duties, other sufficient cause, conduct unbecoming.

Appellant appealed and The Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the instant appeal to the Office of Administrative Law on May 31, 2017. A hearing was conducted on December 19, 2017. Final Submissions were received on March 26, 2018, at which time the record was closed.

FINDINGS OF FACT

The following facts are undisputed and I therefore **FIND** them to be the facts of the case.

Appellant has been employed with the Borough of Ringwood, Department of Public Works since February 26, 2001. Appellant was originally employed as a truck driver, which required a CDL license and daily operation of heavy trucks. Appellant was subsequently demoted to the position of laborer-1 for disciplinary reasons. Borough Director of Public Works Scott Heck testified that the specific incident that gave rise to his demotion to laborer-1 involved appellant improperly operating a heavy truck and sideswiping a building, causing the steps on the side of the truck to tear off. Mr. Heck testified that appellant had a history of improper operation of municipal vehicles. The laborer-1 position does not require a CDL license but does require appellant to routinely operate municipal vehicles that do not require the driver to hold a CDL.

On March 3, 2017, appellant was operating a municipal dump truck during the course of his normal work activity. The truck had a mechanical salt spreader attached to the bed of the truck at the time. The bed of this particular truck had a hydraulic lift which allowed for the bed of the truck to be raised. Upon returning to the municipal garage, appellant proceeded to hose out the back of the truck. To facilitate this maintenance activity, appellant raised the bed of the truck slightly so that the water could flow out.

Appellant then drove the truck from the municipal garage to a local deli, a distance of less than one mile. Appellant had inadvertently left the bed of the truck partially raised while driving, which is against protocol and potentially dangerous. Appellant's co-workers attempted to contact him over the radio to inform him of this error but could not reach him. Appellant testified that his radio was off at the time. Appellant was ultimately contacted via cellphone and instructed to lower the bed of the truck, which he did. Upon returning to the municipal garage appellant was reprimanded. No damage was caused to person or property.

Appellant was served a notice of removal (PNDA) dated March 3, 2017. A departmental hearing was conducted at the municipal level and the removal was subsequently converted to a thirty-day suspension and demotion from laborer-1 to maintenance worker, a position that does not require appellant to operate any vehicle at all.

Appellant testified that he makes less money as a maintenance worker than he did as a laborer. Mr. Heck testified that appellant complained to him regarding the reduced compensation and Heck increased appellant's hours as a courtesy. Heck also testified that the municipality considers appellant's operation of municipal vehicles to be a liability.

LEGAL ANALYSIS AND CONCLUSION

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act

related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant does not dispute that he improperly operated a municipal dump truck by driving the truck with the bed partially raised. Rather, appellant argues that this inadvertent mistake caused no harm to person or property and the penalty imposed is disproportionate to the offense and must be overturned.

1. Inadvertent mistake resulting from lapse of judgement is grounds for termination

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline). In the case at bar appellant's employment required operating a municipal vehicle on the public roadways in the normal course of his work. An integral aspect of this charge of duty is the responsibility to operate the vehicle safely at all times. The mere fact that good fortune did not allow for death, destruction, or injury to person or property to occur should not negate the inherent careless nature of the misconduct and corresponding need for discipline.

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).[1] "In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how). In the case at bar the appellant has exerted incompetent behavior on more than one occasion and the municipality contemplated terminating appellant for his misconduct but ultimately resolved to suspend and demote appellant instead. I **FIND** that there were grounds for termination under the circumstances set forth herein and I further **FIND** that the penalty sought by respondent is less severe and should therefore be upheld.

2. Appellant had been progressively disciplined

The concept of progressive discipline is often used as a guiding principle when determining the degree of severity and overall fairness of an agency's disciplinary action against its own employee. Progressive discipline allows for an employee's past disciplinary record to be used as "guidance in determining the appropriate penalty for the current specific offense. See W. New York v. Bock, 38 N.J. 500 (1962).

In the case at bar, the appellant started out at a relatively high paying "truck driver" position and was subsequently demoted to a lower paying "laborer-1" position because of disciplinary infractions, many of which stem from his improper operation of municipal vehicles. While employed in the position of laborer-1 appellant continued to operate some municipal vehicles, including the dump truck at the center of the forgoing matter. The respondent ultimately found appellant to be a liability on the road and demoted him to a position which would not involve the operation of any municipal vehicles whatsoever. Respondent could have sought to uphold a removal as indicated in the PNDA but instead chose to apply progressive discipline and move towards a less severe course of action.

[1] Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.

I **FIND** that the discipline being appealed herein is logically connected to appellant's misuse of municipal vehicles and is the result of progressive discipline and I **CONCLUDE** appellant's demotion and the corresponding suspension is warranted and is therefore upheld.

ORDER

Based upon the foregoing, it is **ORDERED** that the forgoing appeal is **DISMISSED**.

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

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

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

April 10, 2018

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 11 20

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

LIST OF WITNESSES

For Appellant:

Leroy Melmstone

Robert Figliuolo

For Respondent:

Scott Heck

Vincent Super

LIST OF EXHIBITS REFERED TO IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 Final Notice of Disciplinary Action dated April 25, 2017

5-2-18

A-4

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Anthony Herrera

CSC Docket No. 2018-1192
OAL Docket No. CSV 16600-17

ISSUED: JUNE 6, 2018 (DASV)

The appeal of Anthony Herrera, a Police Aide with the City of East Orange, of his removal, on charges, was heard by Administrative Law Judge Susana E. Guerrero (ALJ), who rendered her initial decision on April 19, 2018. No exceptions were filed by the parties.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 23, 2018, accepted and adopted the Findings of Fact as contained in the attached initial decision but did not adopt the ALJ's recommendation to modify the removal to a 90 working day suspension. Rather, the Commission modified the penalty to a 30 working day suspension.

DISCUSSION

The appellant was removed, effective October 3, 2017, on charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause. Specifically, the appointing authority asserted that the appellant violated the East Orange Police Department (EOPD) General Order Social Media Policy (Social Media Policy), which indicated in part that "Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the Chief of Police or his or her designee." It was alleged that the appellant admitted to taking unauthorized photographs of the inside of jail cells, hallways leading to the intake area and cellblocks, an EOPD "authorized document," and a van to transport

detainees while on duty and then publishing them on social media in video format. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In the initial decision, the ALJ set forth the testimony of the witnesses and found that the appellant while on break from duty took pictures on his cell phone of the EOPD's intake cells, hallways, and the sally port. He also photographed an EOPD transport vehicle. The appellant then published these pictures on social media in video format and titled the video, "East Orange Police Jail Graffiti." During an investigation of this matter, the appellant admitted in his interview that the took the photographs and placed them on YouTube. He took down the post immediately after being directed to do so on the same day of his interview. There were 12 pictures in all, with seven images of graffiti on the walls, doors, and a bench inside of the jail cells. Another photograph was taken of a sign which read: "DO NOT ENTER UNLESS YOU HAVE A PRISONER OR IT IS APPROVED BY THE DESK SERGEANT." The other pictures were of the transport van and a "dimly lit hallway outside of the jail cells leading into the intake area." There were no pictures of inmates or employees and the video did not identify where the photographs were specifically taken in the EOPD. The ALJ further found that the appellant has an interest in graffiti artwork and prison culture. There was no evidence that the photographs were intended to disclose confidential information, place the EOPD in a negative light, or jeopardize the safety of staff or inmates. Additionally, the ALJ found that, although the appellant was subject to the Social Media Policy, he was not familiar with the policy and the appointing authority had not demonstrated that the appellant received the policy or was trained on it.

Based on these findings, the ALJ determined that in taking the photographs inside the EOPD and publishing them on YouTube without authorization, the appellant had violated the Social Media Policy. Therefore, the charges against him, namely conduct unbecoming a public employee, neglect of duty, and other sufficient cause, had been sustained. Regarding the penalty, the ALJ indicated that seven photographs depicted "close-up images" of graffiti, and although the "DO NOT ENTER" sign hung in a restricted area, there was no evidence that the images of the graffiti or disclosure of the sign compromised safety or contained sensitive or confidential information. Moreover, the picture of the transport van also did not disclose confidential information. The van could be seen on the road by the public. Furthermore, the ALJ stated that while the other photographs were in a restricted area, the images were of a dimly lit hallway and the location was not identified. The ALJ was not persuaded that the publishing of these photographs presented an actual threat to the safety of the staff and inmates of the EOPD, as argued by the appointing authority. Therefore, the ALJ concluded that while the appellant "undoubtedly exhibited poor judgment," his misconduct was not so severe under the circumstances to warrant his removal. The appellant had only a minor discipline of a written reprimand in 2012 for a sick leave violation in his 11 years of

employment.[1] Nonetheless, major discipline was appropriate considering the seriousness of the appellant's actions. Therefore, the ALJ recommended that the appellant's removal be modified to a 90 working day suspension.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. The appellant's conduct, in taking unauthorized pictures and then publishing them on YouTube, which he admitted, is clearly a violation of the Social Media Policy and sustains the charges against him. However, as discussed further below, the Commission does not adopt the ALJ's recommendation to modify the appellant's removal to a 90 working day suspension. Rather, a more appropriate penalty is a 30 working day suspension.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In the instant matter, the record reveals that the appellant was a relatively long-term employee of 11 years with only one minor discipline of a written reprimand for an unrelated charge. His conduct, while serious in nature, is not sufficiently severe to disregard progressive discipline principles and remove him from employment given his employment history. The Commission is mindful of the society we now live in where so much of our lives are depicted in social media. Nonetheless, a public employee must show discretion as to what he or she posts, especially when it touches upon employment. In this case, there is no doubt that the appellant exercised poor judgment when he took pictures at his worksite. What is more troubling is he took pictures of restricted areas of a jail. However, the record does not indicate that the appellant received the Social Media Policy or was trained on it. Moreover, the evidence does not demonstrate that the photographs actually compromised safety or revealed sensitive or confidential information. Indeed, many of the pictures were close-up images of graffiti and the transport van

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[1] Agency records indicate that the appellant was provisionally appointed pending open competitive examination procedures as a Police Aide on March 13, 2006. He received a regular appointment to the title effective January 22, 2007.

was on the road, visible to the public. The Commission emphasizes that it does not condone the appellant's misconduct. However, given the totality of the circumstances, the Commission finds that neither removal nor a 90 working day suspension is proportionate to the offense. It is also noted that the appellant cooperated in the investigation and immediately took down his post as directed. The Commission is satisfied that a major discipline of a 30 working day suspension will impress upon the appellant that his conduct was improper and serve as a warning to the appellant that future offenses may result in a more serious penalty, up to and including removal. Accordingly, the foregoing circumstances provide a sufficient basis to modify the removal imposed by the appointing authority to a 30 working day suspension. *See N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d).

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority following the 30 working day suspension up to his date of reinstatement. With regard to counsel fees, the record does not indicate that the appellant is represented by an attorney. Rather, he is represented by his union. Nonetheless, it is noted that the charges against the appellant were sustained and the penalty has only been modified. In that regard, the primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert* Dean (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). As such, the appellant has not prevailed on the primary issue of his appeal. Therefore, an award of counsel fees would be improper. *See N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra,* the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the removal to a 30 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 30 working day suspension through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of

mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdrè L. Webster Cobb

Deirdrè L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries and Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16600-17
AGENCY DKT. NO. 2018-1192

IN THE MATTER OF ANTHONY HERRERA, CITY OF EAST ORANGE POLICE DEPARTMENT.

Jenelle Blackmon, Union Representative, Communications Workers of America, for appellant Anthony Herrera pursuant to N.J.A.C. 1:1-5.4(a)(6)

Allan C. Roth, Esq., for respondent City of East Orange (Roth D'Aquanni, attorneys)

Record Closed: March 13, 2018 Decided: April 19, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Appellant Anthony Herrera (Herrera or appellant) appeals the determination of the respondent City of East Orange Police Department (EOPD or respondent) that found appellant took unauthorized photographs of the EOPD's intake and cell area, of an EOPD authorized document, and of the EOPD van used to transport detainees; and

posted these photographs in video format on the appellant's YouTube channel. Respondent terminated Herrera based on these actions, and while appellant does not dispute that he took the photographs and posted them to his YouTube channel, he asserts that termination is not warranted, and he seeks reinstatement to his prior position as police aide.

PROCEDURAL HISTORY

On April 5, 2017, respondent served Herrera, a police aide, with a Preliminary Notice of Disciplinary Action (PNDA) informing him of the charges made against him for taking several photographs of the EOPD's property while on duty and posting the photographs on social media without authorization. An internal disciplinary hearing took place on September 7, 2017 pursuant to Herrera's request. On October 14, 2017, Herrera was served with a Final Notice of Disciplinary Action (FNDA), dated October 2, 2017, which sustained all charges set forth in the PNDA. The disciplinary action taken against Herrera was removal, effective October 3, 2017.

On November 8, 2017, the New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. This matter was assigned to the undersigned and the hearing was held on February 23, 2018. Following receipt on March 13, 2018 of color copies of the photographs presented at the hearing, the record closed.

CHARGES

The charges in the FNDA include violations of: N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), Neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause.

The specification of the charges sustained in the FNDA reads as follows:

Mr. Herrera admitted to taking photos of the intake and cell area in the EOPD including the graffiti on the cell walls, benches and doors of the jail cell, of hallways leading to intake and the cellblock, an EOPD authorized document and the EOPD van used to transport detainees. Mr. Herrera further admitted that the photos were put into video format and uploaded publicly onto the social media site YouTube on Herrera's channel known as "elgordowon" on or about December 6, 2016. On or about January 26, 2017, Herrera admitted to the Professional Standards Unit of EOPD that he took the photos, without authorization and posted the video to YouTube without authorization in violation of the EOPD General Order Social Media policy.

Summary of Testimony

Appellant's Witnesses

Herrera was employed as a police aide for the EOPD for eleven years. His responsibilities included processing bails and prisoner releases, working the information desk, taking calls, directing civilians, feeding and checking on prisoners, cleaning cells, taking DNA swabs, fingerprints and mugshots. In his eleven years at the EOPD, Herrera's disciplinary history consisted of one written reprimand in 2012 for "sick leave violation-chronic and/or excessive absenteeism." (R-1.)

Herrera has always admitted to having taken the photographs at issue, and fully cooperated with the EOPD's investigation of the matter. He admits that he did not receive any authorization from his supervisor to take these photographs, and that taking the photographs was outside the scope of his job duties. Herrera took the photographs with his personal cell phone while on break from duty at the EOPD. The photographs contain images of graffiti taken inside several EOPD cell blocks; three photographs of a hallway outside the cell blocks; a picture of a EOPD prisoner transport van; and a picture of a typed sign/notice posted inside the EOPD. On December 6, 2016, Herrera posted these pictures onto YouTube to document graffiti artwork in the prison. Herrera testified credibly that he took the photographs because he has an interest in prison culture and graffiti artwork, and has taken and posted images of other graffiti online in

the past. During cross-examination, he confirmed that the three photographs of the EOPD hallway outside the intake cells do not contain any graffiti.

Appellant was first confronted about the video/photographs by Detective Adkins in January 2017, and Herrera removed the online post that same day. Detective Adkins conducted an investigation of the matter and told Herrera that he would just get a "slap on the wrist" for his actions.

Herrera testified credibly that he was unaware of the EOPD General Order on Social Media Policy in effect at the time he took the photographs and published them on YouTube, and that he never received any training on the Social Media Policy or any EOPD General Orders, which he believed only apply to police officers. He appeared remorseful at the hearing and stated that he would never take photographs inside the EOPD again if he were to be reinstated.

Nicole Walters (Walters) is employed as a Community Service Clerk 2 at the EOPD, where she has been employed for approximately fifteen years. She is also a union shop steward and Secretary for the CWA Executive Board. Walters was appellant's co-worker at EOPD, and she represented him at the departmental hearing. She testified as a CWA union representative in this matter and asserted that the EOPD General Orders are given to new sworn officers only. She did not know whether the EOPD provides any General Orders or policies to police aides or other civilian employees.

Respondent's Witness

Detective Hewlett S. Adkins Jr. (Detective Adkins) has been employed with the EOPD for fourteen and a half years. For the past four years, he has been assigned to the Professional Standards Unit, where he investigates police misconduct and ensures that all employees adhere to the EOPD's rules and regulations. Detective Adkins investigated this matter and prepared an administrative report with a summary of his

investigation, findings and recommendation, dated February 10, 2017. (R-1.) He also prepared the PNDA, dated March 28, 2017. (J-2.)

Detective Adkins' investigation consisted of his review of the YouTube video created by Herrera which lasted three minutes and twenty-one seconds, and contained approximately twelve photographs. (R-3.) The first photograph shown on the video depicts a typed sign/notice located in a restricted area of the EOPD that reads: "DO NOT ENTER UNLESS YOU HAVE A PRISONER OR IT IS APPROVED BY THE DESK SERGEANT." This sign is not visible by the general public, only by EOPD employees and inmates taken into that area of the police department. Detective Adkins also identified three photographs of a hallway outside the jail cells which shows the closed door leading to the police intake area. When a prisoner is processed, he is taken down this hallway and into his cell. Seven photographs contain images of graffiti found on the walls, doors and a bench found in EOPD jail cells, and one photograph depicts the exterior of the EOPD prisoner transport van, which is on the road and observable by the public.

After initially viewing the video and speaking with Herrera, Detective Adkins informed Herrera that he would "probably just get a slap on the wrist" for his actions, and that it was "not a big deal." Herrera was initially charged with a thirty-day suspension, as documented in the PNDA, but he was later removed following his departmental hearing. While Detective Adkins testified that he does not determine the discipline to be imposed on EOPD employees, he was unable to explain why Herrera was initially charged with a thirty-day suspension in the PNDA and later removed in the FNDA. Although he mentioned that a thirty-day suspension was proposed before the investigation was fully concluded, he did not testify as to what, if any, additional information was discovered during the investigation to cause the respondent to change the recommended discipline of a thirty-day suspension to a removal. When he prepared the PNDA, Detective Adkins had already reviewed the core piece of evidence --the video-- and questioned Herrera, who admitted to taking the pictures.

The EOPD General Order - Social Media Policy addresses prohibitions on the use of social media by EOPD personnel. The Social Media Policy prohibits divulging: "confidential information, including photographs or videos, related to department training, activities, or work-related assignments without express written permission" from the Chief of Police. Herrera never received permission from the Chief of Police to post any information on social media, and he is not an EOPD employee authorized or designated to post on behalf of the department. While respondent asserts that Herrera was subject to the Social Media Policy as an EOPD employee, there was no signed receipt of the General Order on Social Media Policy by Herrera, and no evidence was offered to suggest that Herrera was ever trained on the Social Media Policy.

The Social Media Policy also contains a section addressing the personal use of social media by all EOPD personnel. It states in relevant part that "Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the Chief of Police or his or her designee." Detective Adkins testified that Herrera did not have permission from the Chief of Police or his designee to post pictures of the EOPD and, therefore, acted in violation of the Social Media Policy. Respondent also maintains that it is common knowledge that taking pictures inside the EOPD is prohibited.

The photographs taken by Herrera were deemed by the respondent to be confidential in nature because they depict actual jail cells where inmates are held that are not accessible by the public. Detective Adkins testified that the posting of the photographs of the transport van, the hallway, and exit areas compromised the safety of inmates, personnel and visitors and that this warrants Herrera's removal. He also briefly referenced the risk of inmate escape by the publishing of these photographs. While Detective Adkins repeated multiple times that safety had been compromised by Herrera's posting of the photographs, he did not explain or expand upon this assertion.

Herrera was charged with violating N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), Neglect of duty; and N.J.A.C. 4A:2-

2.3(a)(12), Other sufficient cause, because he admitted to taking the photographs during his shift as a reserve man at the EOPD when he was not authorized to do so.

FINDINGS OF FACT

The parties stipulated the following facts and I, therefore, **FIND** them as **FACTS**:

1. Anthony Herrera was a police aide with the City of East Orange.

2. Anthony Herrera, while on break from duty, took still pictures of the inside of the East Orange Police Department Intake cells, hallways and sally port.

3. Anthony Herrera, while on break from duty, took still pictures of the East Orange Police Department Police Transport vehicle.

4. On or about December 6, 2016, Anthony Herrera published these pictures by placing them on the social media site YouTube.

5. On January 26, 2017, during the interview with Detective Adkins, of the East Orange Police Department Professional Standards Unit, Anthony Herrera admitted to Detective Adkins that he took the aforementioned photographs and placed them on his social media site that is hosted by YouTube.

Based on the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following additional **FINDINGS of FACT**:

1. Herrera was not authorized to take the photographs and publish them onto a social media website, nor did he receive permission from the Acting Chief of Police or any other authorized agent to do so.

2. As an employee of the EOPD, Herrera was subject to the EOPD General Order – Social Media Policy.

3. The EOPD General Order – Social Media Policy reads, in part: "Department personnel shall not post, transmit, or otherwise disseminate any information to which they had access as a result of their employment without written permission from the Chief of Police or his or her designee."

4. As an EOPD civilian employee, Herrera was not familiar with the General Order - Social Media Policy, and respondent was unable to substantiate that Herrera ever received a copy of, or received training on, the General Order - Social Media Policy.

5. Herrera posted onto his YouTube channel twelve photographs depicting the following:

   - Seven photographs depicting images of graffiti found on the walls, doors and a bench inside the EOPD jail cells;
   - A photograph of a typed sign/notice that appears in a restricted area of the EOPD that reads: "DO NOT ENTER UNLESS YOU HAVE A PRISONER OR IT IS APPROVED BY THE DESK SERGEANT."
   - A photograph depicting the exterior of the EOPD transport van used to transport detainees.
   - Three photographs of a dimly lit hallway outside the jail cells leading into the intake area. (R-3.)

6. The photographs do not contain images of any inmates, EOPD officers/employees, or any individual. Not all of the images depict graffiti. The video is labeled "East Orange Police Jail Graffiti," but the individual pictures in the video are not labeled, and the video does not identify where in the EOPD the photographs were taken.

7. Appellant took the photographs to document graffiti in the prison because he has an interest in graffiti artwork and prison culture, and no evidence was presented to suggest that appellant took or posted the photographs intending to disclose confidential information, to jeopardize the safety of EOPD staff or inmates, or to place the EOPD in a negative light.[1]

8. Herrera's prior disciplinary history consisted of one written reprimand in 2012 for a sick leave violation and/or excessive absenteeism.

9. Herrera cooperated with the EOPD's investigation of this matter, and removed the online posting of his video immediately after being directed to do so.

LEGAL ANALYSIS AND CONCLUSIONS

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11).

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

[1] Respondent did not allege that Herrera intentionally violated any rule or policy, or that he took or published the photographs for any purpose other than to document graffiti artwork.

The first issue in this proceeding is whether a preponderance of the credible evidence establishes that the charges set forth in the FNDA as a result of appellant's taking of several photographs at the EOPD and publishing the photographs on a social media website warrant disciplinary action. If so, the issue to be addressed is whether termination is the appropriate disciplinary action. The parties stipulated as to the underlying action—i.e., that the appellant took the photographs and posted them online—but the appellant maintains that he was unaware of, and never received, the respondent's Social Media Policy, and that his removal is an excessive measure that falls outside the scope of progressive discipline.

Herrera is charged with Conduct Unbecoming a Public Employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6). "Conduct Unbecoming" is an "elastic" phrase that encompasses conduct that "adversely affects the morale or efficiency of a governmental unit . . . [or] which has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citing In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, the appellant's actions in taking photographs inside the EOPD and publishing them onto YouTube without the required authorization constitute a violation of the EOPD General Order – Social Media Policy. Therefore, based on my findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes a violation of N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming a Public Employee), N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty), and N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause), and that such charges must be **SUSTAINED**.

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 1996 N.J. AGEN LEXIS 467 (April 16, 1996). Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24

Progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. 19, 33 (2007). Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention. Rotundi v. Dep't of Health and Human Services, OAL Dkt. No. CSV 385-88 (Sept. 29, 1988)

Here, respondent argues that Herrera's misconduct was so severe that it falls outside of progressive discipline. Respondent asserts that removal is appropriate because Herrera compromised the safety of EOPD staff and inmates when he published on social media photographs taken inside restricted areas of the EOPD. This, respondent argues, not only violated the EOPD's Social Media Policy, but a broader, unwritten "general rule" that is common knowledge at the EOPD. Herrera maintains that removal is an excessive penalty, that he was unaware of the Social Media Policy and that his "mistake" should not cost him his job.

I thoroughly examined the twelve photographs that appear on Herrera's YouTube video. Seven of the twelve photographs depict close-up images of graffiti

found in various jail cells. The content of the graffiti was not raised as a concern; no individuals appear in the photographs; and respondent did not present any credible evidence to establish that these seven photographs of graffiti compromised safety at the EOPD. The one photographs of the "DO NOT ENTER" sign does hang in a restricted area of the EOPD and is directed to EOPD staff, however, the content of the sign itself does not contain any sensitive or confidential information. Moreover, the video does not disclose where in the EOPD the sign appears; and there is no evidence that the public disclosure of this sign compromises safety at the EOPD. Similarly, the photograph depicting the exterior of the EOPD transport van does not disclose any confidential information, as the van can be seen on the road by the general public, and no individual appears in the photograph. The respondent also did not sufficiently establish how the publishing of the exterior of the van jeopardizes the safety of EOPD staff or inmates. Finally, with regard to the three photographs of the hallway outside the jail cells, while they were taken in a restricted area generally accessible only by EOPD staff and inmates, I am not persuaded, based on my review of the photographs and testimonial evidence presented at the hearing, that the posting of these photographs presented an actual threat to the safety of the EOPD staff or inmates. These photographs contain images of a dimly lit hallway with unmarked closed doors, leading to an unmarked intake area. It is unclear to the viewer where these photographs were taken, and the location is not identified in the video/photographs. Moreover, respondent did not sufficiently explain how safety was compromised by publishing these photographs, nor how these photographs may create a risk of inmate escape, particularly when inmates are routinely brought through this area when they are taken to their cells. While Herrera undoubtedly exhibited poor judgment in publishing pictures taken inside an EOPD restricted area, I am not convinced that the publishing of these photographs online presented an actual threat to the safety of EOPD staff or inmates.

Herrera's actions in taking the photographs inside a restricted area of the EOPD was inappropriate and careless. However, I **CONCLUDE** that the misconduct here is insufficiently severe to render appellant unsuitable to continue in his position, and I further **CONCLUDE** that the penalty of removal is excessive, and that progressive discipline should apply.

Finally, it is undisputed that in his eleven years at the EOPD, appellant's disciplinary history consisted of one single written reprimand in 2012 for a sick leave violation and/or excessive absences. Nonetheless, the sustained charges against appellant are serious in nature and major disciplinary action is warranted. I, therefore, **CONCLUDE** that a ninety-day suspension is more appropriate and proportionate to the offense.

ORDER

It is **ORDERED** that the determination of the City of East Orange Police Department that Anthony Herrera be removed is **REVERSED**.

It is **ORDERED** that Anthony Herrera be suspended for ninety days and receive the return of appropriate benefits.

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

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

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

April 19, 2018
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: April 19, 2018

Date Mailed to Parties:
jb

APR 24 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

Appellant:

Anthony Herrera

Nicole Walters

Respondent:

Detective Adkins

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

J-2 Preliminary Notice of Disciplinary Action (31-A) dated March 28, 2017

J-3 Final Notice of Disciplinary Action (31-B) dated October 2, 2017

J-4 East Orange Police Department Internal Affairs Complaint Notification dated January 19, 2017

J-5 East Orange Police Department Administrative Investigation Notice dated January 26, 2017

J-6 Notice of Charges form dated March 28, 2017

J-7 CWA 2005-2006 Collective Bargaining Agreement

J-8 CWA 2006-2010 Memorandum of Agreement

J-9 CWA 2010-2013 Memorandum of Agreement

J-10 CWA 2014-2018 Memorandum of Agreement

For Appellant:

A-1 2015 Anthony Herrera Performance Appraisal

A-2 2017 Anthony Herrera Performance Appraisal

For Respondent:

R-1 Report of Detective Hewlett Adkins dated February 10, 2017

R-2 East Orange General Order – Social Media Policy

R-3 Stills of YouTube video

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of William Lane
City of Newark,
Department of Public Works

CSC DKT. NO. 2018-1511
OAL DKT. NO. CSV 18160-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 18160-17
AGENCY DKT. NO. 2018-1511

IN THE MATTER OF WILLIAM LANE, CITY OF NEWARK, DEPARTMENT OF PUBLIC WORKS.

Terry L. Woodrow, Organizer/Field Representative, AFSCME, for appellant William Lane pursuant to N.J.A.C. 1:1-5.4(a)6

France H. Casseus, Assistant Corporation Counsel, for respondent City of Newark (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: April 12, 2018 Decided: April 17, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant William Lane filed an appeal from a Final Notice of Disciplinary Action dated October 30, 2017, issued by respondent City of Newark, Department of Public Works. The Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed on December 12, 2017, for determination as a contested case. A telephone prehearing conference was held on January 16, 2018, during which the parties agreed to a settlement conference, which was scheduled for March 20, 2018. The parties appeared and reached an amicable resolution of the

matter. Subsequently, under cover letter dated April 11, 2018, counsel for respondent submitted the attached Settlement Agreement and General Release, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

4/23/18

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 4-23-18

Date Mailed to Parties: APR 23 2018

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

William Lane, Appellant,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
v.	:	**OAL DOCKET NO.: CSV 18160-2017N**
CITY OF NEWARK, Respondent	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**

RECEIVED
2018 APR 12 A 9:43
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

IT IS HEREBY AGREED by and between the City of Newark ("City"), AFSCME Council 63 ("Union"), and Employee William Lane ("Lane"), to resolve the disciplinary matter as it relates to the Final Notice of Disciplinary Action ("FNDA") dated October 30, 2017. Rather than continuing further with the appeal of Lane's removal at the Office of Administrative Law on the charges of Insubordination, Conduct Unbecoming a Public Employee; Neglect of Duty; Misuse of Public Property, Including Motor Vehicles and other sufficient causes, as codified at N.J.A.C. 4A:2-2.3(a)(2); 4A:2-2.3(a)(6); 4A:2-2.3(a)(7); 4A:2-2.3(a)(8) and; 4A:2-2.3(a)(12), the City, the Union and Lane (collectively referred to hereinafter as the "Parties") have determined to resolve this matter by this Agreement, and agree as follows:

1. The Parties hereby agree that Lane will plead guilty to the charges of "Conduct Unbecoming a Public Employee" and "Neglect of Duty" as codified at N.J.A.C. 4A:2-2.3(a)(6) and 4A:2-2.3(a)(7) associated with the FNDA issued on October 30, 2017.

2. The City agrees to withdraw the charges of "Insubordination"; "Misuse of Public Property, Including Motor Vehicles" and Other Sufficient Cause as codified at N.J.A.C. 4A:2-2.3(a)(2); 4A:2-2.3(a)(8) and; 4A:2-2.3(a)(12) against Lane, which will be reflected in the amended FNDA.

3. The City will amend the FNDA from 55-Days Suspension to 15-Days Suspension (8/21/17 to 9/11/17).

4. Lane shall receive 40 days of back pay (from 9/12/17 to 11/5/17), resulting from the reduction of his served Fifty-Five (55) working day suspension to a Fifteen (15) day suspension.

5. The Parties agree that Lane's effective return to his Civil Service title of "Truck Driver" is November 6, 2017. Lane agrees the time between

November 6, 2017 until his return to employment, will be accredited as an "Approved Leave of Absence".

6. Lane shall withdraw his letter of resignation dated November 6, 2017. Also, The City agrees to withdraw its pending Preliminary Notice of Disciplinary Action dated November 20, 2017; seeking removal for "Resignation Not in Good Standing" against Lane.

7. Lane further waives any and all rights or claims which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same.

8. Lane and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

9. Lane and the Union each further agree that there is no consideration due Lane, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

10. Except for the assessment of Lane's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

11. Lane and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

12. Lane is bound by this Agreement. Anyone who succeeds to Lane's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.

13. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

14. Lane and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

15. This Agreement contains the sole and entire agreement between Lane, The Department of Public Works and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Lane specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

16. A Notice of Claim was filed on behalf of Lane to the City dated January 23, 2018. Lane agrees not to pursue any causes of action alleged in said Notice. Lane acknowledges he has advised, attorney, Christopher C. Roberts he is not pursuing any cause of action against the City. Further, Lane hereby releases all claims, grievances, or actions of any kind against the City of Newark currently pending regarding any issues relating to or arising out of Lane's employment with the City and he agrees not to file, pursue or participate in any claims, grievances or actions in any Court, administrative agency or tribunal or with the City of Newark regarding any issues relating to or arising out of Lane's employment with the City.

17. This release includes, but is not limited to, every claim, right and cause of action, including those of which Lane may not be aware and those not expressly mentioned in this Agreement. This Agreement applies to every claim that Lane may have, resulting from anything, which has happened up to now and may happen up until the date Lane executes this Agreement. It is understood and agreed that, in particular and without limitation that this release also covers and includes every claim that Lane may have or has ever had before the New Jersey Division on Civil Rights or Civil Claims.

18. Lane agrees and acknowledges that he has been fully and fairly represented by his Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

19. Lane agrees and acknowledges that he has had full opportunity to review this Agreement with his counsel and/or union representation and he enters into same knowingly and voluntarily.

20. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

21. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

22. By signing this Settlement Agreement, Lane states that:
    A. He has read it;
    B. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;
    C. He agrees with everything in it;
    D. His representative negotiated this Agreement with his knowledge and consent;
    E. He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so; and
    F. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

4/10/18
Date

BY: _____
City of Newark Department of Public Works

4-6-18
Date

BY: Tony L. Woodson Staff Rep.
Union Attorney/Representative

4-6-18
Date

William Lane
William Lane

Approved as to Form and Legality:

4/11/18
Date

Law Department

CERTIFICATION

I, William Lane, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4-6-18
DATE

William Lane
NAME

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Luz Lopez
Hudson County,
Department of Family Services

CSC DKT. NO. 2017-3043
OAL DKT. NO. CSV 05255-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 05255-17

IN THE MATTER OF LUZ LOPEZ, HUDSON COUNTY, DEPARTMENT OF FAMILY SERVICES.

Terry Woodrow, Staff Attorney, for appellant (AFSCME Council 52)

John J. Collins, Assistant County Counsel, for respondent (Donato J. Battista, County Counsel)

Record Closed: April 16, 2018 Decided: April 18, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On April 18, 2017, the Civil Service Commission transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

4/18/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 4-23-18

Date Mailed to Parties: APR 23 2018

dr

Attachment

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE

RECEIVED
2018 APR 16 P 2:

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 28th day of February, 2018 between the County of Hudson (hereinafter referred to as the "County") and Luz Lopez (hereinafter referred to as "Lopez" or the "Employee").

WHEREAS, the Employee has been employed within the Hudson County Department of Family Services for 7 years as a HSS 1 BIL;and

WHEREAS, on February 24 2017, the County issued a Preliminary Notice of Disciplinary Action charging her with the following violations: conduct unbecoming a public employee; insubordination; and other sufficient cause; and

WHEREAS, the County and Lopez desire to resolve all outstanding issues with respect to the aforementioned Preliminary Notice of Disciplinary Action (hereinafter referred to as the "Disciplinary Action");

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the County and Lopez agree as follows:

1. **DISCIPLINARY ACTION**

a. Lopez pleads guilty to one (1) charge of insubordination and one (1) charge conduct unbecoming a public employee stemming from the allegations raised within charges contained in the Disciplinary Action, a copy of which is deemed incorporated herein as if set forth at length.

b. Lopez agrees to accept a disciplinary penalty of a fifteen (15) day suspension, without pay, which shall be recorded as such with the New

Jersey Department of Personnel, fifteen (15) days of which the County shall be credited for time already served.

c. Lopez agrees that the additional five (5) days of suspension already served shall be treated as an unpaid leave.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE**

In further consideration of the settlement hereinabove, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that they have not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement related to the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law,

decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which,

among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare. The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. **NO DISPARAGING STATEMENTS.**

Releasor agrees that she will not make any statement(s) that has, have, or can be expected to have the affect of disparaging the County or any of its employees.

4. **NON ADMISSION OF LIABILITY.**

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by Releasor, except as expressly provided in Paragraph 1 herein, or by the County, by whom any such liability is expressly denied.

5. **INDEMNIFICATION.**

If Releasor violates this Agreement in any way, Releasor agrees to pay in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the opposing party as a result of such violation, including reasonable attorney's fees.

6. **CONSULTATION WITH ATTORNEY.**

Releasor has consulted with her attorney and /or Union Representative with respect to this Agreement and has reviewed with her Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

7. **REASONABLE PERIOD OF TIME.**

Releasor agrees that she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this 21 day period by signing in the space provided at the end of this Agreement.

8. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between Releasor and the County, and each of them, with respect to the subject matter and supercedes all prior agreements, understandings and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the County to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey. It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice.

9. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

11. **ATTESTATION.**

Releasor represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that she enters into this Agreement voluntarily, of her own will, without any pressure or coercion from any person or entity including, but not limited to, the County and/or Releasees.

12. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to the County, addressed Roger Quintana, 257 Cornelison Stree, Jersey City, NJ 07306. This seven (7) day revocation period may not be waived by Releasor.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Luz Lopez,executed the foregoing Agreement this 4 day of ~~March~~ APRIL 2018.

Luz Lopez, Employee

Sworn and Subscribed to before me this 4 day of ~~March~~ APRIL, 2018.

Notary Public of the State of New Jersey

SHARON SANTIAGO
NOTARY PUBLIC
MY COMMISSION EXPIRES
NOV 12 2019
ID # 2391011
NOTARY PUBLIC, STATE OF NEW JERSEY

Date: 4/4/18

COUNTY OF HUDSON

By: _____
Roger Quintana, Personnel Officer

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in the 7th recital on page 7of this Agreement.

Luz Lopez

DATED: 4/24/18

5-23-18

A-5

STATE OF NEW JERSEY

In the Matter of Wayne Kubs
Borough of Rutherford

CSC DKT. NO. 2015-1640
OAL DKT. NO. CSV 05914-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 25, 2018 BW

The appeal of Wayne Kubs, of the removal of his name from the eligibility list for Police Officer (S9999R), Borough of Rutherford, was heard by Administrative Law Judge John P. Scollo (ALJ), who rendered his initial decision on March 23, 2018 reversing the removal of Kubs' name from the list. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 23, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

It is noted that the S9999R eligible list has expired. As such, that list should be revived at the time of the next certification for Police Officer, Borough of Rutherford to allow Kubs' name to appear on that certification. Further, as Kubs is a veteran, his appointment from that certification is mandated absent any disqualifying issues identified upon an updated background check which may include medical and psychological examinations.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing Wayne Kubs' name from the eligibility list for Police Officer (S9999R), Borough of Rutherford was not justified. The Commission therefore reverses that action and grants the appeal of Wayne Kubs.

Further, the Commission revives the Police Officer (S9999R), Borough of Rutherford, eligible list at the time of the next certification for Police Officer, Borough of Rutherford to allow Kubs' name to appear on that certification. Further, as Kubs is a veteran, his appointment from that certification is mandated absent any disqualifying issues identified upon an updated background check which may include medical and psychological examinations.

Should Kubs ultimately be appointed, upon the successful completion of his working test period, the Commission orders that he be granted a retroactive date of appointment to the date he would have been appointed if his name had not been removed from the subject eligible list. This date is for salary step placement and seniority-based purposes only. However, the Commission does not grant any other relief, such as back pay or counsel fees, except the relief enumerated above.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 05914-17
CSC DKT. NO. 2015-1640

WAYNE R. KUBS,

Petitioner,

v.

BOROUGH OF RUTHERFORD,

Respondent.

Catherine M. Elston, Esq., for Petitioner (C. Elston & Associates, LLC, attorneys)

Dominic P. DiYanni, Esq. for Respondent (Eric M. Bernstein & Associates, LLC attorneys)

Record Closed: January 26, 2018 Decided: March 23, 2018

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

STATEMENT OF THE CASE

Petitioner, a veteran, is appealing the April 19, 2017 decision (issued on April 26, 2017) of the Civil Service Commission, which upheld the appointing authority's

(Borough of Rutherford's) removal of his name from the eligible list for Police Officer candidates. The name of another candidate, who was not a veteran and who was the nephew of Rutherford's Mayor, Joseph DeSalvo, remained on the list and was appointed as a police officer. The sole issue before the Office of Administrative Law is whether the extent to which Rutherford's Mayor was present during several of the candidate interviews created a conflict of interest, which tainted the appointment process.

PROCEDURAL HISTORY

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on April 28, 2017 as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

On May 4, 2017 this matter was assigned to John P. Scollo, A.L.J. On May 16, 2017, Judge Scollo, along with Appellant's counsel, Catherine M. Elston, Esq. and Respondent's counsel, Dominic DiYanni, Esq. held an initial telephone conference. On May 18, 2017 Judge Scollo issued his Pre-Hearing Order setting dates for the completion of discovery, a motion schedule and setting a hearing date. This Order was amended on May 23, 2017 and thereafter various extensions were granted to allow additional discovery, including depositions. Subsequent telephone status conferences were held.

On December 19, 2017 both sides moved for Summary Decision. On or about January 3, 2018 the Tribunal received Opposition papers from both sides and on or about January 8, 2018 the Tribunal received Appellant's reply to Respondent's Opposition. After clarifications were made, the Tribunal deemed the motion record completed by January 26, 2018.

FINDINGS OF FACT

Based on the evidence presented in the parties' Motion, Opposition and Reply papers, as well as in the Joint Certification of Counsel (Joint Appendix) containing various documents, I **FIND** that the parties are not in dispute about the following **FACTS** and that there are no issues of material fact outstanding, which would preclude a disposition of the issue by Summary Decision:

1. The municipal government of the Borough of Rutherford consists of an elected Borough Council and an elected Mayor. The Mayor votes only to break a tie. (DeSalvo Dep. 15:18)

2. The process for the appointment of police officers in the Borough of Rutherford is as follows: After receiving recommendations from the Chief of Police, the Mayor decides which candidates to appoint; then the Council decides and votes on whether to appoint or not appoint each individual candidate. (DeSalvo Dep. 50:4 through 51:13; 116:23 through 117:7; and 119:6 through 122:16)

3. In June, 2014 the Borough of Rutherford (hereinafter "Boro", or "Rutherford") Police Department (hereinafter "RPD") conducted interviews of candidates for the position of police officer.

4. Russo chose between five and eight RPD detectives to serve as investigators. It was the job of each investigator to do background research on the candidates assigned to him by Chief Russo and to assist the Chief in interviewing the candidates. Mayor Joseph DeSalvo and Councilman Frank Nunziato, who was the Council's Police Liason, were invited to attend the interviews by the Chief. (Russo Dep. 25:19 through 27:3 and 39:2 through 40:17)

5. The hiring procedure for new police officers was explained by Chief Russo. Generally, the Tribunal's summary of the process, based on the evidence submitted, is as follows: The RPD would contact the Mayor and Boro Council through the Police Liason regarding the need for new officers to replace those expected to retire. After the RPD received authorization from the Boro government, the RPD contacted the Civil Service Commission to obtain a list of candidates. Potential candidates were contacted to ensure that they were still interested in a position and efforts were made to screen potential candidates to ensure that they would be eligible (e.g. residency requirements, etc.). Then RPD would send applications to potential candidates. Those responding within the time limit would have their applications assigned to RPD's investigators, who would do background research. After the background research was done on each of the applicants assigned to them, the investigators prepared a summary report for the Chief to review regarding each potential candidate. The Chief would discuss the background information with the investigators and if there were no outright objections or other issues, then the Chief would arrange dates and times for the applicants to be interviewed. (Russo Dep. 25:19 through 27:3; 29:18 through 30:12; 32:11 through 33:18; and 43:3 through 44:11)

6. The purpose of the interview was to learn about the candidate, to clarify issues about his background, and to ask him scenario-based questions in order to further evaluate him. (Russo Dep. 43:3 – 6; 45:25 through 47:8; and 53:23 through 60:25; see also, the Deposition of Mayor Joseph DeSalvo 94: 2-9 and 118: 17 through 119:5)

7. The interviews of the candidates were conducted by Chief Russo and available members of his team of investigators, who would ask questions of the candidates. Mayor DeSalvo and the Police Liason, Councilman Frank Nunziato, were invited to attend the interviews, but they did not speak with or ask questions of the candidates and neither of them attended all of the interviews. (Russo Dep 34:16 -25; DeSalvo Dep. 94:6 through 97: 13)

8. Chief Russo wrote a list of fourteen questions for each of the candidates to answer during his interview. Each candidate answered each of these questions during his interview. Questions posed to the candidates were not limited to those on the Chief's list of questions. The questioners were able to ask other questions. (Russo Dep. 43: 25 through 44:19; 54: 17-19; 55:7-10; 58:5-11; 62:19-20)

9. Paper copies of the Chief's list of fourteen questions were given to the investigators. (Russo Dep 45:6-24)

10. One of the candidates interviewed was James Fecanin, who is the nephew of Mayor DeSalvo. (Russo Dep. 67:18 through 70:23 and DeSalvo Dep. 102: 11 through 103:12)

11. Chief Russo and the investigators knew that James Fecanin was Mayor DeSalvo's nephew. (Russo Dep. 68:7-25; 70:7-23; and DeSalvo Dep 102:11 through 103:12)

12. Mayor DeSalvo attended the interviews of several, but not all, of the candidates before his nephew was interviewed. (Russo Dep. 76:12-15; 108:10-13; and DeSalvo Dep. 118:1-3 and 14-16)

13. Mayor DeSalvo did not attend the interview of his nephew, James Fecanin. (DeSalvo Dep. 100: 1-8)

14. For the interviews that Mayor DeSalvo attended, he heard the candidates being asked all fourteen questions on Chief Russo's list. (DeSalvo Dep. 95: 22 through 96: 5 and 106: 2-20). Mayor DeSalvo heard the questions before his nephew, James Fecanin, was interviewed. (Russo Dep. 107: 2 through 111:10)

15. Mayor DeSalvo was not asked to sign a document promising that he would not disclose to his nephew any information about the interview process, including the contents of the Chief's 14-question list. (Russo Dep. 110:17-20)

16. Having been present during the several candidates' interviews, which took place before James Fecanin was interviewed, and having heard all of the questions on Chief Russo's 14-question list as well as other questions posed to the candidates, Mayor DeSalvo received information, which could have been advantageous to James Fecanin, if Mayor DeSalvo had disclosed it to him before Fecanin's interview. (Russo Dep. 107:2 through 114:14 and DeSalvo Dep.)

17. Regarding the possibility of James Fecanin becoming employed as a police officer for the Boro, Mayor DeSalvo admitted that this would be deemed to be a personal interest of his arising out of their uncle-nephew relationship. (DeSalvo Dep. 115: 3-6)

18. Mayor DeSalvo admitted that a member of the public could perceive it to be a conflict of interest if, before James Fecanin was interviewed, the Mayor had already heard the actual questions that the other police officer candidates had been asked. (DeSalvo 111: 21 through 113:23 and 126:8 through 128:8)

APPLICABLE LAW

In 1991, New Jersey enacted the Local Government Ethics Law (LGEL), which is found at N.J.S.A. 40A:9-22.1, et seq. At N.J.S.A. 40A:9-2.2 the Legislature declared that: (a) public offices and public employments are public trusts; (b) that democracy depends upon the public's confidence in the integrity of its representatives; (c) that whenever the public perceives a conflict between the private interests and the public duties of a government officer, that confidence is imperiled; (d) that governments have the duty to provide standards of conduct for government service and to appraise the

conduct of government officials while conducting their public duties; and (e) that this law was enacted to set and enforce ethical standards and require appropriate financial disclosures by those who are in government service.

N.J.S.A. 40A:9-22.3 sets forth the definitions of various terms used in the LGEL. One such term is "member of immediate family". Member of immediate family is defined as: "the spouse or dependent child of a local government officer or employee residing in the same household." An Appellate panel in Haggerty v. Red Bank Borough Zoning Board of Adjustment, 385 N.J. Super. 501, 514 (App. Div, 2006) summarized the Local Government Ethics Law's definitions of "local government officer" and "local government agency" as follows:

> The Ethics Law defines "local government officer" as any person "serving on a local government agency which has The authority to enact ordinances, approve development applications or grant zoning variances," N.J.S.A. 40A:9-22.3 (g) (2), and a "local government agency" as a municipal board which performs functions in other than a purely advisory nature. N.J.S.A. 40A:9-22.3 (e).

N.J.S.A. 40A:9-22.5 sets forth provisions with which local government officers and employees must comply. Among the pertinent provisions are the following:

> a. No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity which is in substantial conflict with the proper discharge of his duties in the public interest;
>
> c. No local government official or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;
>
> d. No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

> g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information not readily available to the members of the public, which he receives or acquires in the course of or by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated....

N.J.S.A. 40A:9-22.10 and 22.11 set forth penalties for ethical violations and provide for various disciplinary actions, including demotion, suspension, or removal. N.J.S.A. 40A:9-22.13 mandates the establishment of a County Ethics Board to serve the members of the county government; N.J.S.A. 40A:9-22.20 has similar provisions on the municipal level. N.J.S.A. 40A:9-22.15 mandates the adoption and publication of a county Code of Ethics. N.J.S.A. 40A:9-22.21 has similar provisions on the municipal level. N.J.S.A. 40A:9-22.16 empowers the County Ethics Board to investigate and hold hearings on possible ethical violations involving county or municipal officials or employees. N.J.S.A. 40A:9-22.22 has similar provisions on the municipal level. N.J.S.A. 40A:9-22.17 provides that any county of municipal officer or employee to request from the County Ethics Board an advisory opinion as to whether any proposed activity or conduct would, in its opinion, constitute a violation of the County Code of Ethics or any financial disclosure requirements. N.J.S.A. 40A:9-22.24 has similar provisions on the municipal level.

New Jersey has a Conflicts of Interest Law codified at N.J.S.A. 52:13B-12 to -28. New Jersey's conflicts of interest jurisprudence has its origins in the Common Law. The New Jersey Supreme Court has, in no uncertain terms, set clear guidelines for attorneys and judges to follow in conflict of interest issues.

In New Jersey, prerogative writ jurisdiction has served as the mechanism for the supervision of government officials. In Wyzykowski v. Rizas, 132 N.J. 509 (1993), a case brought under the Municipal Land Use Law, the Supreme Court set forth a comprehensive history of the origins of our conflicts of interest law as well as

expounding its general principles for application in a variety of legal and factual contexts. Starting on p. 522 the Court said:

> "Our judicial system is historically vested with a comprehensive prerogative-writ jurisdiction, which it inherited from the King's Bench. We have frequently exercised that jurisdiction in the supervision of government tribunals, including administrative agencies. Avant v. Clifford, 67 N.J. 496, 520 (1975). That common law jurisdiction is guaranteed under N.J. Constitution, article VI, section 5, paragraph 4. The oft-cited function of the common law writ of certiorari is " to bring before the superior court for inspection the records of the proceedings of the inferior tribunal, to determine whether the latter had jurisdiction and had proceeded according to law." State v. Court of Common Pleas, 1 N.J. 14, 19 (1948). Among the guarantees of the common law is the entitlement to a fair and impartial tribunal.
>
> These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign. [Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, cert. denied, 344 U.S. 838 (1952).]
>
> Thus, common law principles concerning the participation of public officials in matters in which they have a personal interest primarily govern this dispute. At common law '[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.' Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J. Super. 566, 568 (App. Div. 1991).
>
> The Municipal Land Use Law codified the common law principles, expressly prohibiting a planning board member from acting "on any matter in which [the member] has, either directly or indirectly, any personal or financial interest." N.J.S.A. 40:55D-23.b.
>
> We repeat the general guidelines for determining whether a particular interest is sufficient to disqualify. "The decision as

> to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958) (citing Aldom v. Borough of Roseland, 42 N.J. Super. 495, 503 (App. Div. 1956)). "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Van Itallie, supra, 28 N.J. at 268.
>
> Local governments would be seriously handicapped if every possible interest, no matter how remote or speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency." Graham v. United States, 231 U.S. 474, 480 (1913); see also Ward v. Scott (II), 16 N.J. 16 (1954). [Id. 28 N.J. at 269.]
>
> Actual proof of dishonesty need not be shown. Aldom, *supra*, 42 N.J. Super. at 503. An actual conflict of interest is not the decisive factor, nor is "whether the public servant succumbs to the temptation," but rather whether there is a potential for conflict. Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960) (citing Aldom, *supra*, 42 N.J. Super. Atv 502). A conflicting interest arises when the public official has an interest not shared in common with the other members of the public. Id. 33 N.J. at 220-21. Another way of analyzing the issue is to understand that "[t]here cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions." LaRue v. Township of East Brunswick, 68 N.J. Super. 435 (App. Div. 1961)."

As the decision in Wyzykowski demonstrates, the Supreme Court intended that its statement of general principles should be applied universally. As will be seen, it also

adopted a four-part categorization of conflicts of interest that should result in disqualification. Continuing at p. 524 the decision reads as follows:

> "Our courts have invoked the application of the test under varied circumstances. See Griggs, supra, 33 N.J. 207 (invalidating determination of "blighted" area by borough council where two participating councilmen were professors of university benefitted by designation); Pyatt v. Mayor of Dunellen, 9 N.J. 548 (1952) (voiding vote for ordinance where councilmen were employees of corporation that substantially benefitted); Barrett v. Union Township Committee, 230 N.J. Super. 195 (App. Div. 1989) (voiding vote where councilman's mother resided in nursing home favored by zoning amendment); Sokolinski v. Woodbridge Township Municipal Council, 192 N.J. Super. 101 (App. Div. 1983) (enjoining vote of board of adjustment members employed by or related to employees of board of education who benefitted by variance); Marlboro Manor, Inc. v. Board of Commissioners, 187 N.J. Duper. 359 (App. Div. 1982) (voiding vote where councilmen were members of church opposed to transfer of liquor license); S&L Associates v. Township of Washington, 61 N,J, Super. 312 (App. Div. 1960) (invalidating zoning amendment enhancing value of property owned by certain voting members of governing body), aff'd in part, rev'd in part, 35 N.J. 224 (1961); Aldom, *supra*, 42 N.J. Super. 495 (voiding zoning ordinance where employer of councilman who voted for enactment would be benefitted); Hochberg v. Borough of Freehold, 40 N.J. Super. 276 (App. Div. 1956) (voiding zoning amendment permitting enlargement of horse track at which a participating councilman operated horsemen's kitchen), certif. denied, 22 N.J. 223 (1956); Bracey v. City of Long Branch, 73 N.J. Super. 91 (Law Div. 1962) (voiding ordinance where architect-member of planning board stood to gain by urban renewal ordinance benefitting his client-agency). But see Van Itallie, supra, 28 N.J. 258 (upholding zoning amendment although participating councilman's brother held a "lower echelon" position in benefitted corporation).
>
> A commentator has distilled those varying circumstances into four types of situations that require disqualification: (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that

> financially benefits one closely tied to the official, such as an employer or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) "Indirect personal interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies. See, Michael A. Pane, Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities, March 1980, at 8,9."

The Supreme Court's ruling in Wyzykowski provides government officials and employees with guidance which enables them to decide whether they have an interest (be it financial or personal), which is something "not shared in common with the other members of the public" concerning a matter on which they will be called upon to deliberate and vote. It is the dual functions of deliberation and voting that makes the process quasi-judicial. If the government official or employee has a financial or personal interest and encounters "contradictory desires tugging [him] in in opposite directions" then a potential for a conflict of interest exists and recusal is required.

The courts of New Jersey have recognized that the quasi-judicial functions of government officials are governed by the same ethical standards that apply to judges. In Kremer v. City of Plainfield, 101 N.J. Super. 346 (Law Div. 1968) an applicant's attorney appeared before the Board of Adjustment. One of the Board's members was the uncle of the applicant's attorney. After the Board of Adjustment granted the application for a variance, the plaintiff brought a prerogative writ action seeking to set aside the grant of the variance. Judge Wood, citing various authorities noted that judges are required to recuse themselves when a party to a case is related by blood or marriage or where his conduct of the case could result in the impression that he could be affected by the "kinship, rank, position or influence of any party or other person."

The judge noted that the standards he relied on applied to judges, but went on to rule that

> "[T]here is no sound reason why a lesser standard should govern the conduct of those acting in a quasi-judicial capacity. The need for unquestionable integrity, objectivity and impartiality is just as great for quasi-judicial personnel as for judges." Kremer at 352-53.

The Appellate Division in Randolph v. City of Brigantine Planning Board, 405 N.J. Super. 215, 226 (App. Div. 2009), quoted the reasoning of Judge Woods and adopted Kremer. The panel ruled that:

> "planning board members, in their quasi-judicial capacity, may not participate in evaluating an application in any matter in which their direct or indirect private interests may be at variance with the impartial performance of their public duty." Randolph at 225.

In Wyzykowski at p. 523 the Court underscored the principle, handed-down from the common law, that:

> "[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body."

The Court emphasized that judicial and quasi-judicial functions are to be regarded as equally important from the standpoint of the ethical responsibilities. Thus the standards imposed on government officials in the discharge of their quasi-judicial functions rise to the same high level which judges must meet in the discharge of their judicial duties.

It follows that government officials must conform to the appearance of impropriety standard when issues of conflicts of interest arise in the performance of their quasi-judicial duties. The Supreme Court said exactly that in Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 220 (2013). Re-affirming that the appearance of impropriety standard applies to all judicial and quasi-judicial proceedings, the Court categorically stated:

> "[T]he appearance of impropriety standard has never been altered as it relates to judges, *see*, Code of Judicial Conduct, Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all activities."), and, as our Appellate Division has observed, it remains applicable to municipal officials acting in a quasi-judicial capacity, *see*, Randolph v. City of Brigantine Planning Board, 405 N.J. Super. 215, 226 (App. Div. 2009) (citing Kremer v. City of Plainfield, 101 N.J. Super. 346, 352-53 (Law Div. 1968)." Kane at 220.

The Court went on to further explain its continuing adherence to the appearance of impropriety standard for both attorneys and for judges at p. 221 of Kane, saying:

> "Our traditional explanation of the appearance of impropriety standard recognized that '[t]o maintain public confidence in the bar it is necessary that the appearance of, as well as actual, wrongdoing be avoided.' In re Cipriano, 68 N.J. 398 (1975); accord, In re Opinion Number 415, 81 N.J. 318, 323 (1979). In particular, we have commented that "[w]hen representation of public bodies is involved, the appearance of impropriety assumes an added dimension [because positions] of public trust call for even more circumspect conduct.' In re Opinion Number 415, 81 N.J. 318 at 324 (footnote omitted). As our Appellate Division has observed, when an 'office calls for the service of an attorney in areas where the public interest is involved, the possible areas of conflict of interest are subject to even closer scrutiny and more stringent limitation.' Lafayette, supra, 208 N.J. Super. at 473 (citing In re Opinion 452, 87 N.J. 45, 50 (1981)).
>
> We recently articulated the manner in which a claim that a judge's act violated the appearance of impropriety standard is to be evaluated. DeNike v. Cupo, 196 N.J. 502, 514-19 (2008). We defined the appropriate standard to use in determining whether there was an appearance of impropriety in that context as: 'Would a reasonable, fully informed person have doubts about the judge's impartiality?' Id. at 517; see, In re Tenure Hearing of Onorevole, 103 N.J. 548, 561 (1986). As we explained, if a judge's conduct gave the public 'reason to lack confidence in the integrity of the process and its outcome [,]' the decision rendered would have to be reversed and the matter retried. DeNike, supra, 196 N.J. at 517.

> In establishing that approach, we did not require evidence that the judge in fact conducted the proceedings in a biased or unfair way. Id. at 517-19. Instead, we made it clear that "it is not necessary to prove actual prejudice..." to establish an appearance of impropriety; an "objectively reasonable" belief that the proceedings were unfair is sufficient.' Id. at 517 (quoting State v. Marshall, 148 N.J. 189. cert. denied, 522 U.S. 850 (1997)); *see* Griggs v. Borough of Princeton, 33 N.J. 207, 220 (1960) (holding that when an appearance of impropriety standard applies, it is 'the mere existence of a conflict, not its actual effect, which requires the official [municipal] action to be invalidated')."

The applicable law in the matter before the Tribunal in rooted is the Common Law. The Common Law established the enduring principle that a public officer is disqualified from participation in a judicial or quasi-judicial matter wherein he has an interest which may interfere with the impartial performance of his governmental duties. While each case is fact sensitive, the question is always the same: whether the circumstances could reasonably be interpreted to show that they have the capacity to tempt the officer to depart from his sworn public duties. Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958). The standard to be applied to those in judicial and quasi-judicial positions is an appearance of impropriety standard, meaning that if a reasonable, fully-informed person had reason to doubt the decision-maker's impartiality, then a conflict exists and the action would have to be set aside. DeNike v. Cupo, 196 N.J. 502, 514-19 (2008).

LEGAL ANALYSIS AND CONCLUSION

The issue before this Tribunal is whether the extent to which Mayor DeSalvo was present during several of the candidate interviews created a conflict of interest, which tainted the appointment process. The fact question is whether DeSalvo had a sufficient-enough personal, monetary or other interest in the proceedings to invalidate the decision-making process. The resolution of this or any other fact question in a conflict of interest case depends on the circumstances of the particular case. Van Itallie v. Borough of Franklin Lakes, 128 N.J. 258, 268 (1958). Here, the relevant facts are not

in dispute: (1) Mayor DeSalvo is the uncle of James Fecanin; (2) Several candidates for the position of police officer were interviewed before James Fecanin; (3) Mayor DeSalvo sat in on several interviews and learned all of the questions on Chief Russo's 14-question list plus several other questions posed to the candidates; (4) A candidate's knowledge of the aforementioned questions before his interview would be valuable to a candidate and would give him an advantage over other candidates.

In DeNike v. Cupo, 196 N.J. 502, 518 (2008) our Supreme Court observed that a trial judge's discussion of employment opportunities with a law firm which was representing a party in a case that was still pending before that judge constituted a pattern of factual circumstances that "invites doubt about the trial judge's partiality". Certainly this applies also to people holding a quasi-judicial office. See, Scotch Plains-Fanwood Board of Education v. Syvertsen, 251 N.J. Super. 566, 568 (App. Div. 1991); Kremer v. City of Plainfield, 101 N.J. Super. 346, 352-53 (Law Div. 1968); Randolph v. City of Brigantine Planning Board, 405 N.J. Super. 215, 226 (App. Div. 2009); Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993). In DeNike, the Supreme Court formulated a standard by which judges and those in quasi-judicial positions could decide whether to participate in a matter or not. That standard is set forth in the form of the following question: "Would a reasonable, fully informed person have doubts about the judge's (or quasi-judicial person's) impartiality?" DeNike at 517. If a reasonable, fully informed person would have doubt, then a recusal is indicated. DeNike at 518.

I **CONCLUDE** that Mayor DeSalvo had a sufficient personal interest (the hiring of his nephew, James Fecanin) in the outcome of the appointment / hiring process to warrant his recusal from the process.

I **CONCLUDE** that Mayor DeSalvo had the present, apparent ability to give the interview questions to his nephew and thus afford him an advantage over the other candidates.

When the above-reference standard, enunciated in DeNike, is carried-over into the matter at hand, the question becomes: Would Mayor DeSalvo's learning of the

interview questions (the 14-question list and the others) before his nephew was interviewed cause a reasonable, fully informed member of the public to have doubts about the integrity of the appointment / hiring process? The answer to this question was actually stated by Mayor DeSalvo himself. Mayor DeSalvo admitted that a member of the public could perceive it to be a conflict of interest if, before James Fecanin was interviewed, the Mayor had already heard the actual questions that the other candidates had been asked. (DeSalvo Dep. 111: 21 through 113: 23 and 126:8 through 128:8). I **CONCLUDE** that, even though it has not been proven that the Mayor actually violated his oath by actually providing his nephew with the interview questions, the reasonable perception of a conflict of interest in the mind of a reasonable, fully informed member of the public was enough to taint the appointment / hiring process.

I **CONCLUDE** that Mayor DeSalvo's presence at and during the police officer interviews / selection process and his exposure to the questioning of police officer candidates created a conflict of interest, which indeed tainted the police officer selection process.

In fashioning an appropriate remedy, I **CONCLUDE** that it would be impractical, as well as unfair to the police officers who were hired, to invalidate the entire appointment / hiring process that took place in 2015. However, I **CONCLUDE** that it would be appropriate to reverse the removal of Wayne Kubs' name from the eligible list and thereby restore it to the list for consideration when the Borough of Rutherford next seeks to hire police officers.

ORDER

Based upon the foregoing and because the actions of Mayor Joseph DeSalvo, tainted the appointment / hiring process for the hiring of police officers in 2015, it is hereby **ORDERED** that the following remedies shall be put into place:

(1) the police officers hired in 2015 by the Borough of Rutherford shall remain in their positions;

(2) the removal of Wayne Kubs from the eligible list is hereby **REVERSED**;

(3) the name of Wayne Kubs shall be **RESTORED** to the list of eligibles and shall therefore be considered with the names of future candidates the next time the Borough of Rutherford seeks to hire police officers.

It is further **ORDERED** that the decision of the Civil Service Commission upholding the Respondent's decision to remove Petitioner's name from the list of candidates is hereby **REVERSED**.

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

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

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

March 23, 2018

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

Moving Papers and Pleadings

Joint Certification of Counsel (Joint Appendix)

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Wayne N. Miller, Sr., Mercer County, Department of Transportation and Infrastructure	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2018-862 OAL DKT. NO. CSV 15788-17	:	

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15788-17
AGENCY DKT. NO. 2018-862

IN THE MATTER OF WAYNE N. MILLER, SR., MERCER COUNTY DEPARTMENT OF TRANSPORTATION AND INFRASTRUCTURE.

Debbie Parks, Field Coordinator, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Kristina E. Chubenko, Assistant County Counsel, for respondent Mercer County (Paul R. Adezio, County Counsel)

Record Closed: April 24, 2018 Decided: April 24, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter involves the appeal of Wayne N. Miller, Sr. (Miller) of the decision of respondent Mercer County Department of Transportation and Infrastructure (the Department) to remove him from employment, effective August 15, 2017, on charges of (1) chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4); (2) conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); (3) other

sufficient cause, specifically violations of the Mercer County Table of Offenses and Penalties, pursuant to N.J.A.C. 4A:2-2.3(a)(12); and (4) resignation not in good standing, pursuant to N.J.A.C. 4A:2-6.2(b).

The Department notified Miller of the above charges by a Final Notice of Disciplinary Action dated September 5, 2017. Upon receipt of Miller's hearing request, the matter was transmitted on October 23, 2017, to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein. The settlement agreement provides Miller with a seven-day right of revocation following his execution of the agreement. Miller signed the settlement agreement on April 16, 2018. He did not submit notice of revocation by April 23, 2018; accordingly, the settlement agreement became effective and irrevocable on April 24, 2018, and the record closed.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 24, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 4/24/18

Date Mailed to Parties: 4/25/18

TMC/nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement and General Release, dated April 16, 2018

ARTHUR R. SYPEK, JR., MERCER COUNTY COUNSEL
BY: KRISTINA E. CHUBENKO, ASSISTANT COUNTY COUNSEL
McDADE ADMINISTRATION BUILDING, ROOM 201
640 SOUTH BROAD STREET
P.O. BOX 8068
TRENTON, NEW JERSEY 08650-0068
609-989-6511

RECEIVED
2018 APR 18 A 10:17
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF
WAYNE MILLER

SETTLEMENT AGREEMENT AND GENERAL RELEASE

Settled prior to Administrative Law Hearing

CSV 15788-17

This Settlement Agreement and General Release ("Agreement") is agreed to by the County of Mercer ("County") and Wayne Miller ("Employee") (collectively "parties") upon the following terms and conditions:

WHEREAS, Employee is employed as a Laborer in the County's Department of Transportation & Infrastructure/Highway Division; and

WHEREAS, Employee was on an approved medical leave of absence from September 19, 2016 through July 10, 2016; and

WHEREAS, Employee failed to return to work on July 11, 2016 and was not approved for an extension of his leave; and

WHEREAS, a Preliminary Notice of Disciplinary Action dated August 21, 2017 was issued to Employee; and

WHEREAS, a Final Notice of Disciplinary Action dated September 5, 2017 was issued removing Employee from his employment; and

WHEREAS, Employee filed a timely appeal of the FNDA with the Civil Service Commission bearing agency reference number 2018-862; and

WHEREAS, the matter was transferred to the Office of Administrative Law bearing docket number CSV 15788-17 for a de novo hearing; and

WHEREAS, the parties would like to resolve the matter amicably due to the uncertainties and cost of litigation; and

WHEREAS, Employee has agreed to resign, upon and subject to the terms and conditions contained herein, which shall be considered a general resignation; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein and further good and valuable consideration, the parties mutually agree as follows:

1. Employee understands and agrees that his employment with the County ended effective July 10, 2019 and will be recorded as a general resignation. Employee understands and agrees that the County is not obligated to employ him, and that he will not seek reemployment or reinstatement or accept reemployment with the County or any of its subdivisions, subsidiaries or affiliates, at any time in the future.

2. Employee agrees to withdraw with prejudice the appeal with pending at the Civil Service Commission bearing agency reference number 2018-862 and Office of Administrative Law Docket Number CSV 15788-17.

3. Employee agrees that the County accepting his resignation in lieu of seeking removal constitutes consideration for his waiver of claims contained in this Agreement. Employee will be given the opportunity to obtain medical coverage through the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. § 1166(a)(4) ("COBRA") for a period of up to eighteen (18) months starting from the date of his employment end date at Employee's own expense.

4. This Agreement is not, and shall not in any way be constructed, as an admission by the County and the Employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to or by employee, but instead constitutes the good faith settlement of a disputed claim and the parties specifically disclaim any liability to each other or to any other person. The parties have entered into this Agreement for the sole purpose of resolving the subject matter of this case and any related claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

5. Employee agrees that this Agreement shall operate as a complete and final disposition of this matter. As consideration for the County amending the charges in this matter and agreeing to these terms, Employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims relating to the subject matter of this agreement that he has now to any relief of any kind from the County, whether or not he now knows about those rights, arising out of his employment with County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII of the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act;

defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealings; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relation Act; New Jersey Family Leave Act, Older Workers Benefit Protection Act of 1990, 29 U.S.C. §621 et seq., and any other claims for unlawful employment practices with regard to this matter. It is emphasized that Employee is waiving all possible claims against the County with regard to this disciplinary matter.

6. Employee represents and certifies that he has carefully read and fully understands all of the provisions of and effects of this Agreement and further, certifies that he is voluntarily entering into this Agreement and that the County has not made any representations concerning the terms of effects of this Agreement other than those contained herein.

7. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under laws of the State of New Jersey. The language of all parts of this Agreement shall, in all cases, be constructed as a whole, according to its fair meaning and not strictly for or against any of the parties.

8. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining part(s)/term(s) or provision(s) shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

9. The foregoing constitutes a full and final disposition of this matter.

10. Employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

11. This Agreement may not be modified, altered or changed, except upon the prior express written consent of the parties.

12. This Agreement is the result of negotiations with Employee and Employee's attorney, with whom Employee had an opportunity to consult prior to signing same and is satisfied with the representation.

13. Employee specifically acknowledges that he understands that this Agreement is a legally binding document, and that by signing this Agreement he is prevented from filing, commencing or maintaining any action, complaint, charge, or other proceeding against the County, except as expressly permitted by the terms of this Agreement. Employee further agrees that any fact, evidence, event or transaction currently unknown to Employee but which hereafter may become known shall not affect in any way or manner the final and unconditional nature of this Agreement. Employee acknowledges that he understands that he has the right to consult with an attorney of his choice to review this Agreement and that he is encouraged by the County to do so. Employee further acknowledges that he understands that he has twenty-one (21) days to consider and accept this Agreement from the date it was first given to Employee, although ~~she~~ he may accept it at any time within those twenty-one (21) days. Employee further acknowledges that he understands that he has seven (7) days after signing the Agreement to revoke it by delivering to Kristina Chubenko, Assistant County Counsel, County of Mercer, McDade Administration Building, 640 S. Broad Street, Trenton, New Jersey 08650, written notification of such revocation within the seven (7) day period. If Employee does not revoke the Agreement, the Agreement will become effective and irrevocable on the eighth (8^{th}) day after he signs it (the "Effective Date").

If Employee elects to exercise his right of revocation, this Agreement and the promises contained in it, will automatically be deemed null and void.

14. This settlement fully and finally disposes of all issues in controversy. It is reached by way of compromise.

15. This Agreement shall neither set a precedent nor constitute a past practice.

16. This Agreement shall not be considered binding and/or final until approved by and executed by the County Administrator and/or his designee. Any subsequent disapproval by the Civil Service Commission shall cause all the terms and conditions of this agreement to be null

IN WITNESS WHEREOF, and intending to be legally bound hereby, I have hereunto set my hand. **WITH MY SIGNATURE HEREUNDER, I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT AND UNDERSTAND ALL OF ITS TERMS INCLUDING THE FULL AND FINAL RELEASE OF CLAIMS SET FORTH ABOVE. I FURTHER ACKNOWLEDGE THAT I HAVE VOLUNTARILY ENTERED INTO THIS AGREEMENT, THAT I HAVE NOT RELIED UPON ANY REPRESENTATION OR STATEMENT, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO HAVE THIS AGREEMENT REVIEWED BY MY ATTORNEY.**

Dated: 4/16/18

ANDREW MAIR,
MERCER COUNTY ADMINISTRATOR

Dated: 4-16-2018

WAYNE MILLER, EMPLOYEE

Dated: 4/16/18

DEBBIE PARKS, AFSCME NJ

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Deicles Moschen
City of Newark,
Department of Engineering

CSC DKT. NO. 2017-1034
OAL DKT. NO. CSV 13531-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13531-17

AGENCY DKT. NO. 2017-1034

IN THE MATTER OF DEICLES MOSCHEN, CITY OF NEWARK, DEPARTMENT OF ENGINEERING.

John D. Feeley, Esq., for appellant (Feeley & Larocca, LLC, attorneys)

France Casseus, Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: March 1, 2018 Decided: March 1, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 14, 2017, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a hearing on January 26, 2018, but the date was adjourned because the parties engaged in settlement discussions and agreed to settle the matter. The signed Settlement Agreement and General Release indicating the terms of settlement is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 1, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: 3-5-18

Date Mailed to Parties: MAR 5 2018
sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

2018 MAR -1 A 10:27

2018 FEB 29 A 10:25

DEICLES MOSCHEN, Appellant,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
v.	:	**OAL DOCKET NO.: CSV 13531-2017N**
CITY OF NEWARK, Respondent	:	

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (hereinafter, referred to as the "Agreement") is made and entered into by the City of Newark, its affiliates, subsidiaries, officials, officers, agents, employees, attorneys, successors, heirs, and assigns (hereinafter, referred to as the "City"), and Deicles Moschen, his agents, attorneys, successors, heirs and assigns, to resolve the disciplinary matter as it relates to the Final Notice of Disciplinary Action ("FNDA") dated July 18, 2016. Rather than continuing further with the appeal of Moschen's termination at the Office of Administrative Law on the charges of Inability to Perform Duties and other sufficient causes, as codified at N.J.A.C.4A:2-2.3(a)(3) and (a)(12); Moschen and the City have independently determined that it is in their best interest to resolve the dispute between them that are the subject of appeal at the Office of Administrative Law in the above matter;

NOW, THEREFORE, in consideration of the agreements contained herein, Mr. Moschen and the City agree as follows:

1. Deicles Moschen agrees he was employed with the City as an electrician. He sustained injuries while employed with the City on August 16, 2014.
2. On or about September 24, 2015, he was released from disability by his physician to return to work on a "light duty" basis.

3. The Parties agree the City of Newark does not have "light duty" available to provide to Mr. Moschen.

4. On December 11, 2015, Mr. Moschen filed for disability retirement application with the State of New Jersey, Public Employment Retirement Systems. Said application was granted on August 17, 2016, with an effective date of January 1, 2016.

5. In exchange for the terms and promises in this Agreement, the City agrees it will rescind the termination effective October 14, 2015.

6. The City will amend the FNDA to reflect Moschen retired.

7. Moschen agrees to waive any future employment with the City.

8. Moschen agrees not to seek any medical health payments/benefits from October 14,2015 to January 31, 2018.

9. The parties agree any medical health coverage obligations of the City to Moschen, pursuant to the Collective Bargain Agreement for disability retirement, shall commence on February 1, 2018.

10. The Parties agree this Agreement resolves all outstanding claims asserted by Mr. Moschen that arise from his employment with the City.

11. Moschen and/or his agents agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

12. Moschen and/or his agents each further agree that there is no consideration due Moschen, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

13. Except for the assessment of Moschen's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

14. Moschen and/or his agent further acknowledge that this Agreement further precludes either of them from bringing any type of legal or

contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

15. Moschen and/or his agent is bound by this Agreement. Anyone who succeeds to Moschen's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.

16. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

17. Moschen and/or his agent agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

18. This Agreement contains the sole and entire agreement between Moschen and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Moschen specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

19. Moschen agrees and acknowledges that he has been fully and fairly represented by his Union/Attorney in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

20. Moschen agrees and acknowledges that he has had full opportunity to review this Agreement with his counsel and/or union representation and he enters into same knowingly and voluntarily.

21. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

22. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further with a hearing at OAL.

a. By signing this Settlement Agreement, Moschen states that:

a) He has read it;

b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c) He accepts the terms;

d) His representative negotiated this Agreement with his knowledge and consent;

e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so; and

f) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this ~~Settlement Agreement~~ to be executed.

2/27/18
Date

BY: _____
City of Newark,

2-8-18
Date

BY: _____
~~Union~~ Attorney/Representative)

2-8-18
Date

_____
Deicles Moschen

Approved as to Form and Legality:

2/27/18
Date

_____
Law Department

CERTIFICATION

I, Deicles Moschen, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2-8-18
DATE

NAME

Angiulo, Nicholas

From: Casseus, France <casseusf@ci.newark.nj.us>
Sent: Tuesday, May 1, 2018 6:03 PM
To: Angiulo, Nicholas; jfeeley@jjslawoffice.com
Cc: Messina, JoAnn
Subject: Re: Deicles Moschen v City of Newark, Department of Engineering

Good evening Mr. Angiulo:

Please excuse the delay in response. Mr. Feeley and I have agreed the gap between the removal and resignation will be deemed an approved, unpaid leave of absence. Thank you for your patience on this matter.

France

From: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Sent: Wednesday, March 28, 2018 3:14:31 PM
To: Casseus, France; jfeeley@jjslawoffice.com
Cc: Messina, JoAnn
Subject: RE: Deicles Moschen v City of Newark, Department of Engineering

Mr. Feeley and Ms. Casseus:

While the email below from Ms. Casseus clarifies the date of removal, the issue of the gap in time described below remains. Please let me know your resolution to that issue as soon as possible.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Casseus, France [mailto:casseusf@ci.newark.nj.us]
Sent: Thursday, March 22, 2018 4:47 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; jfeeley@jjslawoffice.com
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: Re: Deicles Moschen v City of Newark, Department of Engineering

Good afternoon:

You are correct, the termination was effective October 1, 2015. I put the date the PNDA was issued in error.

France

From: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Sent: Thursday, March 22, 2018 3:18:49 PM
To: Casseus, France; jfeeley@jjslawoffice.com
Cc: Messina, JoAnn
Subject: RE: Deicles Moschen v City of Newark, Department of Engineering

Mr. Feeley and Ms. Casseus:

As further information, the settlement indicates a removal date of October 14, 2015, but the Final Notice of Disciplinary Action indicates a removal date of **October 1, 2015**. Please advise.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Thursday, March 22, 2018 3:16 PM
To: Casseus, France <casseusf@ci.newark.nj.us>; 'jfeeley@jjslawoffice.com' <jfeeley@jjslawoffice.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: Deicles Moschen v City of Newark, Department of Engineering
Importance: High

Mr. Feeley and Ms. Casseus:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Deicles Moschen from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates, *inter alia*, that Mr. Moschen in exchange for a rescission of his removal effective October 14, 2015, will retire effective January 1, 2016. However, the settlement does not account for the time from the effective date of his removal to the effective date of his retirement. In that regard, we need to know how that time should be reflected in his official personnel record. Should it be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An email reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

5-22-18

A-6

STATE OF NEW JERSEY

In the Matter of Dallas Newman Bayside State Prison, Department of Corrections CSC DKT. NOS. 2017-528 & 2017-529 OAL DKT. NO. CSR 13010-16 (Consolidated)	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: MAY 25, 2018 BW

The appeals of Dallas Newman, Senior Correction Officer, Bayside State Prison, Department of Corrections, two removals effective August 5, 2016, on charges, were heard by Administrative Law Judge Dorothy Incarvito-Garrabrant, who rendered her initial decision on April 18, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 23, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Dallas Newman.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 13010-2016
AGENCY DKT. NO. N/A

IN THE MATTER OF DALLAS NEWMAN,
BAYSIDE STATE PRISON,
DEPARTMENT OF CORRECTIONS.

William Blaney, Esq. for appellant Dallas Newman (Blaney & Karavan, attorneys)

Emily M. Bisnauth, Deputy Attorney General, for respondent, Bayside State Prison (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: January 8, 2018 Decided: April 18, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Appellant, Dallas Newman, a Senior Corrections Officer at the Ancora Satellite facility of Bayside State Prison, (BSP),[1] Department of Corrections, (respondent or DOC), appeals from the determination of respondent that he be terminated, pursuant to a first Final Notice of Disciplinary Action (FNDA), dated August 5, 2016, for violations of N.J.S.A 52:13D-23 Uniform Ethics Code; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11) conduct

[1] Ancora is a minimal security unit facility, which is a satellite unit of BSP located on the grounds of Ancora Psychiatric Hospital in Camden County.

unbecoming an employee; E(1) violation of a rule, regulation, policy, procedure order or administrative decision; and E(2) intentional use or misuse of authority or position, (R-4); and the determination of respondent that he be terminated pursuant to a second FNDA dated August 5, 2016, for violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(8) falsification: intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding; C(11), conduct unbecoming an employee; D(4) improper or unauthorized contact with inmate-undue familiarity with inmates, parolees, their families or friends; D(6a) loss or careless control of keys, pager/beepers or cellular phones; D(6b) loss or careless control of radios, mace, or handcuffs; E(1) violation of rule, regulation, policy, procedure, order or administrative decision. (R-2.)

The appellant denies the allegations that he falsified information or lied during an investigation, that he was unduly familiar with an inmate, a parolee, their family, or friends, that he took inmates outside of the facility for them to repair his personal vehicles or property, or that he carelessly lost control of his radio and keys during a shift change. Appellant further contends that the charges brought against him were not timely filed. He also contends that he was labeled as a "bad employee" after a workplace injury led to an opioid addiction, from which he recovered after treatment. As a result, he maintains he was targeted for termination with these false and unsubstantiated allegations.

PROCEDURAL HISTORY

On May 13, 2016, respondent issued a first Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against appellant. (R-3.) On July 12, 2016, respondent issued a second PNDA setting forth the charges and specifications against appellant. (R-1.) Following a departmental hearing on July 15, 2016, the respondent issued Final Notices of Disciplinary Action on August 5, 2016, sustaining the charges brought in both preliminary notices and terminating appellant from employment. (R-2 and R-4.) Appellant filed a timely notice of appeal. The matter was

transmitted to the Office of Administrative Law on August 26, 2016, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

On February 7, 2017, the Honorable Dean J. Buono, A.L.J. denied appellant's evidentiary motion to suppress appellant's cellular telephone records obtained pursuant to a valid Camden County Communication Data Warrant (CDW).

The hearing in this matter was held on June 21, August 29, and October 19, 2017. The parties filed post-hearing briefs and the record closed on January 8, 2018.[2]

FACTUAL DISCUSSION

Testimony

For Respondent

Edward Soltys (Soltys) is a Principal Investigator in the Special Investigations Division (SID) for DOC. He has been employed by DOC for twenty years and became a Principal Investigator in 2015. Soltys participated in the interviews conducted in this matter with Principal Investigator Stephen Manera. He also contacted Verizon to obtain a "key" from Verizon. The key explained what type of data was included within the columns on the telephone records produced pursuant to the valid CDW.[3]

Stephen Manera (Manera) is a now retired Principal Investigator for DOC's SID. He was employed by DOC for approximately twenty years. During his employment as an investigator, his job duties included conducting investigations, interviewing witnesses, reviewing documents and evidence, and writing reports. Initially, Manera was assigned to investigate the appellant relative to criminal allegations. However, the investigation became administrative after the Camden County Prosecutor's Office issued a declination to prosecute letter on March 28, 2016. Thereafter, the matter was remanded to SID, which was tasked with continuing their investigation for further investigation and action. Manera issued a supplemental report dated April 7, 2016. (R-25.).

[2] An extension of time until April 18, 2018, was granted for the filing of this initial Decision.
[3] The key was obtained after the local hearing.

As part of the criminal investigation of appellant, and another BSP senior corrections officer, Manera reviewed appellant's personnel file, and also applied for and received the CDW, which allowed for disclosure of appellant's cellular phone records. (R-36-R-38.)[4] Manera explained that the cellular records included the person receiving the call, the date, duration of the call, and whether the call was incoming or outgoing. (R-40.)

While conducting the investigation, Manera received information relative to an alleged relationship between appellant and L.M., the father of inmate D.M., who had been incarcerated at Ancora and worked on a maintenance detail assigned to appellant. Manera interviewed L.M. and recorded the interview.

During that interview, L.M. stated that he knew appellant through his son, D.M., who had been incarcerated in the Ancora facility of BSP. L.M. provided his cell phone number, ending in X423, to Manera and stated that he spoke to appellant on the phone. Also, L.M. showed Manera that he had saved appellant's phone number, ending in X609, in his phone under appellant's first name, "Dallas." L.M. stated that he provided appellant with baked ziti to take to his son, D.M., while he was incarcerated in Ancora. Appellant had delivered this food to D.M. D.M. had told L.M. that he and appellant were good friends, and that after his release D.M. and appellant were going to get in shape together.[5]

Manera confirmed numerous cellular communications between appellant and L.M., during and after the time D.M. was incarcerated at BSP. (R-40.) There were thirty communications, which were recorded in the telephone records between September 15, 2013 and September 1, 2014, produced pursuant to the CDW.[6] Manera stated there were approximately sixty communications. D.M. was released from BSP to a half-way house.[7] However, Manera did not know when D.M. was released or the duration of

[4] The other Senior Corrections Officer was criminally charged.
[5] L.M.'s statements were recorded on a CD. (R-45.)
[6] The cellular records were admitted into evidence as R-40. They detail appellant's cellular communications during the period from September 15, 2013 and September 1, 2014. There are thirty cellular communications between appellant and L.M. during that period. It is noted that the records for the period between March 1, 2013 and September 15, 2013, which were produced pursuant to the CDW, were not submitted in this proceeding.
[7] D.M. was still under the custody and control of DOC while he was in this half-way house.

D.M.'s sentence at the half-way house. Thereafter, D.M. became deceased in October 2013.

Additionally, during the criminal investigation, Manera was also provided with information that appellant parked his truck with attached fifth wheel camper at BSP and took an inmate, J.L., outside of the facility to repair it on July 16, 2014. A group of inmates were assigned to the H07 work detail, the function of which was to complete maintenance tasks inside and outside of the BSP facility. They were permitted to leave the facility to complete the tasks and returned back via DOC transport to Ancora each time to remain in custody. Manera interviewed members of the H07 detail and testified that several indicated that appellant and an inmate were seen near the camper, outside the facility's perimeter on July 16, 2014. (R-24.) One inmate on the work detail saw J.L. with appellant outside the perimeter of the facility.

As a result, J.L was interviewed by Manera and SID investigators on July 24, 2014. (R-46.)[8] Manera testified that he made no promises or threats to J.L. to entice his statement. During the interview, J.L. stated that he was an inmate at Ancora and that he worked on appellant's truck and camper outside the facility's perimeter on three separate occasions. J.L. did not indicate the dates of the first two repairs. He made mistakes during his statement about the date on which he completed the third repair. In a prehearing conference with investigators, J.L. had provided a different date than in his taped interview. He corrected the date in the interview.

J.L. completed the truck and camper repairs, including repairs to the hot water system, the vehicle suspension, and the motor which lifts the camper off the towing truck's bed, with tools brought from within Ancora. During the interview J.L. stated that relative to the third repair, he and appellant did not exit through the metal detector. Instead, they left through an area in the gate shed, where the table had been pulled away from the

[8] J.L.'s statements were recorded on a DVD. (R-46.) After the interview, J.L. was transferred to a different facility for his safety; however, it is unknown whether the transfer resulted from his interview. J.L. was not produced by the respondent to testify. Respondent stated that J.L. might not have been in its custody at the time of this proceeding, and therefore, could not be produced to testify. Respondent stated that it did not subpoena J.L. to testify in this hearing.

metal detector by appellant. While completing the third repair, the H07 details van returned to the facility. J.L. stated that appellant told him to go back inside.

Additionally, in his statement, J.L. provided the make and color of appellant's truck and other personal information about appellant, including his wife's and children's names, his residence, and the family's hobbies. J.L. stated that appellant would bring chicken into the facility for him to cook, and that he learned appellant's personal information because he hung out with appellant in the general assignment office to which appellant was assigned. He also crafted personal items for the appellant and his family.

Manera testified that he corroborated J.L.'s statements with records in appellant's personnel file and was not concerned that J.L. confused the dates for the repairs, since inmates are not permitted to have watches. Manera stated that J.L. had a pre-interview conference with J.L., during which he was given information about the questions he was going to be asked.

Manera also interviewed Officer Gressel, who was responsible for counting the inmates at the end of a shift on the night of July 16, 2014. Although he counted J.L. as being in the facility, he could not definitely state where J.L. actually was, because some inmates are permitted to be off of the unit. They are finishing up their duties like locking up the maintenance shop. No officer ever saw J.L. outside of the facility's secured perimeter. (R-24.)

Finally, during his investigation, Manera reviewed surveillance photographs from the gate shed entrance/exit from the Ancora facility on July 16, 2014. One photograph showed appellant passing through a metal detector to leave after his shift. A subsequent photograph showed appellant's keys and radio sitting on a table next to the metal detector. (R-28D & R-28E.) Manera interviewed Officer Luis Benvenuti (Benvenuti), who was the officer to whom appellant was to transfer his radio and keys on July 16, 2014. Benvenuti reported that appellant had already departed without handing off his keys and radio. Appellant had left those on the table.

On March 28, 2016, a declination to prosecute letter was issued by the Camden County Prosecutor's Office relative to appellant. The investigation of appellant changed from a criminal to an administrative SID investigation. Manera was tasked with continuing the investigation. On April 6, 2016, Manera and Soltys interviewed appellant, who was accompanied by his union representative Gerald Gribble. The interview was recorded. (R-44.) During the interview, appellant was questioned about all of the above referenced facts and circumstances. He was advised that his recorded interview statement would serve as his official statement and that by not telling the truth he would be falsifying his report.

Appellant stated that his truck and camper were parked at BSP on July 16, 2014, because the lift motor, which allowed the camper to be removed from the truck, malfunctioned, upon his return from a vacation the previous day. He did not have the part to fix it. Until it was fixed, the camper could not be removed from the truck.

Appellant stated that he knew J.L. and that J.L. had worked for him on his work/maintenance detail. J.L. was a leader on that detail and had access to tools. Appellant denied ever taking J.L. out of the perimeter gate to work on his camper. Appellant indicated that he was not friendly with J.L. and that J.L. could have learned personal information about him in various ways, including overhearing discussions between officers or on the internet.

In relation to L.M., appellant was provided a phone number and asked if he had ever received calls from D.M.'s family. Appellant denied the phone calls. When investigators presented the phone records, appellant then offered that, "there was a guy. An older man from Mays Landing that had an old truck at our facility when he was visiting. I gave this guy a jump. He worked at Home Depot." Appellant stated that he gave L.M. a jump at 2:00 p.m. and that this was the time for visits with inmates. Appellant stated "yeah" in response to the investigator's question "you have a guy parked at the Ancora parking lot; you know he was there for a visit?"

Appellant indicated that L.M. had two sons who had been incarcerated. Appellant denied knowing them. However, subsequently, appellant stated that one son was an

inmate at Ancora, but he did not know who that inmate was and did not know that inmate's last name. Thereafter, appellant stated that D.M. worked in the kitchen at Ancora.

Appellant later stated that he met L.M. again at Home Depot, at which time he and L.M. recognized each other. L.M. helped him out with some electrical questions and issues. Appellant explained that L.M. was a union electrical worker. Appellant was doing construction at his home and needed help. The appellant gave L.M. his phone number. Appellant got electrical advice from L.M. by phone on numerous occasions. In response to questioning, appellant stated that he could have had over sixty calls with L.M. Appellant stated, that "electrical is no joke, it could burn your house down."

During the continued questioning, investigators asked appellant about L.M.'s son. Appellant stated that he did not know what happened to him. Appellant denied bringing any food into Ancora for L.M.'s son. Appellant never reported his out-of-work contacts with L.M. to BSP and indicated that he never thought he should.

Subsequently during the interview, investigators asked appellant if D.M. ever came up in conversations with L.M. The appellant rephrased the question and inquired, "what that his son's (sic) locked up?" Investigator Soltys responded in the affirmative, and asked if L.M. asked "how's my son doing? Stuff like that." Appellant stated "yeah, it could have, definitely." In response to questions about the context in which L.M. spoke to appellant about D.M., appellant stated that it was "small talk about his son" and that L.M. asked him "maybe you seen (sic) him in there. How's he doing?" Subsequent to D.M.'s release from Ancora and a halfway house, L.M. called appellant for help, when D.M. took L.M.'s truck, and could not be found. On October 4, 2013, L.M. also called appellant to tell him D.M. had died. The calls between appellant and L.M. continued after D.M.'s death.

During the interview, investigators questioned appellant about the hand-off of his keys and radio on July 16, 2014. Appellant stated it was his practice to leave the items and his cuffs on the table at the exit near the metal detector, if he did not personally hand them over to the next officer. He stated that he had already walked out on the day in question and confirmed that he would head over to the gate to leave the facility after his shift, when last count was done in the unit.

Manera testified that he did not know appellant outside of work. He stated that he had no stake in the outcome of this hearing.

Albert Ferrari (Ferrari), Lieutenant, testified that he has been employed by the DOC for twenty-three years. Twenty-two of those years he has served at BSP where he was the Administrative Lieutenant. His duties included being responsible for overseeing the policy, procedures, rules and regulations, and discipline at NJSP. Two codifications of the rules, regulations and procedures, the Handbook of Information and Rules for Employees of the New Jersey DOC and Law Enforcement Personnel Rules and Regulations primarily govern the actions of law enforcement officers.

Ferrari explained pertinent portions of the Handbook of Information and Rules for Employees of the New Jersey DOC. (R-7.) Officers cannot engage in unduly familiar relationships with inmates or their family members because it can corrupt the officer and lead to possibilities for corruption, which place the officer, inmates, civilians and the public in danger. The Handbook provides in the General Principles, Subsection C that employees are prevented from "becoming unduly familiar with any inmate or group of inmates or permit[ting] himself to become obligated in any way to an inmate or his family; a parolee or his family." General Rules and Regulations, subsection K provides that "employees must not give or receive from any inmate or parolee or any inmate or parolee's friend, relative, or representative anything in the nature of a gift or promise or favor, however trivial." Appellant received training on undue familiarity and acknowledged receipt of the handbook, rules and regulations, and ethics code. (R-7 – R-15.)

Pursuant to the Law Enforcement Personnel Rules and Regulations, Article III, Section 4, "no officer shall become unduly familiar with inmates who are incarcerated, on community release, or on parole status, within one year of the completion or vacating of all court imposed sentences or while the former inmate is under any form of criminal justice jurisdiction. An officer shall report all prior relationships with inmates or parolees in writing to the Administrator or his designee." (R-8.) The one-year time period begins when the inmate is released from DOC's custody and control. Ferrari explained that the

Handbook and the Personnel Rules and Regulations must be read together. Therefore, the one-year prohibition period includes the former inmates' family and friends.

Pursuant to Article III, Section 3, the ethical standard for law enforcement officers is that, "no officer shall act or behave either in an official or private capacity, to the officer's discredit, or to the discredit of the Department. Officers are public servants twenty-four hours a day and will be held to the law enforcement higher standard both on and off duty."

Unduly familiar relationships violate the public trust, by compromising the officer and place the officers, facility, inmates, and community at risk. Ferrari testified that it is inappropriate for an inmate at BSP to work on the personal vehicles of officers.

BSP Level III, Internal Management Procedure, (IMO), 400 applies to facilities within the BSP complex. (R-6.) Subsection 17 required that, "as the officer being relieved it is your responsibility to pass on all necessary equipment, keys, and information to the oncoming officer." Appellant violated this requirement by leaving a radio and keys on a table. That action was insufficient to satisfy the pass on requirement. Once appellant left his radio and keys on the table, he lost control over them or carelessly controlled them.

Ferrari indicated that providing false information causes safety issues.

Ferrari discussed the ranges of penalties for the offenses appellant was charged with in this matter. He explained that the charges are identified in HRB 84-17, and that the level of punishment depends on the totality of the circumstances and egregious nature of the actions.

Ferrari testified that he had no bias against appellant. He stated that he had no stake in the outcome of this hearing.

For Appellant

Dallas Newman, appellant, a Senior Corrections officer, testified that he began working for the DOC in 2001. Appellant suffered a workplace injury in 2011, for which he was prescribed oxycodone, to which he subsequently became addicted. As a result, he sought help from his union and completed an inpatient rehabilitation program. Appellant explained that prior to the treatment he had no disciplinary issues. This changed after he sought help and treatment. Appellant testified that he had had difficulties with Ferrari relative to inmate assignments and overtime.

Appellant denied taking J.L. outside the secured perimeter to work on his truck or camper, and that he ever had J.L. produce any personal items for him or his family. Appellant stated that inmates often pick up personal information about officers by listening to discussions between the officers or through the internet. He also indicated that inmates get personal information about officers from other inmates.

Relative to L.M, appellant first came in contact with him in the Ancora parking lot when he helped L.M. by jump starting his vehicle. He did not know L.M. or why he was there. Other civilians utilized the lot.

D.M. worked in the kitchen at BSP and not on appellant's detail. Appellant denied bringing baked ziti from L.M. into BSP to D.M.

Appellant next met L.M. at a Home Depot approximately four to five months after meeting him in the Ancora parking lot. Although at that time appellant could not remember where he had met L.M. previously, he eventually recognized where they first met. L.M. provided appellant with help with an electrical project appellant was doing at his house. After several encounters at Home Depot, appellant and L.M. exchanged telephone numbers. L.M. provided advice about the electrical installation by telephone. L.M. helped appellant hook up a breaker panel, electrical box, and drop ceiling lights at his home.

Thereafter, appellant became aware that L.M.'s son was a former inmate. In October 2013, L.M. called appellant and told him D.M. was missing. Appellant believed that maybe L.M. thought he could assist in investigating missing people or cars. L.M. then also called appellant to tell him D.M. had become deceased. L.M. and appellant continued to communicate after D.M.'s death about appellant's electrical project.

Appellant maintained that he was never told he was prohibited from having contact with the family of a former inmate for one year after the inmate left custody.

Relative to his radio and keys, appellant stated that he generally handed off his radio and keys to the incoming officer in the gate shed where the metal detector is located. He did not remember leaving his radio or keys unattended. Standard procedure was to place the items on the table for the next officer. On the date in question, Benvenuti replaced him. Appellant's keys and radio never went missing.

Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . .

. [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

The testimony presented by Soltys and Manera about their investigatory actions, observations of appellant's behavior and statements, and the facts as detailed in Manera's special report were consistent. Collectively, their testimony of the events of the incident and the information they gathered during their investigation made sense and hung together to describe what occurred. It was undisputed that appellant and L.M. engaged in several meetings and numerous, at least thirty, telephone communications during D.M.'s incarceration, his half-way house sentence, and after D.M.'s release and death.

Manera and Ferrari expressed no pre-existing issues with or animosity toward appellant, which made their testimony believable. Although appellant alleged he was labeled a "bad officer" and targeted for discipline after he received treatment for his prescription drug addiction, he failed to produce any competent evidence to support his position. Appellant's allegation alone was insufficient to mar the credibility of Manera and Ferrari.

It further failed to demonstrate that appellant's renditions of the facts were believable. Appellant's statements were inconsistent and contradictory. In this regard, appellant's rendition of the facts surrounding his relationship with L.M. and D.M developed from a denial about knowing L.M. and D.M., until appellant was confronted with evidence to the contrary; to an admission of having met L.M. in the Ancora parking lot while he was there to visit D.M.; to an admission of numerous telephone communications with L.M. beginning while D.M. was incarcerated at BSP; to discussions about how D.M. was fairing

in BSP; to an admission that L.M. materially helped appellant complete electrical construction at his home.

Further, appellant's testimony in this proceeding then contradicted his interview statements, despite stating under oath that both were true. In this regard, appellant denied knowing L.M. and D.M. He knew that L.M. was visiting an inmate, when he met him in the Ancora lot because it was visiting time. He and L.M. had conversations about how D.M. was fairing in BSP. L.M. believed his son's statements that appellant and D.M. were friends and were going to work out together after he was released. However, appellant testified that L.M. provided significant help with his electrical construction, that he did not know why L.M. was in the Ancora parking lot because other members of the public used it, and that D.M. had been already been released when he was communicating with L.M.

In sum, Appellant's statements could not be reconciled to make them consistent or justify his conduct. The other witnesses' renditions of the disputed facts have a greater "ring of truth," than the scenarios offered by appellant, who plainly had a greater interest in the outcome of this proceeding.

I accept Manera's testimony about his investigation, the interviews he conducted and conclusions insofar as it relates to appellant's relationships and conduct with L.M and D.M. and the hand-off of appellant's radio and keys, and other attendant facts. The information regarding L.M and D.M. was supported in the CDW phone records and appellant's own admissions.

Additionally, during his interview, appellant's responses to some questions were articulated clearly and with a strong voice. However, when responding to questions, which related to the crux of the allegations of violative conduct, his relationship with D.M., or L.M., or allegations of lying during the interview, appellant's voice became significantly lower in volume and his responses were mumbled, inarticulate or delayed. He also responded with questions which rephrased the initial inquiry and never quite answered the question that was asked. In nearly every instance, appellant delivered each answer by first hanging his head. Similarly, appellant exhibited the same behavior during his

testimony in this proceeding, especially on cross-examination when he was questioned about telling the truth. This affect undermined his credibility.

Appellant's behavior, and his inconsistent statements and testimony lacked credibility. The discrepancies in appellant's testimony and changing renditions of the facts made appellant's testimony unbelievable.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to also be relevant and credible **FACTS** in this matter:

Appellant was assigned to BSP as a Senior Corrections Officer. He had been employed in that capacity since 2001. In 2011, appellant suffered a workplace injury to his shoulder. He was prescribed oxycodone and became addicted to the prescribed medication. Appellant received help from his union and underwent rehabilitation treatment at an inpatient facility.

In or about 2014, appellant was the subject of a criminal investigation. During the criminal investigation, information was provided alleging that on July 16, 2014, appellant had taken an inmate, J.L., outside of the secured perimeter of the Ancora BSP facility to repair his truck and camper. They further advised that appellant had J.L. produce personal items for his family, and that appellant inappropriately shared personal information with J.L.

SID investigated these allegations. BSP had a H07 work detail which was comprised of inmates, who completed maintenance projects inside and outside of BSP. The detail returned to BSP's custody each night, when they were assigned to a project outside BSP. Manera interviewed the inmates assigned to the work detail to determine if they had seen J.L. outside the perimeter with appellant, when their van returned on July

16, 2014. Manera also interviewed six Ancora officers to determine whether they knew about appellant taking J.L. outside the perimeter fence.

Manera conducted a pre-interview conference with J.L. to review the information and questions, which would be included within his interview. During the conference, J.L. provided inaccurate information relative to the dates of the alleged repairs to appellant's vehicles. J.L. was then interviewed to corroborate some of the information and allegations, which had been provided to Manera. During the interview, J.L. corrected the dates he had previously provided.

Manera retrieved appellant's marriage certificate and children's birth certificates from appellant's personnel file. He obtained pictures of appellant's house, vehicle, and camper.

Respondent did not subpoena or produce J.L., the members of the H07 work detail, or the six Ancora officers to testify in this proceeding. No evidence was produced to support J.L.'s or the other witnesses' statements. Respondent failed to locate and subpoena J.L. or the H07 witnesses, who might not have been in DOC custody at the time of this proceeding, to testify. Respondent failed to subpoena or produce the Ancora officers to testify. Appellant did not have the opportunity to cross-examine these witnesses.

On July 16, 2014, appellant was photographed at 21:30 hours as he left the facility after inmate count through the BSP gate shed. Appellant failed to properly hand-off his radio and keys to the officer replacing him on the next shift as required, when he left them unattended on the table next to the metal detector. At 21:40 hours, appellant's radio and keys were still unattended on a table.

Officer Benvenuti replaced appellant on the next shift at 21:42 hours, at which time he retrieved the equipment from the table. Appellant abandoned his radio and keys for twelve minutes, and departed before Benvenuti arrived for the shift change and the required hand-off of equipment. This was appellant's ordinary practice and conduct.

A CDW issued out of Camden County during the criminal investigation for the disclosure of appellant's cellular phone records for the period between March 1, 2013 and September 1, 2014, showed numerous cellular communication between L.M. and D.M. Between September 15, 2013 and September 1, 2014, thirty calls were exchanged between appellant, whose cell phone number ended in X609, and L.M., whose cell phone number ended in X423. Appellant and L.M. had additional communications.

Appellant and L.M. exchanged telephone numbers and had numerous telephone communications and appellant's personal cell phone number was stored in L.M.'s phone under appellant's first name, "Dallas."

On March 28, 2016, a declination to prosecute letter was issued by the Camden County Prosecutor's Office. As a result of that correspondence, appellant's matter was remanded to SID for an administrative investigation.

Appellant was formally interviewed by SID investigators on April 6, 2016, with his union representative present. Appellant was informed and knew that his statements would constitute a formal report and that lying during the questioning would constitute falsifying his report. Appellant's interview statements were inconsistent and contradictory about his knowledge of the events and circumstances, and his contact D.M. and L.M.

In this regard, initially, appellant denied knowing D.M. or L.M. When confronted with the telephone records, appellant only then recalled meeting L.M. in the Ancora parking lot at 2:00 p.m. and giving him a jump start. Appellant stated that he knew L.M. was at Ancora to visit an inmate, because 2:00 p.m. was visiting time.

Despite having denied knowing L.M., appellant and L.M. engaged in at least thirty cellular communications. Appellant met L.M. in Home Depot where L.M. worked multiple times. L.M. provided appellant with the benefit of his experience as a union electrician, and helped appellant install electrical service and fixtures in his home and complete his home improvement project. Appellant received significant benefit from L.M.'s help.

Appellant stated that D.M. worked in the BSP kitchen. However, D.M. was actually assigned to appellant's work detail. Moreover, during their communications and meetings, appellant and L.M. discussed L.M.'s sons who were incarcerated. Appellant and L.M. engaged in "small talk about his son." L.M. asked him, "maybe you seen (sic) him in there. How's he doing?" L.M. and appellant conversed about how D.M. was fairing in Ancora. L.M. provided appellant with a baked ziti, which he took into Ancora for D.M. L.M. believed his son that appellant and D.M. were friends, while D.M. was an inmate in Ancora and afterwards, and that appellant and D.M. were going to work out and get in shape after D.M. was released. Appellant's relationship with L.M. and D.M. began while D.M. was incarcerated at BSP.

D.M. was ultimately released to a DOC half-way house to complete his sentence. Although the date of D.M.'s release to the half-way house is unknown, appellant continued to engage in communication and contact with L.M. during that time. Appellant and L.M. continued their relationship and appellant continued to receive help from L.M. relative to his home improvement project, after D.M. was released from DOC custody. In October 2013, L.M. contacted appellant, because D.M. had gone missing with L.M.'s car. Shortly thereafter, L.M. contacted appellant and told him D.M. had died. Appellant and L.M. continued to communicate after D.M.'s death.

Appellant's relationships with D.M. and L.M. began while D.M. was incarcerated at BSP. Appellant's relationship with L.M. continued after D.M.'s death. Appellant never reported his relationships with L.M or D.M. to his Administrator or employer. These were unduly familiar relationships. Such behavior was unbecoming a corrections officer and violated the public trust.

SID issued a supplemental report, dated April 7, 2016, which recommended actions including continuing the investigation of appellant to allow DOC to review the investigatory information including the video recording of appellant's interview.

Appellant was trained regarding the requirements provided in the Handbook, and Rules and Regulations, and about familiar and consensual relationships and ethics. Appellant acknowledged receipt of these materials and training.

The first PNDA issued on May 13, 2016, related to the allegations surrounding J.L. For these charges a FNDA was issued on August 5, 2016. The second PNDA issued on July 12, 2016, and related to the allegations regarding L.M. and D.M. For these charges a FNDA was issued on August 5, 2016.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of

authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

J.L.

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)93); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52: 14B-10(a); and N.J.A.C. 1:1-15(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable, (N.J.R.E. 802), unless it falls within an exception set forth in N.J.R.E. 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it. Id. at 51.

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

I accept Manera's testimony about his investigation and interview of J.L. However, J.L.'s demeanor during his interview and rendition of the events lacked a ring of truth that undermined his credibility. J.L. was given a pre-interview conference during which he was provided with the questions to be asked and information about the events about which he was to be questioned. J.L.'s interview statements revealed that he had incorrectly identified the repair date in the pre-interview conference and had to correct himself in the taped interview.

Additionally, appellant's marriage certificate, children's birth certificates, pictures of his residence, or make and color of his vehicle, which were obtained by Manera or retrieved from appellant's personnel file, did not constitute a residuum of competent evidence to support J.L.'s statements. If J.L. knew this information, it could have been overheard from conversations between corrections officers, gathered from documents J.L. or others obtained from the internet and public documents, or obtained in other ways. The nexus between those records, and the substance of J.L.'s statements including his alleged relationship with appellant, as presented in this proceeding, was too tenuous to deem his statements credible and reliable. The personal documents retrieved from appellant's personnel file did not support the position that appellant gave that information to J.L., that appellant took J.L. outside the facility's secured perimeter, or that J.L. worked on appellant's vehicles. This rendered the substance of his statements and information unsubstantiated.

No residuum of competent evidence existed to give credibility to or support J.L.'s hearsay statements. No photographs of appellant taking J.L. outside of the secured

perimeter gate to the parking lot were introduced. No document was produced supporting J.L.'s allegations. No corroborating witness was produced to testify. I **CONCLUDE** that J.L.'s statements were hearsay.

Therefore, I exclude Manera's testimony about the facts he gathered and conclusions he made, which related to J.L. and the attendant circumstances. I reject the credibility and reliability of J.L.'s statements and the information provided by him in his interview. As it specifically and only relates to facts and circumstances alleged to involve J.L., I **CONCLUDE** that the investigation's findings and conclusions, and J.L.'s statements were hearsay and not supported by a residuum of competent evidence.

Furthermore, N.J.R.E. 804 provides in pertinent part as follows:

> (a) Definition of unavailable. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:
>
> ***
>
> (4) is absent from the hearing because of physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial...

In civil cases, where the use of out of court statements does not trigger the Sixth Amendment's Confrontation Clause protections, determining whether a party used "reasonable means" to locate a declarant is a decidedly fact sensitive inquiry, which is generally left to the trial court's sound discretion. Rodriguez v. Hayman, 2013 WL 1222644, 2 (2013). The Rodriguez court found that the touchstones of "reasonable means" under N.J.R.E. 804(a)(5) are variation and repetition, which require various methods for finding the witness, and then, employing some or all of those methods recurrently. Ibid. While the circumstances will vary with each case, a party seeking to show that a declarant is unavailable under Rule 804(a)(5) should generally demonstrate two things. First, that it fashioned a multifaceted approach to locate the declarant.

Second, that it implemented each of these methods more than once, unless it was clear at the time that repetition of any one method would have proven futile. Ibid.

Despite the fact that Manera spoke with the H07 detail and a confidential informant who stated that appellant took J.L. out of the facility to work on his personal vehicle, no such witness testified in this proceeding.[9] The recordation of those statements in Manera's report alone did not constitute a residuum of competent evidence sufficient to warrant the hearsay being admitted, and was insufficient to substantiate the charges stemming from those allegations.

Respondent failed to demonstrate that J.L., or any other member of the H07 team, was an unavailable witness. Whether J.L. was still in DOC custody, such that his production could have been compelled, is not the issue, as suggested by respondent. If J.L. was no longer in DOC custody, then he could have been located and subpoenaed to testify. Respondent advised that J.L. was not subpoenaed. Respondent failed to produce any information about whether it attempted by any means to locate or produce J.L. to testify in this proceeding. These attempts, if any, were unreasonable. No fact or evidence was produced which demonstrated J.L.'s unavailability. Therefore, I do **NOT FIND** that J.L. was unavailable to testify. Since no residuum of competent evidence was produced to substantiate J.L.'s statements and appellant was denied the opportunity to cross-examine the witness, J.L.'s statements are excluded.

Similarly, I do **NOT FIND** that any of the H07 members or officers related to the J.L. facts and events or identified in Manera's report, (see footnote 9 herein), were unavailable to testify. Again, respondent failed to utilize reasonable means to locate and attempt to produce each of them to testify in this proceeding. Their statements recorded in Manera's report are hearsay that lack any residuum of competent evidence to support them. Accordingly, their statements are also excluded.

[9] Manera also interviewed six Ancora Officers relative to the J.L. allegations. "All gave statements that they had no knowledge of SCO Newman bringing inmate [J.L.] outside the secure perimeter to work on his camper." (R-24.)

Based on the foregoing, respondent failed to satisfy its burden to substantiate the charges brought against appellant based on the information related to J.L. Therefore, I **CONCLUDE** that the respondent has failed to present competent evidence to satisfy its burden and substantiate the charges provided for in the first FNDA. I **CONCLUDE** that the charges brought in the FDNA dated August 5, 2016, for violations of N.J.S.A 52:13D-23 Uniform Ethics Code; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(11), conduct unbecoming an employee; E(1) Violation of a rule, regulation, policy, procedure order or administrative decision; and E(2) intentional use or misuse of authority or position are **DISMISSED.**

45-day Rule

Appellant argued in his summation that the charges must be dismissed under the auspices of the 45-day rule because respondent failed to bring the disciplinary charges within the time constraints set forth under N.J.S.A. 30:4-3.11a.

N.J.S.A. 30:4-3.11a provides as follows:

> A person shall not be removed from employment or a position as a State corrections officer, or suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of employees of the Department of Corrections, unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint. The 45-day time limit shall not apply if an investigation of a State corrections officer for a violation of the internal rules and regulations of the Department of Corrections is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State; the 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement in this section for the filing of a complaint against a State corrections officer shall not apply to a filing of a complaint by a private individual.

In the first instance, appellant alleged that the Camden County Prosecutor Office's declination letter was received by DOC on March 28, 2016, and therefore, respondent had to file its charges on or before May 12, 2016. Appellant acknowledged that the earliest PDNA is dated May 13, 2016; however, appellant claims this is one day beyond the statutory limit.

In the second instance, appellant alleged that the only charge which post-dated the March 28, 2016, declination letter related to appellant lying about an unduly familiar relationship with an inmate and his father. Appellant reasoned that since Manera's supplemental report was dated April 7, 2016, the statutory limit for bringing that charge was May 22, 2016. Appellant submitted that this charge was filed on July 12, 2016, which was forty-six days too late.

Relative to the first PNDA, dated May 13, 2016, and the corresponding FNDA, dated August 5, 2016, the issue is moot because those charges have been dismissed for the reasons set forth above.

Relative to the second PNDA, dated July 12, 2016, as a result of the Camden County Prosecutor's Office's declination letter, dated March 28, 2016, the internal affairs investigation changed from criminal to administrative. Appellant's matter was remanded to SID for further investigation.

SID interviewed the appellant on April 6, 2016. In a report, provided to departmental authorities for review, dated April 7, 2017, appellant's interview was summarized. The report specifically stated as follows:

> It should also be noted, all of the aforementioned statements from the video recoded (sic) interview are a synopsis of the video recording. These statements are not a transcript and further information may be obtained by reviewing the video recording.

N.J.S.A. 30:4-3.11(a) did not preclude respondent from completing its investigation, reviewing the video or any other evidence or statements gathered in the criminal and administrative portions of the investigation, before bringing all charges against appellant. The date of the supplemental report is not controlling to commence the running of the forty-five day period. Transmission of that report and the statements contained therein indicate that the investigation was ongoing. The report and the other referenced investigatory information, had to be reviewed by departmental authorities.

Additionally, appellant did not suffer prejudice because the charges were filed on July 12, 2016. Appellant's argument to the contrary that the approximate two-year period between the incidents on July 16, 2014, and the date of the local hearing damaged appellant's ability to remember the events and defend against the charges is without merit. The ability to bring charges against appellant was tolled during the nearly two-year criminal investigation. Appellant was accompanied by his union representative during his interview. He was provided with his Weingarten Rights. He understood the events and circumstances about which he was being questioned. He understood the investigation was ongoing.

I **CONCLUDE** the second charges were timely brought on July 12, 2016.

N.J.A.C. 4A:2-2.3(a)(6)

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that

which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge of conduct unbecoming a public employee was appellant's unduly familiar and inappropriate relationship with L.M. and D.M. and that appellant lied during his internal affairs interview by changing his rendition of the facts relating to L.M. and D.M. multiple times. Appellant engaged in a relationship with D.M. while he was incarcerated at BSP and thereafter, until the date of his death. Appellant engaged in a relationship with L.M. while D.M. was incarcerated at BSP. Appellant became unduly familiar with L.M. and D.M. Appellant took food from L.M. to D.M. while D.M. was in BSP. In return, appellant exchanged the access to D.M., which his position as an SCO provided, for receipt of electrical contracting expertise and help with his home improvement project. Appellant received benefit from his relationship with the father of an inmate during the inmate's incarceration, term in a half-way house, and within one year of the inmate's release from DOC custody. This conduct compromised appellant.

Moreover, appellant repeatedly lied by making false and contradictory statements to investigators, during his internal affairs interview. Appellant's rendition of the facts surrounding his relationship with L.M. and D.M developed from a denial about knowing L.M. and D.M., until appellant was confronted with evidence to the contrary; to an admission of having met L.M. in the Ancora parking lot, while he was there to visit D.M.; to an admission of numerous telephone communications and meetings with L.M. beginning while D.M. was incarcerated at BSP; to discussions about how D.M. was fairing in BSP; to an admission that L.M. materially helped appellant complete electrical construction at his home.

Further, appellant's testimony in this proceeding then contradicted his interview statements, despite his stating under oath that both were true. In this regard, appellant denied knowing L.M. and D.M. He knew that L.M. was visiting an inmate, when he met him in the Ancora lot because it was visiting time. He and L.M. had conversations about how D.M. was fairing in BSP. L.M. believed his son's statements that appellant and D.M. were friends and were going to work out together after he was released. However,

appellant testified that L.M. provided significant help with his electrical construction, that he did not know why L.M. was in the Ancora parking lot because other members of the public used it, and that D.M. had been already been released when he was communicating with L.M. Appellant's statements could not be reconciled to make them consistent or justify his conduct. Simply put, appellant lied about the relationship and his contact with L.M. and D.M. in his interview.

As a corrections officer, appellant was held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's conduct in these unduly familiar relationships and his lies to investigators adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency.

No circumstances existed to warrant or justify appellant's deceitful conduct. Moreover, no circumstances existed justifying his relationship with L.M. or D.M. Those unduly familiar relationships existed while D.M. was incarcerated in BSP, while D.M. was serving his sentence in a DOC half-way house, and during the year after.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has met its burden of proof on this issue.

Appellant has also been charged with violating of Human Resource Bulletin (HRB) 84-17, as amended; C(8) falsification: intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding; C(11), conduct unbecoming an employee; D(4) improper or unauthorized contact with inmate-undue familiarity with inmates, parolees, their families or friends; D(6a) loss or careless control of keys, pager/beepers or cellular phones; D(6b) loss or careless control of radios, mace, or handcuffs; E(1) violation of rule, regulation, policy, procedure, order or administrative decision

Human Resource Bulletin (HRB) 84-17

HRB 84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

C(8) Falsification: Intentional misstatement of material fact in connection with work, employment application, attendance or in any record, report, investigation or other proceeding.

Appellant was advised that his recorded interview statement would serve as his official statement and that by not telling the truth he would be falsifying his report. Despite this warning, appellant lied and otherwise intentionally misstated facts repeatedly during his internal affairs interview relative to his relationship with L.M. and D.M.

In the Law Enforcement Personnel Rules and Regulations, Article III, Section 4 requires an Officer to, "report all prior relationships with inmates or parolees in writing to the Administrator or his designee." Appellant never reported his relationship with L.M. or D.M. I **CONCLUDE** this omission was an intentional misstatement of fact meant to conceal his relationships.

Appellant contradicted himself numerous times during his interview. Appellant's rendition of the facts surrounding his relationship with L.M. and D.M developed from a denial of knowing them, until appellant was confronted with evidence to the contrary; to an admission of numerous telephone communications with L.M.; to an admission that L.M. materially helped appellant complete electrical construction at his home. Further, appellant's testimony in this proceeding then contradicted this his SID interview statements. Appellant's statements could not be reconciled to make them consistent or

justify his conduct. Simply put, appellant lied about the relationship and his contact with L.M. and D.M. Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated C(8) by falsifying and intentionally misstating facts in connection with work, the SID investigation, and his statement which under the circumstances presented herein served as his report.

C(11) Conduct Unbecoming an Employee; and D(4) Improper or Unauthorized Contact with Inmate-Undue Familiarity with Inmates, Parolees, Their Families or Friends

General Principles, Subsection C of the Handbook of Information and Rules for Employees of the New Jersey DOC provides that employees are prevented from, "becoming unduly familiar with any inmate or group of inmates or permit[ting] himself to become obligated in any way to an inmate or his family; a parolee or his family." General Rules and Regulations, Subsection K provides that "employees must not give or receive from any inmate or parolee or any inmate or parolee's friend, relative, or representative anything in the nature of a gift or promise or favor, however trivial."

Furthermore, the Law Enforcement Personnel Rules and Regulations provides in pertinent part Article III, Subsection 4 provides that "no officer shall become unduly familiar with inmates who are incarcerated, on community release, or on parole status, within one year of the completion or vacating of all court imposed sentences or while the former inmate is under any form of criminal justice jurisdiction. An officer shall report all prior relationships with inmates or parolees in writing to the Administrator or his designee."

Appellant was required to follow both the Handbook Rules and the Law Enforcement Rules. The two policies must be read together and supplement each other. The purpose of the policies is consistent. It is to prevent officers from being compromised or becoming obligated to inmates, their friends, or families. These unduly familiar relationships compromise officers, the facility, inmates, and the public. They are an avenue to corruption.

Appellant's relationship with L.M. began while D.M. was incarcerated in BSP. Appellant conversed with L.M. about D.M. and how he was fairing in BSP. Appellant took baked ziti from L.M. to D.M. in BSP. Appellant received a benefit and favor from L.M. when he received electrical construction help and advice from L.M. which permitted him to complete the construction at his house. This was an unduly familiar relationship. Such behavior is unbecoming a corrections officer and violates the public trust.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated D(4), improper or unauthorized contact with an inmate and undue familiarity with inmates, parolees, their family or friends by engaging in a relationship with L.M. and D.M. I **CONCLUDE** that appellant's actions violated C(11), conduct unbecoming and employee by engaging in an unduly familiar relationship with an inmate and his family for which appellant exchanged his access and ability to aid or favor an inmate to receive a benefit.

D(6a) loss or careless control of keys, pager/beepers or cellular phones; D(6b) Loss or Careless Control of Radios, Mace, or Handcuffs; and E(1) Violation of Rule, Regulation, Policy, Procedure, Order or Administrative Decision

IMO 400 General Duties, Subsection 17 required that "as the officer being relieved it is your responsibility to pass on all necessary equipment, keys, and information to the oncoming officer." The purpose of this policy is to prevent the officer's radio, keys, cuffs and other required uniform tools from becoming lost, or finding their way to the inmates and becoming contraband. On July 16, 2014, appellant left his shift at 21:30 hours through the metal detector in the gate shed. He placed his keys and radio on the table and left BSP. Appellant's keys and radio were left unattended for twelve minutes. They were then retrieved by the next shift's officer. Appellant did not hand-off the equipment to the next officer as required. His actions were insufficient to satisfy the pass-on requirement. Once appellant left his radio and keys on the table he lost control over them or carelessly controlled them.

Appellant admitted that his practice was place his keys and radio on the table next to the metal detector and leave. Appellant's "no harm, no foul" justification that his keys,

cuffs and radio never went missing as a result of this practice was without merit. The fact that a consequence did not occur is insufficient reason to permit appellant to violate the rules, regulations, and policies. Appellant failed to abide by rules, procedures and orders by abandoning a radio and keys on a table.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated D(6a) by losing and carelessly controlling his keys. I **CONCLUDE** that appellant's conduct violated D(6b) by losing control of his radio and keys. I **CONCLUDE** that appellant's conduct violated E(1) by failing to abide by these rules, procedures and orders by abandoning his keys and radio.

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

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12).

PENALTY

The next question is the appropriate level of that discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See, In re Herrmann, 192 N.J. 19, 33 (2007) (Division of Youth and Family Services worker who snapped lighter in front of five-year-old), in which the Court stated:

> ". . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest."

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Respondent argued that appellant knowingly and intentionally engaged in unduly familiar relationships with D.M. and his father, L.M., while D.M. was an inmate at BSP, was serving his sentence in a DOC half-way house, and after D.M. was released. Appellant continued this relationship with L.M. after D.M.'s death. Respondent further argued that appellant lied about these inappropriate relationships during his SID interview; thus, falsifying his report. Respondent also argued that appellant violated safety and security rules, orders and procedures, when he lost control over his keys and radio. Respondent submitted that appellant's conduct placed appellant, inmates, the public and the BSP facility at risk.

Appellant argued that after he suffered a work place injury in 2011 he became addicted to his prescription medication and sought treatment, he was labeled a "bad employee," and targeted for discipline. Prior to that date, and throughout his first eleven years of his employment he had no significant disciplinary problems. To terminate him would be harsh, excessive, and flies in the face of progressive discipline.

There is no question that appellant had few disciplinary issues prior to the events of July 16, 2014. In this regard, appellant had an official reprimand for attendance and unexcused lateness in 2001, and a one-day suspension for negligent actions relating to property, which was a violation of safety and security precautions, in 2003. Thereafter, in 2006, 2007, and 2011, appellant received commendations.

Unfortunately, appellant's actions in engaging in unduly familiar relationships with D.M. and L.M., through which appellant received personal and significant benefit, and became obligated to D.M. and L.M., violated the public trust and put the safety of the inmates, the facility, DOC, and the public at risk. This was compounded by his blatant lying in his formal interview. His cavalier attitude about his practice of abandoning his keys and radio, his loss of control over his equipment, and his omission to report his relationship with L.M or D.M., was indicative of his behavior. Moreover, his morphing rendition of the facts was an intentional attempt to conceal his actions and attempt to limit his liability. Appellant's actions consistently showed that he believed he was above the rules. Such conduct placed not only the public, but the DOC at risk.

Accordingly, I **CONCLUDE** that removal is the appropriate discipline for the violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended; C(8) falsification: intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding; C(11), conduct unbecoming an employee; D(4) improper or unauthorized contact with inmate-undue familiarity with inmates, parolees, their families or friends; D(6a) loss or careless control of keys, pager/beepers or cellular

phones; D(6b) loss or careless control of radios, mace, or handcuffs; and E(1) violation of rule, regulation, policy, procedure, order or administrative decision be **AFFIRMED**.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the second Final Notice of Disciplinary Action, dated August 5, 2016, (R-2), of the Bayside State Prison, Department of Corrections, against appellant, Dallas Newman, is hereby **AFFIRMED**.

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

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

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

April 18, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 4/18/18

Date Mailed to Parties: 4/18/18.

tat/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

Dallas Newman, Appellant

For Respondent:

Edward Soltys, Investigator
Stephen Manera, Retired Investigator
Albert Ferrari, Lieutenant

LIST OF EXHIBITS

For Respondent:

R-1 PNDA (non-ethics), dated 7/12/16
R-2 FNDA (non-ethics), dated 8/5/16
R-3 PNDA (ethics), dated 5/13/16
R-4 FNDA (ethics), dated 8/5/16
R-5 HRB 84-17, as amended
R-6 IMP Level III 400
R-7 Handbook of Information and Rules for Employee of N.J. DOC
R-8 Law Enforcement Personnel Rules and Regulations
R-9 Policy Receipt Form Staff/Inmate Over-Familiarity Policy
R-10 Receipt for Law Enforcement Personnel Rules and Regulations
R-11 Annual Ethics Briefing Form
R-12 Receipt Form Mandatory Annual Ethics Briefing
R-13 Receipt Form- Prohibition of Personally Owned Electronic Communication Devices within Designated Areas of NJDOC Correctional Facilities
R-14 Policy Receipt Form Code of Ethics

R-15 Policy Receipt Form Familial and Consensual Personal Relationships Policy

R-16 Performance Assessment Review with Job Expectations and Evaluations

R-17 Marriage Certificate

R-18 Birth Certificate for T.R. Newman

R-19 Birth Certificate for L.V. Newman

R-20 Custody Orientation Checklist

R-21 DOC Interview Questionnaire

R-22 Removed by respondent

R-23 SCO Boaggio's Report

R-24 Manera's Report

R-25 Manera's Supplemental Report

R-26 Weingarten Rights

R-27 Interview with SCO Newman

R28A- through

R28J Photographs of Metal Detector

R-29 Camper Photograph

R-30 Truck Photograph

R-31 Settlement Agreement Progressive Discipline

R-32 FNDA 31-B Specification

R-33 Weingarten Rights

R-34 Cover Sheet for Phone Records

R-35 Subpoena for Phone Records

R-36 CDW

R-37 Authorization for CDW from Camden County

R-38 CDW Affidavit

R-39 Cover Sheet with Notes

R-40 Phone Records

R-41 L.T. Orsini's Report

R-42 Major Redman' Report

R-43 Special Custody Report

R-44 DVD Interview with Newman

R-45 CD- audio interview with L.M.

R-46 Interview with J.L.

R-47 Verizon Phone Key

For Appellant:

None

5-23-18

A-7

STATE OF NEW JERSEY

In the Matter of Manuel Parra
City of Union City, Department of
Public Safety

CSC DKT. NO. 2018-694
OAL DKT. NO. CSV 14254-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 25, 2018 BW

The appeal of Manuel Parra, Police Officer, City of Union City, Department of Public Safety, removal effective August 7, 2017, on charges, were heard by Administrative Law Judge Susana E. Guerrero, who rendered her initial decision on January 26, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 23, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Manuel Parra.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
(CONSOLIDATED)

MANUEL PARRA,
Petitioner,
v.
BERGEN COUNTY POLICE ACADEMY,
Respondent.

OAL DKT. No. PTC 13808-17

IN THE MATTER OF MANUEL PARRA, CITY OF UNION CITY, DEPARTMENT OF PUBLIC SAFETY.

OAL DKT. NO. CSV 14254-17
AGENCY DKT. NO. 2018-694

Kathleen M. Theurer, Esq. for petitioner/appellant Manuel Parra (Law Office of Condon & Theurer, attorneys)

Kenneth B. Goodman, Esq., for respondent City of Union City Department of Public Safety (O'Toole, Scrivo, Fernandez, Weiner, & Van Lieu, attorneys)

Daniel E. Zwillenberg, Assistant County Counsel, for respondent Bergen County Police Academy (Julien X. Neals, County Counsel)

Record Closed: January 23, 2018 Decided: January 26, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

This consolidated proceeding involves appeals by Manuel Parra (petitioner or Parra) from his dismissal by the Bergen County Police Academy (respondent or Police Academy) and his subsequent removal by the City of Union City Department of Public Safety (Union City). The Police Academy dismissed petitioner pursuant to Police Training Commission (PTC) rules and guidelines because petitioner was served with a Temporary Restraining Order (TRO). As a result of petitioner's dismissal from the Police Academy, Union City terminated his employment as a police recruit.

PROCEDURAL HISTORY

Petitioner filed a timely notice of appeal of his dismissal from the Police Academy, and the PTC transmitted the case to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on September 19, 2017. Petitioner also appealed his dismissal from Union City, and the Civil Service Commission (CSC) transmitted the matter to the OAL, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on September 28, 2017.

An Order of Consolidation and Predominant Interest was entered on November 22, 2017, consolidating both matters for hearing and determining that the PTC had the predominant interest since the disciplinary action taken against petitioner by Union City stems from the action taken by and under the auspices and control of the training academy petitioner was attending.

Respondents Union City and Police Academy filed motion for summary decision on December 7, 2017 and December 26, 2017, respectively. Petitioner filed an opposition to respondents' motions on January 18, 2018, and a reply was filed by Union City on January 23, 2018. A hearing in these consolidated matters was scheduled for

January 29, 2018, which was adjourned pending the disposition of the summary decision motions.

STATEMENT OF FACTS

I **FIND** the following **FACTS** are not in dispute:

Petitioner was hired by Union City as a Police Officer Recruit on June 30, 2017. As a condition of employment as a Police Officer for Union City, petitioner enrolled in the Bergen County Police Academy for training. On August 2, 2017, petitioner was served with a TRO, issued pursuant to the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 et seq.

Upon learning of the TRO issued against petitioner, he was terminated from the Police Academy on August 3, 2017. On August 7, 2017, petitioner was served with a Preliminary Notice of Disciplinary Action (PNDA) and a Final Notice of Disciplinary Action (FNDA) for his immediate removal as a Union City Police recruit. The reason for removal, as noted on the PNDA and FNDA, was listed as: "On August 2nd 2017 Recruit Manuel Parra was served with a Temporary Restraining Order issued by Judge George Savino of the Lyndhurst Municipal Court (Bergen County, NJ). As a result of such, Recruit Parra was dismissed from the Bergen County Police Academy."[1]

By Directive 3-2016, dated August 17, 2016, the PTC adopted a revised Basic Law Enforcement Court Training Manual that became effective January 1, 2017 and provides ". . . [A]ny trainee who is served with a Temporary Restraining Order (TRO) or a Final Restraining Order (FRO), issued pursuant to the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 et seq., shall be dismissed from the academy within 24 hours of the required notice being made to the academy."

Respondents assert that these consolidated matters are ripe for summary decision as there is no genuine issue of material fact. Specifically, respondents

[1] Petitioner was specifically charged with having violated N.J.A.C. 4A:2-2.3(A)(4) (sic), Inability to perform duties; and Departmental violation 8:1.5(C), Inability to perform duties.

maintain that there is no dispute that petitioner was served with a TRO pursuant to the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 et seq. and that the dismissal from the Police Academy was mandated by PTC rules. Union City also maintains that as a result of petitioner's dismissal from the Police Academy, he failed to complete the Police Academy training and was, therefore, appropriately terminated from Union City pursuant to N.J.S.A. 52:17B-68(a).

In opposing summary decision, petitioner submitted a Certification of Counsel. The certification states that the Police Academy should have reinstated petitioner because the restraining order was dismissed on September 11, 2017, and because the TRO was obtained by petitioner's paramour with the express purpose of preventing him from continuing as a police recruit. The certification further states that there is no substantiation of the underlying domestic violence allegations and once the restraining order was dismissed, any bar to petitioner's ability to serve as a public recruit was lifted.

Moreover, the certification states that Union City violated petitioner's right to due process when it failed to afford him five days, after receiving the PNDA, to notify Union City of his request for a hearing, and that Union City improperly dismissed petitioner based on PTC policy because the policy only applies to Bergen County and not the appointing authority. Petitioner argues that, despite Union City's assertion, it was not constrained to terminate petitioner.

Union City filed a reply to petitioner's opposition. Union City asserts that while the merit of the TRO is immaterial to the legal positions of the parties, the petitioner's contention that the TRO was based on "wholly uncorroborated allegations" is inaccurate as reflected in the language contained in the Municipal Court Judge's order finding good cause to issue the TRO. Union City maintains that its dismissal of petitioner was appropriate because he failed to complete the Police Academy as required.

LEGAL ARGUMENT

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any

material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electrical Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574, (1986), Anderson v. Liberty Lobby, 477 U.S. 242, (1986), and Celotex Corporation v. Catrett, 477 U.S. 317, (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533 (quoting Liberty Lobby, 477 U.S. at 251-52). The Court stated that under the new standard,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Brill, 142 N.J. at 540 (quoting Liberty Lobby, 477 U.S. at 249).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Brill, 142 N.J. at 541.

Following the Brill standard, after considering all papers and evidence filed in support of and in opposition to summary decision, I **CONCLUDE** that there are no

issues of fact that require a plenary hearing and that this matter is ripe for summary decision.

Petitioner's Dismissal from the Academy

The Bergen County Police Academy is a school approved by the PTC pursuant to N.J.A.C. 13:1-3.1 et seq. to provide basic courses of study for law enforcement trainees. The PTC has the power and duty to promulgate rules and regulations. N.J.S.A. 52:17B-71. N.J.A.C. 13:1-7.2(a)(8) vests the Academy with the power

> [t]o dismiss a trainee who has demonstrated that he or she will be ineligible for Commission certification, for unacceptable behavior or for other good cause.

Here, petitioner does not dispute that a TRO was issued against him pursuant to the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17, et seq. while he attended the Bergen County Police Academy as a police recruit. The Police Academy was required to dismiss petitioner within twenty-four hours of receiving notice of the TRO pursuant to the controlling PTC Directive N. 3-2016. This PTC Directive does not provide the Police Academy any discretion to evaluate the merits of the TRO or wait for disposition of the restraining order, nor does it require the agency to reverse its determination when a restraining order is later dismissed. Since there is no dispute that a TRO was issued here, and that PTC's rules require immediate dismissal from the Police Academy when a recruit is served with a TRO, I must **CONCLUDE** that the Police Academy appropriately dismissed petitioner from the Police Academy as mandated by PTC rules.

Petitioner's Termination of Employment

An appointing authority may discipline an employee for, among other causes, an inability to perform duties. N.J.A.C. 4A:2-2.3(a)(3). The Department bears the burden of proving the charges against petitioner by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In this matter, Union City terminated petitioner's employment predicated on his inability to

perform duties, stemming from his failure to successfully complete the training course at the Police Academy.

The statutory scheme governing police training dictates that successful completion of a police training course at a PTC-approved school is a mandatory prerequisite to a permanent appointment as a police officer. N.J.S.A. 52:17B-68 instructs that "every municipality and county shall require that no person shall hereafter be given or accept a permanent appointment as a police officer unless such person has successfully completed a police training course at an approved school." In other words, the training laws apply to all police officers and establish a classification of temporary or probationary employment for police officers until successful completion of the mandatory program of training. Borger v. Borough of Stone Harbor, 178 N.J. Super. 296, 301–02 (Ch. Div. 1981); see N.J.S.A. 52:17B-68, -69.

The failure to complete the training provided by the Academy is grounds for termination of employment. In its motion, Union City relies on Gottlieb v. Monmouth County Sherriff's Office, 1995 N.J. AGEN LEXIS 1057 (Feb. 7, 1995), which states:

> The controlling statute, N.J.S.A. 52:17B-68.1 leaves no room for discretion. Before permanent appointment, there must be completion of the basic Police Training Commission course for correction officers, among others. In like fashion, civil service rules do not anticipate continued employment of law enforcement officers who do not complete the Police Training Commission course, if so required . . . . The appointing authority, the New Jersey Department of Personnel and Merit System Board may only look to the fact, or no, of course completion. Here, there was none. For that reason, with the threshold condition unmet, the appointment must cease. (Emphasis added.)

Here, as a result of petitioner's dismissal from the Academy and subsequent inability to complete the training, petitioner could not qualify for employment as a Police Officer with Union City. Accordingly, I **CONCLUDE** that Union City's determination to terminate petitioner's employment for failure to complete the Police Academy, a sine qua non to a permanent appointment, was within the scope of its authority and cannot be said to be arbitrary, capricious or unreasonable under the circumstances.

ORDER

It is hereby **ORDERED** that the respondent Union City Department of Public Safety's motion for summary decision is **GRANTED**.

It is hereby **ORDERED** that the respondent Bergen County Police Academy's motion for summary decision is **GRANTED**.

I hereby **FILE** my initial decision with the **POLICE TRAINING COMMISSION** for consideration.

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

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **POLICE TRAINING COMMISSION** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies that may be within its statutory grant of authority.

Upon transmitting the record, the **POLICE TRAINING COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY**

ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 26, 2018
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: January 26, 2018

Date Mailed to Parties: January 26, 2018

jb

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
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GURBIR S. GREWAL
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ELIE HONIG
Director

MANUEL PARRA,

Petitioner

v.

BERGEN COUNTY POLICE ACADEMY,

Respondent

FINAL DECISION

OAL Docket No. PTC 13808-17

OAL Docket No. CSV 14254-17

(CONSOLIDATED)

The Police Training Commission received an Initial Decision in this matter on January 31, 2018. The Police Training Commission requested and was granted one extension on February 5, 2018 pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8. This final decision was rendered within the time limits prescribed by N.J.A.C. 1:1-18.6 and N.J.A.C. 1:1-18.8.

Petitioner Manuel Parra was enrolled in the Bergen County Police Academy through the Union City Police Department. On August 3, 2017, Petitioner was dismissed from the Police Academy after he was served with a Domestic Violence Temporary Restraining Order (TRO) on August 2, 2017. On August 7, 2017, Petitioner was served with a Preliminary Notice of Disciplinary Action and a Final Notice of Disciplinary Action for immediate removal as a Union City Police Recruit.

Petitioner filed an appeal with the Police Training Commission, which was referred to the Office of Administrative Law. Petitioner also filed an appeal of his dismissal from Union City Police Department. On November 22, 2017, an Order of Consolidation and Predominant Interest was entered consolidating petitioner's dismissal from the Academy and termination as a Union City police recruit. The Police Training Commission was determined to have the Predominant Interest.

Respondents Union City Police Department and Bergen County Police Academy filed motions for summary decision on December 7, 2017 and December 26, 2017, respectively. A plenary hearing for these consolidated matters had been initially scheduled for January 29, 2018. The hearing was adjourned pending the disposition of the summary decision motions.

On January 26, 2018, following consideration of all papers and evidence filed, the Honorable Susana E. Guerrero, Administrative Law Judge, determined that Petitioner had been dismissed from the academy following the issuance of a Temporary Restraining Order against the Petitioner, pursuant to the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17, et seq. and that the Order had been issued while the petitioner was attending the police academy. Pursuant to PTC Directive 3-2016, any trainee who is served with a TRO or an FRO must be dismissed from with Academy within 24 hours. Judge Guerrero concluded there were no issues of fact that required a plenary hearing and that the matter was ripe for a summary decision.

On January 26, 2018, Judge Guerrero granted the Motions for Summary Decision filed by the Bergen County Police Academy and the City of Union City Department of Public Safety, concluding that the Petitioner was appropriately dismissed from the police academy and terminated from employment.

On April 4, 2018, at a regular meeting of the Police Training Commission, the commissioners reviewed the Initial Decision rendered by Judge Guerrero. The commissioners voted to **ADOPT** the Initial Decision as the **FINAL DECISION**.

POLICE TRAINING COMMISSION

By: _____
John F. Cunningham, Chairman

Date: 4/16/2018

5-23-18

A-8

STATE OF NEW JERSEY

In the Matter of Daniel Purdy
Camden County Correctional Facility

CSC DKT. NO. 2015-2646
OAL DKT. NO. CSR 04305-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 25, 2018 BW

The appeal of Daniel Purdy, County Correction Officer, Camden County Correctional Facility, removal effective January 19, 2015, on charges, were heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on April 6, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 23, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Daniel Purdy.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 04305-15
AGENCY DKT. NO. N/A

IN THE MATTER OF DANIEL PURDY, CAMDEN COUNTY CORRECTIONAL FACILITY,

2015-26476

Arthur J. Murray, Esq., for appellant, Daniel Purdy (Alterman & Associates, LLC, attorneys)

Antonieta P. Rinaldi, Assistant County Counsel, for respondent, Camden County Correctional Facility (Christopher A. Orlando, County Counsel)

Record Closed: January 5, 2018 Decided: April 6, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Appellant Daniel Purdy, a Corrections Officer (CO) at Camden County Correctional Facility (CCCF), appeals his removal for Conduct Unbecoming a Public Employee, Insubordination, Inability to Perform Duties, Neglect of Duty, Discrimination that Affect Equal Employment; Other Sufficient Cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4

Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; 4.1 Curtsey; 4.6 Dissemination of Information; 4.7 Official Correspondence; General Order #73, #74, #203; et al.

PROCEDURAL HISTORY

On January 20, 2015, the respondent issued a Preliminary Notice of Disciplinary Action (PNDA), seeking appellant's immediate suspension. Appellant waived his departmental hearing and respondent issued a Final Notice of Disciplinary Action (FNDA) on March 9, 2015, sustaining the charges and seeking appellant's removal. The appellant requested a hearing and the appeal was filed with the Office of Administrative Law (OAL) on March 26, 2015, pursuant to N.J.S.A. 40A:14-202(d). On October 1, 2015, this tribunal signed an Order under OAL Dkt. No. CSR 03599-2015 consolidating appellant's matter with seven other related matters: Kevin Crossan v. Camden County Correctional Facility, OAL Dkt. No. CSR 3599-2015; William Leister v. Camden County Correctional Facility, OAL Dkt. No. CSR 4306-2015; Lance McCarthy v. Camden County Correctional Facility OAL Dkt. No. CSR 3600-2015; Thomas McNellis v. Camden County Correctional Facility, OAL Dkt. No. CSR 4305-2015; Michael Jacob v. Camden County Correctional Facility, OAL Dkt. No. CSR 8847-2015; Thomas Grosmick v. Camden County Correctional Facility, OAL Dkt. No. CSR 10598-2015; and Albert Daniels v. Camden County Correctional Facility, OAL Dkt. No. CSR 11669-2015. On June 2, 2016, and June 8, 2016, appellants Kevin Crossan, Lance McCarthy and William Leister withdrew their appeals. Hearings were held in this matter on January 19, 2017, April 21, 2017, May 10, 2017, and July 27, 2017. Prior to the January 19, 2017, hearing, appellant Albert Daniels, withdrew his appeal. On April 19, 2017, appellant Michael Jacob, withdrew his appeal and on June 15, 2017, appellants Thomas Grosmick and Thomas McNellis, withdrew their appeals leaving Daniel Purdy as the sole remaining appellant. The parties submitted post-hearing submissions on November 21, 2017, and December 11, 2017, and the record closed on January 5, 2018. An Order was entered in this matter on February 21, 2018, to allow for the extension of time in which to file the Initial Decision.

SUMMARY

Appellant is a CO at the CCCF. The allegations involve highly inflammatory racist, sexist and other discriminatory text messaging between eleven white male corrections officers, including the appellant, which were directed towards colleagues, superiors, inmates and others in general. In addition to the offensive nature of the messages themselves, the messages demonstrate that cell phones were being taken into the CCCF, photographs were being taken of officers and inmates in the jail and photographs were taken of confidential information on the correction center computer. There were no black officers or individuals involved in any of the text messaging. As a result of a shakedown in the facility, the cell phone of CO Michael Jacob was confiscated. The prosecutors retrieved nearly 6,000 text messages from this phone which were part of the group chats between the officers in question. The appellant does not dispute that he received any of the messages in question but argues that he only authored 461 of the messages. Of these 461 messages, just 39 were authored by him while he was on duty and of these 39 messages, 21 of those were sent while appellant was either on break or lunch. The appellant does not deny using his cellular phone while at work. He concedes he never received authorization to bring his personal phone into the facility but asserts that cellular phone use by employees at CCCF was not uncommon.

TESTIMONY

For respondent:

Deputy Warden Christopher Foschini had been a CO for the CCCF for twenty-one years, before his retirement in October of 2014. He was assigned to Internal Affairs (IA) for eighteen years. He completed the investigation of this matter and prepared a report which he submitted to the Warden following his investigation. (RP-2.) He testified that on December 30, 2014, his unit was conducting an investigation into cell phones in the facility, which is strictly prohibited. The investigation followed a shakedown that they conducted in November. They questioned CO King during their investigation and he advised them that CO Jacob was in possession of a phone and was using it in the

facility. When they questioned CO Jacob, it was obvious that he was hiding something, but he denied that he was in possession of a cell phone. He said that his cell phone was in his car and he did not bring the cell phone into the facility. Foschini observed him take something out of his vest and hide it on the shelf in the room where they were questioning him. They caught him when he went to retrieve it as he was leaving the room. CO Jacob had two cellphones because he had a girlfriend who communicated with him on a separate phone than the one he used for his wife and family. The phones were confiscated and turned over to the Camden County Prosecutor's Office. Jacob signed a written consent to search his phone.

Foschini identified a notebook entered into evidence which contained a print out of all the text messages between appellant and the other officers in the CCCF. There were nearly 6,000 messages between the officers from September 30, 2014, to December 28, 2015. The messages contain photographs and videos taken in the jail and thousands of messages between the officers. The photographs demonstrate that several of the officers, including appellant smuggled phones into the facility. Cell phones and photographs are prohibited in the facility. In addition, photographs were taken of inmates and computer screens in the facility which contains highly confidential information. Foschini testified that there were 5,782 text messages retrieved between the periods of September 30, 2014, to December 28, 2014.

All of the 5,782 text messages entered into evidence were broken down into two separate chats. Chat number 4389 (P-1) and chat number 549 (P-2.) Foschini read several of the messages which he deemed to be inappropriate, racist and in violation of the policy prohibiting discrimination in the workplace and constituted conduct unbecoming an employee.

Some of the text messages which came from appellant were as follows:

- "Happy Born day nigga"
- "That one smooth ape over-paid nigga" (referring to Darryl Johnson, the Warden's assistant)

- Appellant posted a picture of a white male wearing a red shirt with an American flag stating "I like shooting cans, Mexican, Africans, um Puerto Ricans"
- "How many years that crazy nig got"
- "sleepy nigga" (referring to his African American boss, Warden Owens)
- "Nah, that spook at home making stuffed shells"
- Appellant posted a picture providing information regarding "White European Pride" with a link to an organization called "The Advanced White Society"
- Appellant posted that he wanted to "curb stomp" one of his supervising officers
- Appellant called then Captain, now Warden, Karen Taylor, who is Hispanic, "Dora the Explorer"
- Appellant made a comment about a female co-worker "They calling her a dusty coon . . . um . . . negress something about her hair . . . It was like a jailhouse mop"

Foschini explained that not all of the Attorney General Guidelines are followed by the I.A. unit of CCFC because they are not mandatory for corrections officers. He also agreed that appellant was never a target of any prior Law Against Discrimination (LAD) or other protected class complaint or investigation throughout his tenure as a CO.

Warden Karen Taylor has been employed as a CO for the CCCF for twenty years. In 2015, she was a Captain but has been Warden of the facility for approximately two years. Taylor reviewed and signed appellants PNDA and FNDA (RP-1.) She considered appellant's actions to be so egregious that his relatively decent disciplinary history did not need to be considered in determining that removal was appropriate. She recommended the discipline to Warden Owens based on several factors: appellant had a duty to inform of the group texting; he disseminated and received information and should have informed the department; he admitted having his cellular phone in the jail and violating policy; he admitted receiving racist, sexist and demeaning texts, pictures and he himself posted some racial texts. Taylor considered appellant a "disgrace to the badge."

For appellant:

CO Daniel Purdy is a thirty-six-year-old white male who is married with three children. He had been employed at CCCF from January 2003, until January 2015. He admitted that he had a cell phone in the secure perimeter of the facility and that he was a party to the chats that had been identified by CO Foschini and entered into evidence. He testified that he and his colleagues sent messages to each other and would send pictures of black people to poke fun at their race. He acknowledged the use of derogatory language, photographs and jokes that were neither appropriate or professional but "mindless banter". Appellant conceded on cross-examination that many of the comments were derogatory, but refused to admit that they were racist. He eventually conceded that he could be viewed as racists based on the content of the chats.

The appellant does not dispute that he received any of the messages in question but argues that he only authored 461 of the messages. Of these 461 messages, just 39 were authored by him while he was on duty and of these 39 messages, 21 of those were sent while appellant was either on break or lunch.

Appellant acknowledged that he deserved discipline for certain infractions he admittedly committed but he does not believe he should have been terminated for those infractions.

FINDINGS OF FACT

In view of the contradictory testimony presented by appellant and the respondent witnesses, the resolution of the charges against appellant requires that I make a credibility determination with regard to the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo

v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, I deem Foschini was truthful and credible. His testimony was consistent with the evidence and the statements that were taken during his investigation. With respect to appellant, he did not dispute the essential facts in this case. He conceded that he had a personal cell phone in the facility and never obtained permission to have it. He conceded that he was aware that other officers had cell phones in the facility and he never reported this conduct. He was also aware that inappropriate photographs were being taken in the facility and transmitted by text message to other officers, including him, and he never reported this conduct. He also conceded that he was a party to the nearly 6,000 text messages which were moved into evidence in this case.

With respect to the nature of the text messages, I deem appellant's testimony was not credible that he was unaware that the comments and the dialogue of the text messages were derogatory, offensive, racist and a violation of the policy prohibiting discrimination and just a joke and mindless banter. This is particularly true considering appellant eventually conceded that he could be viewed as racists based on the content of the chats.

Accordingly, I **FIND**:

1. Between October 2014, and December 2014, appellant received and sent multiple derogatory, inappropriate and racist text messages.

2. Between October 2014, and December 2014, appellant possessed a personal cell phone in the secure part of the CCCF, which he did not have permission to have.
3. Appellant received various text messages which contained photographs or videos taken in the CCCF of confidential information.
4. Appellant was aware that this conduct was occurring and he was aware that it was a violation of the policies and procedures of the CCCF. He never reported this conduct to anyone.
5. Appellant was a member of a group text chain in which inappropriate text messages containing disparaging and racist comments about his supervisors and other colleagues were sent and received. Appellant authored 461 of these text messages both while on duty and off duty.
6. The messages were inappropriate, derogatory, and racist and violated the policy prohibiting discrimination, harassment or hostile environments the workplace; constituted conduct unbecoming and other sufficient cause.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

Conduct unbecoming a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re

Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Unbecoming conduct has also been defined as any conduct which adversely affects the morale or efficiency of the department or which has a tendency to destroy public respect for employees and confidence in the operations of government services. Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992). The Merit System Board and its predecessor and now successor, the Civil Service Commission (CSC), and the courts have generally held that law enforcement officers are held to a higher standard than the conduct unbecoming employees because discipline is invoked. Correction officers are law enforcement officers to which this higher standard applies.

The standard of behavior for police and correction officers is set higher than that of other civil service employees, meaning that infractions will lead to major discipline of officers than otherwise may not have warranted severer discipline for some other position. See Moorestown Township v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). When applied to correction officers, a charge of conduct unbecoming can be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); Bowden v. Bayside State Prison, 268 N.J. Super. 301 (App. Div. 1993).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant. An appeal to the CSC requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as

the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

Applying the law to the facts in this case, I **CONCLUDE** that the respondent has proven all the charges by a preponderance of the credible evidence. I **CONCLUDE** that appellant engaged in conduct which constituted a violation of the policy prohibiting discrimination, harassment or hostile environment in the workplace and conduct unbecoming an employee. I also **CONCLUDE** that the respondent has proven that appellant had a cell phone in the CCCF, which is prohibited. I also **CONCLUDE** that appellant knew that he and his colleagues were violating the cell phone and no photography rules in the CCCF and failed to report such conduct in violation of the rules of the CCCF. I also **CONCLUDE** that appellant was aware that photographs were taken of confidential computer screens and sent by text messages, a violation of the dissemination and confidentiality rules. I further **CONCLUDE** that this same conduct also constituted a violation of rules regarding Neglect of Duty, Insubordination, Inattentiveness to Duty, Courtesy, Dissemination of Information, Personal and Professional Code of Conduct, Official Correspondence, and General Orders #73, #74, and #203.

Appellant argues that respondent is barred by the Law of the Case Doctrine from claiming that the Initial Decision of the Honorable Sarah G. Crowley, A.L.J. issued in a companion matter is, in any manner, dispositive in this matter. See State v. Reldan, 100 N.J. 187 (1985); State v. Hale, 127 N.J. Super. 407 (App. Div. 1974); Lombardo v. Hoag, 269 N.J.Super. 36 (App. Div. 1993). While I agree that Judge Crowley's Initial Decision in Thomas McNulty v. Camden County Correctional Facility, OAL Dkt. No. CSR 3608-15; creates no legal precedent upon which this tribunal is bound to follow, I do, as can be gleaned from the conclusions made herein, agree with her findings of fact

and conclusions of law insofar as the two cases are similar and derive from the same IA investigation.

Appellant further argues that respondent is required to adopt guidelines consistent with the New Jersey Attorney General Guidelines on Internal Affairs Policies and Procedures as it relates to the operation of its IA Unit. N.J.S.A. 40A:14-181 states that "every law enforcement agency . . . shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety." However, as stated in In the matter of Nolan Cox, Mercer County Department of Public Safety, 2016 WL 7148390, the relevant guidelines exempt correctional facilities from the requirements of N.J.S.A. 40A:14-181. Correctional facilities are agencies not under the supervision of the Attorney General as set forth in the Criminal Justice Act of 1970 as their primary mission does not include enforcing the criminal laws of the State of New Jersey. Therefore, I **CONCLUDE** that they are under no obligation to implement the provisions of the New Jersey Attorney General Guidelines on Internal Affairs Policies and Procedures.

Appellant next argues that because the text messages at issue were published in various newspapers prior to the hearing, the case should be dismissed as being in violation of the New Jersey Attorney General Guidelines on Internal Affairs Policies and Procedures asserting that appellant has been deprived of procedural and substantive due process. However, no evidence was provided at the hearing in this matter that appellant was in any way prejudiced by the aforementioned publication or that it even occurred. It was not until this tribunal reviewed appellants closing brief that it was discovered that these texts had been previously disseminated in a news publication. Furthermore, N.J.S.A. 1:1-14.1 provides that administrative hearing conducted before the OAL shall be conducted as public hearings. To the extent that the text messages at issue in this case were identical to the text messages previously entered into evidence in the matter of Thomas McNulty v. Camden County Correctional Facility, OAL Dkt. No. CSR 3608-15, I **CONCLUDE** that appellant cannot assert an expectation of privacy in

this matter. Therefore, I further **CONCLUDE** that appellant has not been deprived of procedural and substantive due process.

Appellant next argues that he has a First Amendment right under the Federal Constitution and a right to speak freely under Article 1, Paragraph 6 of the New Jersey Constitution as it relates to his private text messages.

The First Amendment of the Constitution of the United Sates reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceable to assemble, and to petition the government for a redress of grievances.

Article 1, Paragraph 6, of the New Jersey Constitution provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

It is asserted that appellant was not required to waive any constitutional rights to which they were entitled under these provisions and therefore, the texts at issue in this matter are entitled to protection under both the Federal Constitution and the New Jersey Constitution. There are, however, exceptions to free speech. As noted in Karins v. Atlantic City, 152 N.J. 532 (1998), one such exception requires the balancing of the public employees freedom of expression against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. The question here, as in Kerins, is whether appellant's speech may be fairly characterized as constituting speech on a matter of public concern. Id. at 549. While it is true that most of the texts sent and received by appellant were done so while he was off-duty, it is undisputed that at least some of these texts were sent and received while he and the other members of the group were on duty. Comments such as those posted to this group by appellant and the other members of the group chats were inappropriate, derogatory, and racist and violated the policy prohibiting

discrimination, harassment or hostile environments the workplace. This is especially true considering appellant worked in a jail and his job description required him to exercise control over and interact with the very individuals targets by the inappropriate, derogatory, and racist chats. Therefore, I **CONCLUDE** that appellant's speech cannot be characterized as constituting speech on a matter of public concern and that the State's interest in promoting the efficiency of the public services it performs through its employees out way appellant's interest in making these racist and derogatory comments. Appellant is responsible for the abuse of his right to free speech afforded him in Article 1, Paragraph 6, of the New Jersey Constitution.

PENALTY

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

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

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment

> that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, 192 N.J. at 30-33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. at 486 (citation omitted).

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

A penalty in this case is unavoidable. The case law setting sworn law enforcement officers apart from other public servants as "special" is consistent. The standard guiding their behavior and informing their discipline is strict:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public.

[Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966); See also In re Phillips, 117 N.J. 567, 577 (1990)]

In the case of In re Carter, 191 N.J. 474, 485-486 (2007), affirming removal of a police officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

To determine whether a lesser penalty than the respondent's termination of appellant is appropriate, the concept of progressive discipline is generally examined. Our courts uniformly have upheld the concept in a long line of cases, beginning with West New York v. Bock, 38 N.J. 500, 523 (1962): (an employee's past record of both discipline and commendations can be considered). See also In re Hermann, 192 N.J.

19, 21 (2007). However, the judiciary also agrees that progressive punishment can be waived when the offense involved is sufficiently egregious. In re Stallworth, 208 N.J. 182, 196-197 (2011). However, the Court in Hermann also declared that progressive discipline can be used to mitigate the penalty where there is a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. In re Hermann, 192 N.J. at 32-33.

I am satisfied that appellant's conduct in this case was egregious such that progressive discipline need not be considered. The public who is served, and other employees, deserve to be able to expect that those individuals that exercise control over and interact with them will not make them targets of inappropriate, derogatory, and racist chats. To expect otherwise is to invite disorder and confusion in responding to certain functions within the jail, possibly leading to worse, more dangerous situations, and serves to undermine the confidence the public places in the correctional system. It cannot be tolerated. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from his position was justified.

ORDER

I **ORDER** that the action of the appointing authority removing CO Daniel Purdy is **AFFIRMED** and the appeal is **DISMISSED**.

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

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

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

April 6, 2018
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: April 6, 2018

Date Mailed to Parties: April 6, 2018.

JSK/dm

APPENDIX

WITNESSES

For appellant:

Corrections Officer Daniel Purdy

For respondent:

Deputy Warden Christopher Foschini
Warden Karen Taylor

EXHIBITS

For appellant:

P-1 Chat Number 4389
P-2 Chat Number 549

For respondent:

R-1 Preliminary Notice of Disciplinary Action of Officer Jacob, dated January 5, 2015; Amended Preliminary Notices of Disciplinary Action of Officer Jacob, dated January 16, 2015, and March 18, 2015; Final Notices of Disciplinary Action of Officer Jacob, dated June 1, 2015
R-2 Internal Affairs Report of Captain Foschini
R-3 Internal Affairs Interview of Officer Jacob, dated December 30, 2014
R-4 Two consent forms to search/seize signed by Officer Michael Jacob, dated December 30, 2014
R-5 Phone Text Chat #549 and #4389 Notebook, Individual Extraction Reports of Officer Jacob (aka "Batman")

R-6 Four videos located on Officer Jacob's cell phone

R-7 Photos from Officer Michael Jacob's cell phone along with chat photos posted

R-8 General chat photos

R-9 Sample photos sent/posted specifically by Officer Michael Jacob

R-10 Phone Chat with Officer Takia Johnson

R-11 Phone Text Chat #3488 with Nicole Wagner

RP-1 Officer Daniel Purdy Preliminary Notice of Disciplinary Action, dated January 20, 2015; Final Notices of Disciplinary Action, dated March 9, 2015

RP-2 Internal Affairs Report by Captain Christopher Foschini

RP-3 Shakedown photo of five officers with "Real Niggas do real things" taken in the jail

RP-4 Video of female metal health inmate in tunnel and general photos from Officer Michael Jacob's cell phone

RP-5 General Chat Photos

RP-6 Phone Text Chat Number 549 and Number 4389 (Notebook), Individual Extraction Reports of Officer Purdy

RP-7 Internal Affairs Interview of Officer Daniel Purdy, dated January 16, 2015

RP-8 Sample photos Officer Purdy admitted to seeing

RP-9 Sample photos sent/posted specifically by Officer Purdy

RP-10 Camden County Department of Corrections Rules of Conduct

RP-11 Camden County Department of Corrections Post Order #032 Lobby Security

RP-12 Camden County Department of Corrections General Order #042 Hospital Transport and Duty

RP-13 Camden County Department of Corrections General Order #073 Personal Conduct of Employees

RP-14 Camden County Department of Corrections General Order # 074 Professional Code of Conduct

RP-15 Camden County Department of Corrections General Order #203 Ethical Use of Technology

RP-16 Officer Daniel Purdy Chronology of Discipline

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Alberta Small
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-3389
OAL DKT. NO. CSV 06112-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 06112-17
AGENCY DKT. NO. 2017-3389

IN THE MATTER OF
ALBERTA SMALL, DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER.

William Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Andy Jong, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 17, 2018 Decided: April 17, 2018

BEFORE **KATHLEEN M. CALEMMO,** ALJ:

This matter was filed with the Office of Administrative Law (OAL) on May 2, 2017 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 17, 2018
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: 4/24/18

Date Mailed to Parties: 4/25/18

cmo

APPENDIX

EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement and Release, received by the Office of Administrative Law on April 17, 2018

OAL DKT. NO. CSV 06112-2017 S
AGENCY DKT. NO. 2017-3389
SETTLEMENT AGREEMENT

IN THE MATTER OF
ALBERTA SMALL
AND
DEPT. OF HUMAN SERVICES,
HUNTERDON DEV. CTR.

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated April 7, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin Order 4:08, A-4.5 Chronic or excessive absenteeism from work without pay	Removal (for all charges)	4/13/17
2. N.J.A.C. 4A:2-2.3(a)4 Chronic or excessive absenteeism		
3. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming of employee		
4. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		

B. The **Preliminary** Notice of Disciplinary Action dated September 6, 2017 contained the following charges and proposed discipline: (Attached)

Charge	Discipline	Dates Effective
1. Admin Order 4:08, A-4.6 Chronic or excessive absenteeism from work without pay	Removal (for all charges)	TBD
2. N.J.A.C. 4A:2-2.3(a)4 Chronic or excessive absenteeism		
3. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming of employee		
4. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		

C. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. Respondent Department of Human Services will accept a General Resignation from Appellant Alberta Small, pursuant to N.J.A.C. 4A:2-6.3 effective April 13, 2017. Appellant Alberta Small agrees not to seek or accept employment with the Department of Health or Department of Human Services or any of their subsidiaries at any time in the future.

D. The Appellant Alberta Small withdraws her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).
The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

E. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement agreement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department of Human Services from releasing information on this matter to anyone who has a release executed by appellant, or as otherwise consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent Department of Human Services with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of Alberta Small's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this

agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

4/17/18
DATE

Alberta Small, Appellant

4/17/18
DATE

ON BEHALF OF Appellant William NASH

3/28/2018
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Alberta Small, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4/17/18
DATE

Alberta Small
Alberta Small

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

FROM	Employing Agency Name **Hunterdon Developmental Center**	Address/Phone Number **P.O. Box 4003, Clinton, NJ 08809-4003**	Date 9/6/2017
	Attorney representing your agency should this matter be appealed To be determined	Address/Phone number/Email address	
TO	Employee Name Alberta Small	Permanent Civil Service Title Cottage Training Technician	Employee Identification Number
	Address 596 Walnut Street 2nd Floor Elizabeth, NJ 07201		Pension Number

You are hereby notified that the following charge(s) have been made against you: *(If necessary, use additional sheets and attach)*

Charges:

Chronic or excessive absenteeism from work without pay (A4.6)
N.J.A.C. 4A:2-2.3(a)4 Chronic or excessive absenteeism
N.J.A.C.4A:2-2.3(a)6 Conduct unbecoming of employee
N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

From January to April 2016 you used fifteen (15) sick days exhausting all available sick leave by 5/2/16. Then on 10/4, 10/5, 10/12, 10/31, 11/14, 12/12 and 12/21/2016 you called off from work due to illness with no available sick leave to cover your absences. In addition your absences resulted in issues with staffing.

☐ *If checked, incidents are continued on attached page.*

☐ **You are hereby suspended effective** _____

(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 17 **days of receipt of this form. If you request a hearing it will be held on** to be determined **at (time)** _____ **at (place of hearing)** _____

**Must be a minimum of five days*

The following disciplinary action may be taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☒ Removal, effective (date) ***To be determined**

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing Authority or authorized agent's signature and title.

Signature _____ **Title** _____

This form must be personally served on the employee or sent by certified or register mail.

☐ **Certified or Registered Mail** ☐ **Receipt Number** _____

☐ **Signature of Server** _____ ☐ **Date of personal service** _____

DPF-31A Revised 03/24/2011 DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies all parties.

5-22-18

A-1

STATE OF NEW JERSEY

In the Matter of Brandon Smith
Willingboro Township Police Department

CSC DKT. NO. 2017-2270
OAL DKT. NO. CSV 1461-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 1461-17
AGENCY DKT. NO. 2017-2270

IN THE MATTER OF BRANDON SMITH, WILLINGBORO TOWNSHIP POLICE DEPARTMENT.

Arthur Margeotes, Esq., for appellant (Flanzbaum, Cohen & Raia, LLC, attorneys)

Lester E. Taylor, III, Esq., for respondent (Florio, Perrucci, Steinhardt & Cappelli, LLC, attorneys)

Record Closed: April 9, 2018 Decided: April 10, 2018

BEFORE **JEFFREY N. RABIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 31, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 10, 2018
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 4/12/18

Date Mailed to Parties: 4/13/18

/cb

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter the "Settlement Agreement") is made by and between Petitioner Brandon P. Smith ("Petitioner") and Respondent Township of Willingboro ("Respondent")(Petitioner and Respondent are hereinafter collectively known as the "Parties").

RECITALS

WHEREAS, the Parties desire to avoid further litigation and do hereby wish to settle fully and finally all claims, counterclaims, cross-claims, causes of action and disputes among them, which have or could have been asserted relative to litigation commenced on or about January 31, 2017 in the Office of Administrative Law, bearing OAL docket number CSV-01461-2017-S, and agency reference number 2017-2270 (hereinafter the "Litigation"); and

WHEREAS, the Parties intend for this Settlement Agreement to constitute full and final settlement of all claims, counterclaims and/or other matters arising from the Litigation.

NOW THEREFORE, in consideration of the mutual agreements, promises and undertakings set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

1. **Incorporation.** The above-referenced recitals are incorporated herein by reference.

2. **Settlement Terms.** It is hereby agreed by and between the Parties that:

   a. Petitioner voluntarily accepts the following ten (10) working days suspension without pay from his position as a police officer with the Willingboro Police Department as follows:

      April 27, 2018
      April 28, 2018
      April 29, 2018
      May 2, 2018
      May 3, 2018
      May 7, 2018
      May 8, 2018
      May 11, 2018
      May 12, 2018
      May 13, 2018

3. **Release.** In consideration for carrying out the terms of this Settlement Agreement, the Parties release, and forever discharge each other, including any and all of the Parties' officers, trustees, employees, agents, attorneys, managers, directors and departments, and their predecessors, successors, heirs, executors, administrators and assigns, insurers, reinsurers and/or agents and their successors and assigns individually and in their official capacities, and all persons acting by, through, under or in concert with any of them from any and all actions, causes of action, suits, charges, complaints, claims, liabilities, agreements, controversies, damages, and expenses (including attorneys' fees and costs), and all other claims of any nature whatsoever, known or unknown, in law or in equity that have been or could have been asserted in the Litigation.

4. **Governing Law and Venue.** This Settlement Agreement shall be construed in accordance with the laws of the State of New Jersey, without regard to any conflict of law provisions. Any dispute arising under this Settlement Agreement shall be resolved exclusively by the State and Federal courts of the State of New Jersey and the parties agree to submit to the personal jurisdiction of such courts.

5. **No Prevailing Party/No-Admission of Liability.** The execution of this Settlement Agreement and the settlement made hereunder shall not be construed as an admission of liability by any party in the Litigation, such liability being expressly denied. Each party is responsible for their own respective attorneys' fees and costs.

6. **Confidentiality.** The Parties and respective counsel agree that the terms and conditions of this Settlement Agreement and the claims upon which they were based shall remain confidential insofar as permitted by law, except as necessary to enforce this Agreement.

7. **Non-Disparagement.** The Parties, and their heirs, assigns, devisees, executors, conservators, official and personal representatives shall not take any action or make any statement with regards to the Litigation that is intended to, or would reasonably be expected to, harm or otherwise negatively impact the reputation of the Parties, or which would reasonably be expected to lead to unwanted or unfavorable publicity regarding the Parties.

8. **Language Not Interpreted Against Drafter.** The Parties mutually agree that the language of all parts of this Settlement Agreement shall be construed as a whole, according to its fair and plain meaning. The parties agree that any questions regarding the interpretation of the language of this Settlement Agreement shall not be interpreted against the drafter.

9. **Entire Agreement.** This Settlement Agreement contains the complete and entire understanding between the Parties, and no other promises or agreements shall be binding unless signed by both Parties. The Parties further agree that this Settlement Agreement fully supersedes any prior agreements or understandings between the Parties, for which obligations remain in full force and effect. In signing this Settlement Agreement, the Parties acknowledge that they are not relying on any fact, statement or assumption not set forth in this Settlement Agreement.

10. **Severability.** Should any provision of this Settlement Agreement be held to be illegal, void or unenforceable such provision shall be of no force and effect. However, the

illegality or unenforceability of any such provision shall have no effect upon, and shall not impair the enforceability of any other provision of this Settlement Agreement which shall remain in full force and effect.

11. **Knowingly and Voluntarily**. The Parties both acknowledge that they have carefully read this Settlement Agreement and know and understand its contents and that both parties execute it under their own free act and deed, and enter into this Settlement Agreement knowingly and voluntarily.

12. **Advice of Counsel**. The Parties acknowledge that each has been advised to consult with an attorney prior to executing this Settlement Agreement and have either done so or chosen not to do so.

13. **Counterpart**. This Settlement Agreement may be executed in any number of counterparts, including by portable document format ("PDF"), and all of such counterparts shall for all purposes constitute one agreement binding on the Parties hereto, notwithstanding that all Parties are not signatory to the same counterpart.

14. **Authorization.** The persons executing this Settlement Agreement represent and warrant that they have carefully read this Settlement Agreement, and have the full right, power, and authority to sign this Settlement Agreement on behalf of the Parties.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Parties have executed this Settlement Agreement as of the date first above written.

PETITIONER

Brandon P. Smith

BRANDON P. SMITH
Township of Willingboro Police Officer

Date: 4/6/18

RESPONDENT

Township of Willingboro

GREGORY RUCKER
Director of Public Safety

Date:

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Tia Smith
Camden County,
Department of Corrections

CSC DKT. NO. 2018-1141
OAL DKT. NO. CSV 15974-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15974-17
AGENCY DKT. NO. 2018-1141

IN THE MATTER OF TIA SMITH,
CAMDEN COUNTY DEPARTMENT
OF CORRECTIONS.

Stuart J. Alterman, Esq., for appellant, Tia Smith (Alterman and Associates, LLC, attorneys)

Antonieta P. Rinaldi, Esq., Assistant County Counsel, for respondent, Camden County Department of Corrections (Christopher A. Orlando, Camden County Counsel, attorney)

Record Closed: March 28, 2018 Decided: April 20, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeal of Tia Smith from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 26, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 20, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 4/24/18

Date Mailed to Parties: 4/25/18

tat/lam

4/18/18 Recd.

SETTLEMENT AGREEMENT AND RELEASE

CAMDEN COUNTY DEPARTMENT OF CORRECTIONS
330 FEDERAL STREET,
CAMDEN, NEW JERSEY 08102
(856)225-2510

Tia Smith :

Petitioner Employee :

Vs. :

Camden County :
Department of Corrections : Case CSV 15974-2017 S
Respondent Employer:

THIS SETTLEMENT AGREEMENT AND RELEASE, is made on this 28 th day of March 2018 between the Respondent Camden County Department of Corrections (hereinafter, referred to as Employer) having been represented by Antonieta Paiva Rinaldi, Assistant County Counsel for the County of Camden, and Petitioner County Correction Officer Tia Smith (hereinafter, referred to as Employee) having been represented by Stuart J. Alterman, Esquire from Alterman and associates LLC. (Employer, Camden County Department of Corrections and Employee, Tia Smith are hereinafter collectively referred to as the Parties).

WHEREAS, the Camden County Department of Corrections is a public employer with authority to progressively discipline its employees pursuant to civil service regulations promulgated in the New Jersey Administrative Code; and

WHEREAS, Tia Smith is employed by the Camden County Correctional Facility and holding the title of Correctional officer since 10/31/2011; and

WHEREAS, on 14 February 2018, the Employee received a Preliminary Notice of Major Discipline, (hereinafter PDNA) attached hereto and made a part hereof, the specification for the charges issued against Employee are set forth in this attached notice (see attached Exhibit A); and

WHEREAS, the aforementioned charges set forth in the PNDA resulted in disciplinary action by the Employer, seeking a (10) ten day suspension in Docket # CSV 15974-2017 S pursuant to New Jersey Administrative Code N.J.A.C 4A:2-2.3 (a)(1),(a)(6),(a)(7),(a)(12)et al and violations of the Camden County Department of Correction's Rules of Conduct specified therein; and

WHEREAS, the Parties consider it in their best interest to compromise and settle claims leading to the instant matter to avoid further expense, cost and inconvenience of bringing this matter under Docket # CSV 15974-2017 S against this Employee without further adjudication of any issue of fact or law; and

NOW, THEREFORE, in consideration of the mutual recitals, convents and promises contained herein, and for other good cause shown the Parties hereby agree to the following terms;

1.Employee, Tia Smith agrees to accept a six (6) day suspension. This suspension is for the charges set forth in the PNDA, in lieu of the original penalty of (10) ten days see Exhibit A. The Employer has agreed to return (4) four days of pay and to adjust the original penalty to a (6) six day suspension. The parties have agreed to the terms of this suspension

2 Employee, Tia Smith acknowledges that she is guilty of the charges set forth in both the PNDA dated 14 February 2018 Exhibit A and the Final Notice of Disciplinary Action dated 20 March 2018 Exhibit B in Docket # CSV 15974-2017 S.

3.Employee, Tia Smith finally agrees that by signing this settlement agreement and release, she and her heirs, successors and assigns hereby knowingly and voluntarily waives, releases and discharges the Employer and its employees, agents, directors and legal representatives of and from any and all rights, claims, manner of actions and causes of actions, suits, controversies and/or liabilities of any kind or nature whatsoever in law, equity or otherwise, whether known or unknown, whether asserted or not asserted up to the signing of this agreement. The claims released therein include, but are not limited to, any claims as may arise under or through any federal or state constitutions, statues, laws, decisions, orders, policies or regulations.

4. This settlement contains the entire understanding and agreement of the Parties. All prior conversations, communications, representations, correspondences and other writings are merged

into this agreement which alone sets forth the understanding and agreement of the Parties. This settlement is non-precedent setting.

5. The Parties agree that this agreement has been executed without duress or coercion and has been so executed voluntarily. The Parties further agree that each has carefully read and fully understands the terms, conditions and implications of this Agreement and Release and have had the opportunity to review same with their union and/or attorney if they so choose.

6. This agreement constitutes the entire Agreement between the parties: No representations have been made by any other than those set forth herein.

This agreement cannot be modified or amended except by written instrument executed by all parties to this Agreement.

IN WITNESS HEREOF; the parties have here unto set their hands and seals signed:

C/O Tia Smith
Employee

Date: 3/28/18

Warden Karen Taylor
Camden County Department of Corrections

Date: _____

Stuart J. Alterman, Esquire
Alterman and Associates LLC.

Date: 3/28/18

Antonieta Paiva Rinaldi
Assistant County Counsel

Date: 3/28/18

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

4/18/18 Mail

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
Camden County Correctional Facility	330 Federal Street, Camden NJ 08103 856-225-2510	20 March 2018

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Antonieta P. Rinaldi, Esq., Assistant County Counsel	520 Market Street, Camden, NJ 08103 trinaldi@camdencounty.com 856-225-5425

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Tia Smith Case # 211.17	County Correction Officer	5877488
Address/ Phone Number 271 Burwood Avenue Camden, NJ 08105 (856) 506-7005		Pension Number 5877488

On 17 February 2017 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☐ **You requested a hearing which was held on** 18-July-2017 ☐ **You did not request a hearing**

☐ **You requested a hearing and did not appear at the designated time and place**

Sustained Charges:

N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a) (12) Other Sufficient Cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 2.10 Inattentiveness to duty; 3.2 Security.

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

On or about 17 January 2017, you pulled inmate T.H. out of her cell in 2 North A/blk for an interview without properly securing inmate A.S., who was actively separated from her due to a previous altercation. When questioned by your Supervisor, Lt. Worthy in regards to the separation you seemed unconcerned about your inattentiveness. Furthermore, you admitted that you neglected to check and see if inmate A.S.'s door was secure prior to pulling inmate T.H. out from her cell. Your complacency and disregard of your duties endangers the safety and security of the facility as well as your coworkers, inmates, and civilian staff. You are a Correctional Officer of the Camden County Department of Corrections. You are expected to follow departmental guidelines. Your inattentiveness and your neglect of duty bring the department into disrepute.

☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☐ Suspension for 06 working days, beginning April 5, 6, 10, 11, 14, 15

☐ Indefinite suspension pending criminal charges effective (date)_____

☐ Removal, effective (date)_____

☐ Demotion to position of _____ effective (date)_____

☐ Resignation not in good standing, effective (date)_____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing authority or authorized agent's signature and title.

Signature [signature] **Title** Warden

This form must be personally served on the employee or sent by certified or registered mail.

☐ **Certified or Registered Mail** ☐ **Receipt Number** _____

☒ **Signature of Server** SGT 413 ☒ **Date of personal service** 3/28/18

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. **Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee.** Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. **Any appeal postmarked after the 20 days statutory time limit will be denied.** We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission. For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Harry Tisch
Department of Human Services

CSC DKT. NO. 2017-2506
OAL DKT. NO. CSV 02943-7

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02943-7

AGENCY DKT. NO. 2017-2506

IN THE MATTER OF HARRY TISCH,
DEPARTMENT OFHUMAN SERVICES.

Steven W. Griegel, Esq., for appellant, Harry Tisch (Roselia, Griegel, Lozier & Lazzaro, PC, attorneys)

Christopher J. Hamner, Deputy Attorney General, for respondent, Department of Human Services (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 13, 2018 Decided: April 20, 2018

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on March 1, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On April 13, 2018, at the scheduled hearing, the parties filed a fully executed Settlement Agreement in this matter. The Agreement is attached and fully incorporated herein.

FINDINGS OF FACT

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

April 20, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 4/26/18

Date Mailed to Parties: 4/23/18
/lam

C-1

OAL DKT. NO. CSV 02942-2017-S
AGENCY DKT. NO. 2017-2506

SETTLEMENT AGREEMENT

IN THE MATTER OF
HARRY TISCH
AND
NJ DEPARTMENT OF
HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. Harry Tisch will remain in his present position in his employment with the Department of Human Services as Supervisor Preventive Maintenance and Construction.

B. For purposes of seniority [redacted] purposes, Harry Tisch's appointment date to this position will be considered to be the date in November 2016 the list for this position was promulgated.

C. The Department of Human Services shall amend Harry Tisch's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law.

D. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay. The Department of Human Services agrees to counsel fees in the amount of Seven Thousand dollars ($7,000.00) to be paid to

Counsel for Harry Tisch.

F. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Harry Tisch waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims. This release is limited to claims in connection with OAL Docket No. CSV 02943-2017S

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

4/13/18
DATE

Harry Tisch

4/13/18
DATE

ON BEHALF OF Harry Tisch
as attorney not a party.

4/13/18
DATE

ON BEHALF OF NJ Department of Human Services

CERTIFICATION

I, Harry Tisch, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4/13/18
DATE

Harry Tisch

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Robert Veracierta
Ocean County Board of Social Services

CSC DKT. NO. 2017-3578
OAL DKT. NO. CSV 07013-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 07013-17
AGENCY DKT. NO. 17-3578

IN THE MATTER OF ROBERT VERACIERTA, OCEAN COUNTY BOARD OF SOCIAL SERVICES.

James Grimley, Esq. for appellant, Robert Veracierta

Barbara O'Connell, Esq. for respondent, Ocean County Board of Social Services, (Sweeney & Sheehan, attorneys)

Record Closed: April 2, 2018 Decided: April 18, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeal of Robert Veracierta from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matter was transmitted to the Office of Administrative Law for determination as a contested case on May 17, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 18, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 4/23/18

Date Mailed to Parties: 4/24/18

tat/

4/2/18 ✓
ucd

OAL DOCKET #CSV 07013-2017 S

SETTLEMENT AGREEMENT AND RELEASE

IN THE MATTER OF

Robert Veraciertra (Veracierta")

v.

Ocean County Board of Social Services ("OCBSS")

The parties have voluntarily resolved the disputed matters raised in this OAL case and enter into the following settlement.

A. Veracierta will withdraw his appeal of his termination **with prejudice**, and the OCBSS agrees that Veracierta's discipline giving rise to his termination will be amended to indicate the termination was for 1. Incompetency, inefficiency or other failure to perform duties and 12. Other sufficient Cause. The references to 2. Insubordination, 6. Conduct unbecoming a public employee and 7. Neglect of duty will be removed. OCBSS agrees not to oppose any claim for unemployment compensation, disability or pension benefits should Veracierta's choose to pursue them.

B. Ocean County Board of Social Services shall amend Veracierta's Final Notice of Disciplinary Action in the County and Municipal Personnel System. (CAMPS) to conform to the terms of the settlement. All internal records of the Ocean County Board of Social Services will be kept intact.

C. Veracierta waives all other claims against OCBSS and expressly releases OCBSS from all claims of any nature whatsoever including but not limited to all claims with regard to this discipline including back pay, counsel fees or other monetary relief. This includes all claims

in any way related to this discipline or any other matter that could have been brought under any state or federal law.

Further Veracierta hereby releases and forever discharges the OCBSS and its administrators, successors and assigns and all other persons, entities or associations, whether known or unknown, from any and all actions and causes of action, suits, contracts, agreements, liabilities, claims and demands whatsoever, whether in law or equity and whether known or unknown, including, but not limited to the issues and claims which are the subject of the this pending OAL appeal, which Veracierta ever had, now has or which his heirs, executors, administrators, successors or assigns, or any of them, hereafter have or may have for, or by reason of any cause, matter or thing whatsoever.

D. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

CERTIFICATION

I, Robert Veracierta, hereby certify that I have had sufficient opportunity to review this Settlement Agreement and Release with my attorney, and I fully understand its meaning and terms. I enter into this Settlement Agreement knowingly and voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3-15-2018
Date

Robert Veracierta
Robert Veracierta

Michele A. Pecikonis
Witness

Michele A. Pecikonis
Notary Public
State of New Jersey
Commission Expires 12/6/2022

3/29/18

Date

On Behalf of the OCBSS

Witness

Maryann Frances
Notary Public State of New Jersey
My Commission Expires February 7, 2019

5 22-18

A-1

STATE OF NEW JERSEY

In the Matter of Shikeya D. Walker-Baldwin
Division of Developmental Disibilities,
Department of Human Services

CSC DKT. NO. 2014-2759
OAL DKT. NO. CSV 00247-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 00247-15

AGENCY NO. 2014-2759

IN THE MATTER OF SHIKEYA D. WALKER-BALDWIN, DEPARTMENT OF HUMAN SERVICES, DIVISION DEVELOPMENTAL DISABILITIES.

Shikeya D. Walker-Baldwin, appellant, pro se

Brenda Baxter, Assistannt Commissioner, for respondent Department of Human Services, Division Develeopmental Disabilities, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: April 18, 2018 Decided: April 24, 2018

BEFORE **SARAH G. CROWLEY** ALJ:

This matter concerns the appeal of Shikeya D. Wakler-Baldwin from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on January 6, 2015.

The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 24, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 4/25/18

Date Mailed to Parties: 4/25/18

OAL Docket NO. CSV 00247-2015 S
Agency Ref. No.: 2014-2759
Transmitting Agency: Department of Personnel
SETTLEMENT AGREEMENT

IN THE MATTER OF

Walker-Baldwin, Shikeya D.

AND

Department of Human Services, Developmental Disabilities

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them:

A. The Appellant, Shikeya D. Baldwin-Walker, withdraws her appeal and request for a hearing, and the Respondent, the Department of Human Services, Division of Developmental Disabilities, agrees that Shikeya D. Baldwin-Walker is appointed from the **Certification of Eligibles for Appointment,** specifically, **Certification No: OS130577,** to the position of Senior Community Program Specialist, with an effective date of November 30, 2013.

B. The Department of Human Services, Division of Developmental Disabilities shall amend the Shikeya D. Baldwin-Walker's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority, Department of Human Services/Division of Developmental Disabilities, will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by Shikeya D. Baldwin Walker or as consistent with the law. Any information regarding the underlying issues will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

C. Appellant waives all other claims against the Respondent/Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

D. Except for the assessment of Shikeya D. Baldwin-Walker's appointment to the position of Senior Community Program Specialist, nothing in this agreement shall be deemed to

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

E. Appellant waives all claims, suits or actions, whether know, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, specifically, the Department of Human Services/Division of Developmental Disabilities, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A – the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statues, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in subsequent claims, except pending workers compensation claims.

F. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

G. This agreement will become effective only if approved by the CIVIL SERVICE COMMISSION. Any disapproval by the CIVIL SERVICE COMMISSION shall not interfere with the rights of either party to pursue the matter further.

9/20/2017

DATE
Appellant

11/24/17
DATE

Respondent DHS/DDD

DATE

ON BEHALF OF

DATE

ON BEHALF OF

OAL Docket NO. CSV 00247-2015 S

CERTIFICATION

I, Shikeya D Walker-Baldwin, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned by understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the Civil Service Commission, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statement made by me are willfully false, I am subject to punishment.

9/20/2107

DATE

Shikeya Walker-Baldwin

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Stephanie Wallace-Smith
Passaic County,
Preakness Healthcare Center

CSC DKT. NO. 2018-480
OAL DKT. NO. CSV 12870-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 12870-17
AGENCY REF. NO. 2018-480

IN THE MATTER OF STEPHANIE WALLACE-SMITH, PASSAIC COUNTY, PREAKNESS HEALTHCARE CENTER.

Terry Woodrow, AFSCME, appearing for appellant Stephanie Wallace-Smith pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jose Santiago, Assistant County Counsel, appearing for respondent Passaic City (William J. Pascrell, III, County Counsel, attorneys)

Record Closed: April 16, 2018 Decided: April 17, 2018

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

By Final Notice of Disciplinary Action dated July 18, 2017, and made effective July 25, 2017, Passaic City, Preakness Healthcare Center (City), suspended appellant Stephanie Wallace-Smith (appellant) for thirty (30) days from her civil service position as a Nurse's Aide for insubordination, neglect of duty, and other sufficient cause, namely, that she allegedly refused a supervisor's instruction to assist with the dressing of a resident. Appellant filed a request for a hearing appealing her suspension, which

appeal was filed with the Office of Administrative Law by the Civil Service Commission for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 on September 5, 2017.

The matter was assigned to me on September 5, 2017. On September 13, 2017, I scheduled the matter for a hearing date of January 25, 2018. Prior to the scheduled plenary hearing, the parties communicated that they were in the process of negotiating a resolution of the matter and, accordingly, the hearing was converted to a settlement conference. The parties were given the opportunity to reduce the settlement to writing.

Under cover of March 9, 2018, but not received in this Office until April 16, 2018, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the applicable law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

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

April 17, 2018
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 4-20-18

Mailed to Parties: APR 20 2018

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

id

Stephanie M Wallace Smith, Petitioner,	:	
	:	AOL DOCKET NO: CSV - 12870-2017N
v.	:	AGENCY Ref. NO: CSV# 2018-480
	:	
	:	SETTLEMENT AGREEMENT
COUNTY OF PASSAIC PREAKNESS HEALTHCARE	:	
Respondent.	:	

WHEREAS, Stephanie M. Wallace Smith, Petitioner/Appellant is employed as a CNA by Respondent, the Passaic County Preakness Healthcare Center, and

WHEREAS, on or about May 2017, Petitioner was served with a Preliminary Notice of Disciplinary Action, 31A, charging her with a violation of NJAC 4A:2-2.3

1. Incompetency, inefficiency or failure to perform duties

2. Insubordination

7. Neglect of Duty

12 Other sufficient cause

*violation of patient's rights, and

WHEREAS, those charges arose from an incident on April 19, 2017 as stated in the Preliminary Notice of Disciplinary Action - 31-A, (Exhibit A); and

WHEREAS, on July 18, 2017, a Final Notice of Disciplinary Action 31B, was issued, upholding the charges and imposing a 30day suspension without pay from July 25, 2017 through September 14, 2017 and attendance at an Employee Assistance Program, (Exhibit B) and

WHEREAS, Ms. Wallace Smith appealed that determination, which is now before the OAL; and

WHEREAS, the parties have agreed that the charges shall be sustained but the discipline shall be amended; and

WHEREAS, the parties in this appeal, having voluntarily resolved all disputed matters between them, they now enter into the following settlement, which fully disposes of all issues in controversy.

1. Petitioner's records shall be changed to reflect a suspension without pay of five days and five days alternate sanction, as that is understood in the attached Agreement (Exhibit C), and Petitioner has already attended the EAP Program.

2. Petitioner will be reimbursed the remaining salary not paid, due to the suspension, upon the acceptance of this Settlement Agreement by the Civil Service Commission as a Final Decision.

3. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

4. Respondent, Passaic County /Passaic County Preakness Health Care Center shall amend Appellant's personnel records to conform to the terms of the Settlement.

5. All internal records of the Preakness Healthcare Center and, County of Passaic will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with law.

6. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

7. Petitioner waives all other claims against the Preakness Healthcare Center with regard to this matter, counsel fees or other monetary relief.

8. This agreement shall not constitute a precedent in matters involving other employees.

9. No Other Claims: Petitioner represents that Petitioner has not filed any other claim, complaint or charges, either formal or informal, against the Preakness Healthcare Center or Passaic County with any other local, state or federal agency or court relating to Petitioner's employment with Respondent. The Petitioner will not file any such actions as related to the claim, complaint or charge to which this document acts as a Release and Settlement at anytime hereafter, unless necessary to enforce this Agreement.

10. Petitioner waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the County of Passaic and Passaic County Preakness Health Care Center, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title Vii of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination Employment Act, Title 11A – the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practice which arose prior to the date of this Settlement Agreement and bars

the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

11. Costs. The Parties shall each bear their own costs, expert fees, attorneys' fees and other fees incurred in connection with this Agreement.

12. Voluntary Execution of Agreement. This Agreement is executed voluntarily and without any duress or undue influence on the part or behalf of the Parties hereto, with the full intent of releasing all claims. The Parties acknowledge that:

They have carefully read this Agreement and it has been explained to them in full;

They have been represented in the preparation, negotiation, and execution of this Agreement by legal counsel of their own choice or that they have voluntarily declined to seek such counsel;

A. They fully understand the terms and consequences of this Agreement and of the releases it contains;

B. They are fully aware of the legal and final binding effect of this Agreement;

C. They freely and voluntarily enter into this Agreement without duress or coercion;

D. The Parties are completely satisfied that this Agreement is fair, reasonable, and acceptable; and

E. The Parties are satisfied with their respective counsel if any and believe their counsel has effectively represented their independent interests.

13. Authority. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them, under the terms and conditions of this Agreement. Each Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of, or against, any of the claims or causes of action released herein.

14. No Representations. Each Party represents that it has had the opportunity to consult with an attorney, and/or union representative and has carefully read and understands the scope and effect of the provisions of this Agreement. Neither Party has relied upon any representations or statements made by the other Party hereto, which are not specifically set forth in this Agreement.

15. Severability In the event that any provision or portion of a provision hereof becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provision or portion of such provision.

16. Entire Agreement. This Agreement contains and constitutes the entire understanding and agreement between the parties hereto, respecting the subject matter hereof, and supersedes and cancels all previous negotiations, agreements, commitments and writings in connection herewith. The introductory clauses are incorporated herein and read together are contractual in nature and not mere recitals.

17. No Oral Modification. This Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner, orally or otherwise, except by an instrument in writing of concurrent or subsequent date, signed by a duly authorized officer or representative of each of the parties hereto. The parties agree that they waive the rule of construction against the drafter of this Agreement.

18. Governing Law. The laws of the State of New Jersey shall govern this Agreement.

19. Effective Date. This Agreement is effective after it has been signed by all of the Parties.

20. Counterparts. This Agreement may not be executed in counterparts.

21. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

22. This Settlement Agreement represents the complete and full understanding between the parties.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER A PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN THE SAME AS THEIR OWN FREE ACT. BY SIGNING BELOW, THE UNDERSIGNED FURTHER INDICATE AND ACKNOWLEDGE THAT THIS IS A LEGALLY BINDING DOCUMENT AND THAT THEY ARE FREELY AND VOLUNTARILY GIVING UP CERTAIN RIGHTS TO FILE LEGAL CLAIMS AND TO RELEASE PRIVATE AND CONFIDENTIAL INFORMATION AND INTEND TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT WITHOUT EXCEPTION.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the respective dates set forth below.

2/9/18
Date

Stephanie M. Wallace-Smith

2-12-18
Date

Terry Woodrow, Union Representative
AFSCME

2/9/18
Date

Lucinda Corrado, Director
Preakness HealthCare Center

2/9/18
Date

Attorney for Preakness

EXHIBIT A

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

FROM

Employing Agency Name	Address/ Phone Number	Date
Passaic County	401 Grand Street Paterson, NJ 07505	01/09/18

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Office of County Counsel	401 Grand Street, Paterson, NJ (973) 881-4460

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Jenny Gonzalez	NRS AIDE	

Address/ Phone Number	Pension Number

You are hereby notified that the following charge(s) have been made against you: *(If necessary, use additional sheets and attach)*

Charges:

Violation of Administrative Code: 4A:2-2.3

7. Neglect of Duty
   Conduct Unbecoming a Public Employee

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

On 12/27/17, resident A.L. sustained a fracture after Jenny Gonzalez left her unattended on the toilet and resident fell onto the floor. During the investigation, Ms. Gonzalez provided a false written statement and gave false verbal statements when interviewed five times with union representation present.

Incident was reported to the New Jersey Department of Health, New Jersey Ombudsman.

☐ *If checked, incidents are continued on attached page.*

☐ **You are hereby suspended effective** _____
(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 5 ***days of receipt of this form. If you request a hearing it will be held on** _____
at (time) _____ **at (place of hearing)** Preakness Healthcare Ctr; 305 Oldham Road Wayne, NJ (Main Street, 2nd Floor)
**Must be a minimum of five days*

The following disciplinary action may be taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☒ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing authority or authorized agent's signature and title.

Signature _____ **Title** Lucinda Corrado, Executive Director

This form must be personally served on the employee or sent by certified or registered mail.

☐ **Certified or Registered Mail** ☐ **Receipt Number** _____

☐ **Signature of Server** _____ ☐ **Date of personal service** _____

DPF-31A Revised 03-24-11

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

EXHIBIT B

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
Preakness Healthcare Center	401 Grand Street Paterson, NJ 07505	07/18/2017

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Office of County Counsel	401 Grand Street, Paterson, NJ (973) 881-4460

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
STEPHANIE M WALLACE-SMITH	NRS AIDE	000717873

Address/ Phone Number	Pension Number
675 East 25th Street Paterson, NJ 07504	

On 06/08/2017 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ You requested a hearing which was held on 08/15/2017 ☐ You did not request a hearing

☐ You requested a hearing and did not appear at the designated time and place

Sustained Charges:	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
Violation of Administrative Code: 4A:2-2.3 - Incompetency, Inefficiency or failure to perform duties - Insubordination - Neglect of Duty - Other sufficient cause * Violation of Resident Rights	See Attached 31A
☐ *If checked, charges are continued on attached page.*	☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for 30 Days working days, beginning 07/25/2017 and ending 09/14/2017

☐ Indefinite suspension pending criminal charges effective (date)

☐ Removal, effective (date)

☐ Demotion to position of effective (date)

☐ Resignation not in good standing, effective (date) ☒ Other Disciplinary Action

☐ Fine *amount* which is equal to *number* (number of working days) EAP Program

Appointing authority or authorized agent's signature and title.

Signature Title Barbara E. De Spirito, Director of Human Resources

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☐ Receipt Number

☐ Signature of Server ☐ Date of personal service

APPEAL PROCEDURE TO THE EMPLOYEE You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L. 1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.

When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

EXHIBIT C

COUNTY OF PASSAIC ALTERNATE SANCTION AGREEMENT

Employee Name: _____ Title: _____ Date: _____
I have been offered "Alternate Sanction" by the Disciplinary Hearing Officer. The "Alternate Sanction" consists of a fine of twenty-five percent (25%) of one (1 day) salary for each (1 day suspension)

I understand that to be eligible for this option, all of the following conditions must be met:

1. Employee pleads guilty or is found guilty.
2. Employee waives the right to an appeal (According to contractual)
3. Employee agrees to this fine of 25%/day/# of days in lieu of the actual suspension; and
4. The employee acknowledges that his/her record will reflect the actual suspension (total number of days) and not the Alternate Sanction.
5. I understand that, in signing this agreement, I am relinquishing my right to pursue this disciplinary action any further. I further agree that I have been fully and fairly represented by the Union and Management and received a fair and impartial hearing in this matter, including in the negotiations on this agreement.

In accordance with the New Jersey Administrative Code 4A:2-2.4- the appointing authority may only impose a fine as follows:

1. A form of restitution;
2. In lieu of a suspension, when the appointing authority established that a suspension of the employee would be detrimental to the public health, safety or welfare; or
3. Where an employee has agreed to a fine as a disciplinary option.

Alternate Sanction Fine payment schedule in accordance with New Jersey Administrative Code 4A: 2.2-4
An employee may pay a fine of more than five days salary in a lump sum or through installments. Unless otherwise agreed to by the employee, an installment may not be more than **5% of the gross salary per PAY for a fine under $500.00, 10 % of gross salary per PAY for a fine between $500.00 and $1000.00; or 15 % of gross salary per PAY period for a fine over $1000.00.**
Please select one:

_____ I agree to accept the "Alternate Sanction"

One (1) day salary _____ number of suspension days = _____ fine.

Semi-monthly gross _____ @ _____ percent of fine = amount deduction per pay period _____.

_____ I do not agree to accept the "Alternate Sanction option and will accept a full _____ suspension without pay. (Total amount without pay) _____.

Employee's Signature _____ Dated _____

Union Representative _____ Dated _____

Signature of Preparer _____ Dated _____

Cc: Employee
Human Resources
Union

Revised 12/31/11, 04/05/2017

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Devon Young
City of Newark Fire Department

CSC DKT. NO. 2017-1967
OAL DKT. NO. CSV 01958-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 01958-17
AGENCY DKT. NO. 2017-1967

IN THE MATTER OF DEVON YOUNG,
CITY OF NEWARK, FIRE DEPARTMENT.

Lynsey A. Stehling, Esq., for appellant Devon Young (Law Offices of Daniel J. Zirrith, attorneys)

France H. Casseus, Assistant Corporation Counsel, for respondent City of Newark (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: April 23, 2018 Decided: April 25, 2018

BEFORE **MARGARET M. MONACO**, ALJ:

Appellant Devon Young filed an appeal regarding his removal from employment by respondent City of Newark, Fire Department. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on February 7, 2017, for determination as a contested case. The matter was originally assigned to Administrative Law Judge Joan Bedrin Murray and later reassigned to the undersigned. On January 17, 2018, the parties appeared at the OAL and engaged in discussions toward an amicable resolution of the matter. Under letter dated March 1,

2018, counsel for respondent forwarded a Settlement Agreement and General Release, which was later amended by the parties on April 23, 2018. The revised Settlement Agreement and General Release is attached hereto and indicates the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Apr 25, 2018
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency:

APR 30 2018

Date Mailed to Parties:

jb

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

Devon Young, Appellant, v. CITY OF NEWARK, FIRE DEPT, Respondent	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 01958-2017 N** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

RECEIVED
2018 MAR -2 P 12:09
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

IT IS HEREBY AGREED by and between the City of Newark ("City"), Council 21 ("Union"), and Employee Devon Young ("Young"), to resolve the matter as it relates to the Notice of Termination, dated December 23, 2013. Rather than continuing further with the appeal of Young's termination at the Office of Administrative Law, the City, the Union and Young (collectively referred to hereinafter as the "Parties") have determined to resolve this matter by this Agreement, and agree as follows:

1. The City will rescind the termination effective December 23, 2013.
2. The Parties agree from December 23, 2013 until the date Young returns to work will be deemed an unpaid leave of absence.
3. The City agrees to pay Young the amount of Thirty Thousand Dollars ($30,000) as settlement for any and all monies due to Young in relation to the facts in the above matter in further execution of this settlement agreement.
4. The Settlement payment referenced above will be reflected on Internal Revenue forms. The City makes no representation as to the tax consequences of any payment hereunder. The City shall comply with all provisions of the law relating to the settlement payment.

5. Young acknowledges and agrees that she will be responsible for the payment of all applicable state, federal and local taxes with respect to the payments under this Agreement, and assumes full responsibility and liability with respect to same.

6. This Agreement will be presented to the City Council for review at the first City Council meeting conducted after this settlement agreement is executed. Any disapproval by the City Council will require the matter to be returned to OAL for hearing.

7. The City will make its best efforts to ensure any payment that is due pursuant to this Agreement is made within forty-five (45) days from the date of approval of the City Council.

8. Young agrees she will return as a Public Safety Telecommunicator Trainee for the Department of Public Safety, specifically working with the Police Department.

9. Young agrees to complete a criminal background check prior to her return to work. Failure to successfully pass a background check is grounds for the City to immediately terminate Young. Young is not waiving her right to appeal termination on basis of a failed background check.

10. The parties agree the background check will be conducted within 7 days of Ms. Young's execution of said agreement. Ms. Young will return to work immediately upon successfully passing background check.

11. Young agrees to complete a 90 days working test period.

12. Young understands failure to successfully complete her working test period is grounds for removal. Young does not waive her right to appeal a determination that she failed her working test period.

13. The parties agree that, upon reinstatement, Ms. Young will complete the full three month working test period. Additionally, the parties agree Ms. Young's employment previously completed by Ms. Young will be counted toward the one year of service time necessary for completion of the PST Trainee title. Upon completion of the PST

Trainee title, Ms. Young will be immediately placed in the PST title and will receive the appropriate salary increase and any and all contractual benefits associated with the movement from the PST Trainee title to the PST title.

14. Young's return to work is subject to her performance of all obligations and conditions that are set forth in this Agreement.

15. ~~Young's return to work is subject to the review and approval of the NJ Department of Community Affairs (DCA). Any disapproval by the DCA will not interfere with the rights of either party to move forward with OAL Hearing.~~ DCA approval not required effective March 10 Personnel matters. No longer under State oversight. FC 4/23/18 LS 4/23 4/23/18

16. The Parties acknowledge under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

17. Young and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency except to the extent necessary to enforce the terms of this Agreement, or as required by law.

18. Young and the Union each further agree that there is no consideration due Young, her counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from her employment and/or the execution of this Agreement, except as otherwise provided herein.

19. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

20. Young and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a

grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the facts/circumstances related to the termination on 12/23/13, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

21. Young is bound by this Agreement. Anyone who succeeds to Young's rights and responsibilities, such as heirs or the executor of her estate, shall also be bound.

22. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

23. Young and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

24. This Agreement contains the sole and entire agreement between Young, Council 21 and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Young specifically represents and acknowledges in executing this Agreement that she has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

25. Young agrees and acknowledges that she has been fully and fairly represented by her Union in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.

26. Young agrees and acknowledges that she has had full opportunity to review this Agreement with her counsel and/or union representation and she enters into same knowingly and voluntarily.

27. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

28. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** will not interfere with the rights of either party to move forward with OAL hearing.

29. By signing this Settlement Agreement, Young states that:

    a. She has read it;

    b. She understands it and knows that she is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

    c. She accepts the terms of the Agreement;

    d. Her representative negotiated this Agreement with her knowledge and consent;

    e. She has been advised to consult with her attorney prior to executing this Agreement, and has in fact done so;

    f. She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

1-18-18
Date

BY: _____
City of Newark, Department of Public Safety

1/17/18
Date

BY: _____
Union Attorney/Representative

1/17/18
Date

_____
Devon Young
Approved as to Form and Legality:

1/17/18
Date

_____
Law Department

CERTIFICATION

I, Devon Young, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/17/18
DATE

NAME

5-23-18

A-1

STATE OF NEW JERSEY

In the Matter of Felicia Zimmerman
Vineland Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-1243
OAL DKT. NO. CSV 16635-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 23, 2018 BW

The Civil Service Commission, at its meeting of May 23, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MAY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. CSV 16635-16

AGENCY DKT. NO. 2017-1243

IN THE MATTER OF FELICIA ZIMMERMAN,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Rashidah N. Hasan, Esq., for appellant, Felicia Zimmerman

Jana R. DiCosmo, Deputy Attorney General, for respondent, Department of Human Services, Vineland (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 30, 2018 Decided: April 30, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on October 28, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on .

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

4/30/18
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 5/3/18

Date Mailed to Parties: 5/3/18

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on April 30, 2018

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 117
TRENTON, NJ 08625-0117

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Director

April 30, 2018

RECEIVED
2018 APR 30 P 4:03
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Via Fax 609-689-4100 & Overnight Delivery
Honorable John S. Kennedy, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Building 9
3444 Quakerbridge Road, P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Felicia Zimmerman v. Department of Human Services; Vineland Development Center
OAL Docket No. CSV-16635-2016S

Dear Judge Kennedy:

As Your Honor is aware, the parties have resolved all issues through a fully executed Settlement Agreement, a copy of which is attached. The State requests that an Initial Decision be entered in this matter. Thank you for Your Honor's consideration.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: Jana R. DiCosmo
Jana R. DiCosmo
Deputy Attorney General

cc: Rashidah Hasan, Esq. (via email only)
Michael Rutherford, Esq. (via email only)

OAL DKT. NO. CSV 16635-16

OAL DKT. NO. CSV 16635-16
AGENCY DKT. NO.
SETTLEMENT AGREEMENT

IN THE MATTER OF
FELICIA ZIMMERMAN, APPELLANT

AND

DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER,
RESPONDENT

RECEIVED
2018 APR 30 P 4:03
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated October 11, 2016 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.O.4:08; E-1 Violation of a rule, regulation, policy, procedure, order or administrative decision.	Removal	July 6, 2016
2.	N.J.A.C. 4A:2-2.3(a) 6. Conduct unbecoming a public employee.	Removal	July 6, 2016
3.	N.J.A.C. 4A:2-2.3(a) 12. Other sufficient cause.	Removal	July 6, 2016

B. The Appellant Felicia Zimmerman withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services, Vineland

OAL DKT. NO. CSV 16635-16

Developmental Center agrees that the following result will occur with regard to each charge:

Modified to a General Resignation as resolution to the disciplinary appeal pursuant to N.J.A.C. 4A:2-6.3(b).

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. The parties have agreed to the following:

1. To date, appellant has served a total of (Not Applicable) days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: zero (0).
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: (Not Applicable).
4. The Appellant agrees to not seek reemployment with the New Jersey Department of Human Services or the New Jersey Department of Health, and contracted subsidiaries at any time in the future.

D. The Department of Human Services, Vineland Developmental Center (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services, Vineland Developmental Center will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

OAL DKT. NO. CSV 16635-16

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3-30-18
DATE

Appellant

4/4/18
DATE

ON BEHALF OF Appellant

DATE

ON BEHALF OF Respondent

4/5/18
DATE

Respondent

OAL DKT. NO. CSV 16635-16

RECEIVED
2018 APR 30 P 4:18
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CERTIFICATION

I, Felicia Zimmerman, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3-30-18
DATE

Felicia Zimmerman

5-24-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

June 8, 2018

Lisa Ciccone
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Michael Canavan, Esq.
The College of New Jersey
P.O. Box 7718
Ewing, New Jersey 08628-0718

Re: *Gloria Pineda v. The College of New Jersey* (CSC Docket No. 2018-2582 and OAL Docket No. CSV 4419-18) - **SETTLEMENT**

Dear Ms. Ciccone and Mr. Canavan:

The appeal of Gloria Pineda, a Senior Building Maintenance Worker, The College of New Jersey, of her six-month suspension on charges, was before Administrative Law Judge Susan L. Olgiati (ALJ), who issued her initial decision on May 24, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on May 25, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on July 9, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective July 10, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Susan L. Olgiati, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 04419-18
AGENCY DKT. NO. 2018-2582

IN THE MATTER OF GLORIA PINEDA,
THE COLLEGE OF NEW JERSEY.

Lisa Ciccone, Busines Representative, Local 195 IFPTE, for appellant, Gloria Pineda, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Michael Canavan, Associate General Counsel, for respondent, The College of New Jersey, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: May 23, 2018 Decided: May 24, 2018

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 27, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 24, 2018
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 5/25/18

Date Mailed to Parties: 5/25/18

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Fully executed Settlement Agreement, received by the Office of Administrative Law on May 23, 2018

J-1

RECEIVED
2018 MAY 23 P 4:31
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

In the Matter of Gloria Pineda	DISCIPLINARY ACTION SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is made and entered into this 2nd day of MAY, 2018 by and between Gloria Pineda (hereinafter referred to as "Employee") and The College of New Jersey (hereinafter referred to as "TCNJ" or "College").

WHEREAS, a Preliminary Notice of Disciplinary Action dated February 6, 2018, was served upon the Employee by the College; and

WHEREAS, a Final Notice of Disciplinary Action dated March 6, 2018, was served upon the Employee by the College; and

WHEREAS, an Amended Final Notice of Disciplinary Action dated April 6, 2018, which imposed a six month suspension without pay, was served upon the Employee by the College; and

WHEREAS, the Employee timely appealed the Final Notice of Disciplinary Action to the New Jersey Civil Service Commission, which assigned the appeal Docket No. 2018-2582; and

WHEREAS, this matter was referred by the Civil Service Commission to the Office of Administrative Law, which assigned the matter Docket No. CSV 04419-2018S; and

WHEREAS, the Employee and College desire to settle all issues arising under the Amended Final Notice of Disciplinary Action and OAL Docket No. CSV 04419-2018S,

NOW THEREFORE, the parties voluntarily agree to fully resolve and settle all disputed matters by entering into the following settlement agreement, which fully disposes of all issues in controversy between the Employee and College:

1. The parties agree as follows:

   A. The Employee agrees to serve a three-month suspension without pay, in lieu of a six-month suspension without pay.

   B. The dates of suspension shall be modified from the six-month period of February 9, 2018 through August 8, 2018 to a three-month period of February 9, 2018 through May 8, 2018. Employee shall return to work beginning May 9, 2018.

C. As a condition of this Agreement, Employee agrees to execute the Last Chance Agreement, a copy of which is hereby incorporated into this Agreement and attached as Exhibit "A."

D. Any violation of the terms of this Agreement or the Last Chance Agreement will constitute cause for termination of Employee's employment at the College.

2. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

3. The College will amend the Employee's personnel records to conform to the terms of this Agreement.

4. In consideration for a reduction of the Employee's suspension from six months to three months and other consideration provided in this Settlement Agreement, Employee waives, releases, and gives up any and all claims and rights, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the College, the State of New Jersey, their employees, agents, or assigns. Employee waives all claims, demands, damages, causes of action or suits which have been or could have been brought. Employee waives all claims, including those of which he is not aware and those not mentioned in this Settlement Agreement. Employee waives all claims resulting from anything which has happened up to now. This waiver includes, but is not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, the Federal Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Equal Pay Act, the New Jersey Conscientious Employee Protection Act, the Family and Medical Leave Act, the New Jersey Family Leave Act, the Civil Service Act, 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §1985, New Jersey wage and hour laws, retaliation claims under workers' compensation laws, the U.S. Constitution, the New Jersey Constitution, tort law or contract law. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claim.

5. The Employee waives all claims against TCNJ with regard to this matter, including any award of back pay, counsel fees or any other monetary relief.

6. Except for the imposition of the disciplinary sanction in Section 1.A. above and the assessment of the Employee's disciplinary record in any subsequent personnel disciplinary matter, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either party. This Agreement shall not constitute a precedent in matters involving other employees.

IN WITNESS WHEREOF, the Employee, Employee Representative and the College have acknowledged their understanding of this Agreement and cause their signatures to be executed as of the date written above.

Gloria Pineda
Employee

TCNJ Representative

Lisa Ciccone
Employee Representative, Local 195, IFPTE

CERTIFICATION

I, Gloria Pineda, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily. I further agree that I had the opportunity to review this Settlement Agreement with an attorney of my choosing.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against The College of New Jersey emanating from the Amended Final Notice of Disciplinary Action dated April 6, 2018, CSC Docket No. 2018-2582, and OAL Docket No. CSV 04419-2018S.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Gloria Pineda
Gloria Pineda

EXHIBIT A

In the Matter of
Gloria Pineda

LAST CHANCE AGREEMENT

Gloria Pineda (hereinafter referred to as "Employee") enters into this Last Chance Agreement pursuant to the Settlement Agreement dated ~~April~~ May 2, 2018. The Settlement Agreement incorporates this Last Chance Agreement between Gloria Pineda and The College of New Jersey (~~hereinafter referred to as "~~TCNJ" or "College").

1. The Employee and the College agree that the Employee may return to her employment with the College on May 9, 2018, in accordance with the terms of the Settlement Agreement.

2. The Employee understands and acknowledges that the College will immediately terminate her employment in the event the College sustains charges for any future disciplinary violation covered under N.J.A.C. Title 4A.

3. The Employee understands and acknowledges that by signing this Last Chance Agreement, she waives her right to appeal any termination of employment under paragraph 2 of this Last Chance Agreement.

4. The Employee has read and understands this Last Chance Agreement and signs the Last Chance Agreement voluntarily and of her own free will and accord.

5. The Employee further agrees that she has had the opportunity to review this Agreement with her union, International Federation of Professional and Technical Engineers, AFL-CIO, Local 195.

[*Remainder of this page intentionally blank*]

IN WITNESS WHEREOF, the Employee, College and Union have acknowledged their understanding of this Last Chance Agreement and cause their signatures to be executed as of the date below written.

4/28/18
Date

Gloria Pineda
Gloria Pineda

5-2-18
Date

Lisa Ciccone
Employee Representative

5-3-18
Date

The College of New Jersey

6-6-18

A-1

STATE OF NEW JERSEY

In the Matter of Annette D. Barnes
Burlington County Board of Social Services

CSC DKT. NO. 2018-1903
OAL DKT. NO. CSV 00999-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 00999-18
AGENCY DKT. NO. 2018-1903

IN THE MATTER OF ANNETTE D. BARNES, BURLINGTON COUNTY BOARD OF SOCIAL SERVICES.

Annette D. Barnes, appellant, pro se

Richard C. Strobel, Chief Counsel, for respondent, Burlington County Board of Social Services, pursuant to N.J.A.C. 1:1-5.4(a)(8)

Record Closed: May 10, 2018 Decided: May 14, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on January 19, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on .

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 14, 2018
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: 5/14/18

Date Mailed to Parties: 5/15/18

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on May 10, 2018

OAL DKT. NO. CSV 00999-2018 S
AGENCY DKT. NO. 2018-1903

SETTLEMENT CONSENT AGREEMENT

RECEIVED
2018 MAY 10 A 11:50
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF

Barnes, Annette D.
Appellant

and

Burlington County Board of Social Services
Respondent

In this appeal regarding release at the end of the working test period effective December 14, 2017, the parties have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them. Specifically, the parties have agreed to the following:

A. The Appellant, Annette D. Barnes, agrees to resign in good standing which shall be effective December 16, 2017.

B. The Respondent, Burlington County Board of Social Services, agrees to accept the resignation in good standing by the Appellant which shall be effective December 16, 2017.

C. The Appellant, Annette D. Barnes, withdraws her appeal and request for a hearing, and the Respondent appointing authority, Burlington County Board of Social Services, acknowledges the Appellant's withdrawal.

D. The Respondent, Burlington County Board of Social Services, shall amend Appellant's personnel records to conform to the terms of this Settlement Agreement. All internal records of the Respondent appointing authority, Burlington County Board of Social Services, will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law.

E. The Appellant agrees not to apply for future employment with the Respondent appointing authority, Burlington County Board of Social Services.

F. Appellant waives all claims against Respondent appointing authority with regard to this matter, including any award of back pay, counsel fees, or other monetary relief.

G. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Respondent, Burlington County Board of Social Services, their employees, agents, or assigns, including, but not limited to, all claims under Title VII of the Civil Rights Act of 196 4, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title

11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, any workers compensation or common law claims, and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. This agreement will become effective only if approved by the CIVIL SERVICE COMMISSION. Any disapproval by the CIVIL SERVICE COMMISSION shall not interfere with the rights of either party to pursue the matter further.

5/7/2018
DATE

Annette D. Barnes, *Appellant*

05/07/18
DATE

Richard C Strobel
Burlington County Board of Social Services, *Respondent*
By: Richard C. Strobel, Esq., Chief Counsel

A-1

STATE OF NEW JERSEY

In the Matter of Diane Brown
Jersey City School District

CSC DKT. NO. 2018-671
OAL DKT. NO. CSV 16814-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16814-17

AGENCY DKT. NO. 2018-671

IN THE MATTER OF DIANE BROWN,

JERSEY CITY SCHOOL DISTRICT,

Philip Feintuch, Esq., for appellant

Teresa L. Moore, Esq., for respondent (Riker Danzig Scherer Hyland Perretti, LLP)

Record Closed: May 15, 2018 Decided: May 18, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on November 9, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted and the hearing was scheduled for May 15, 2018. During the pendency of the hearing the parties resolved all issues in dispute. The parties prepared and submitted a fully executed Settlement Agreement which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 10 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: _____

Date Mailed to Parties: _____

ljb

LOCAL

OAL DKT. NO. CSV 16814-17

AGENCY DKT. NO. 20##-671

SETTLEMENT AGREEMENT

IN THE MATTER OF

DIANE BROWN

AND

JERSEY CITY PUBLIC SCHOOLS

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 8/25/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	UNBECOMING CONDUCT	30 DAYS SUSPENSION	10/2/17 - 11/10/2017
2.			
3.			
4.			
5.			

B. The Appellant DIANE BROWN withdraws his/her appeal and request for a hearing, and the Respondent appointing authority JERSEY CITY PUBLIC SCHOOLS agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	UNBECOMING CONDUCT	~~6 DAYS~~	6 DAYS SUSPENSION
2.			
3.			
4.			
5.			

OAL DKT. NO. CSV 16814-17

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 6 days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 24 DAYS.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: n/a.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. JERSEY CITY BOARD OF ED. (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority JERSEY CITY BD OF ED will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of 6 DAYS' SUSPENSION 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, JERSEY CITY BD. OF ED., their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 16814-17

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5/15/2018
DATE

Diane Brown
Appellant

DATE

Respondent

5/15/2018
DATE

ON BEHALF OF DIANE BROWN

5/15/18
DATE

ON BEHALF OF JERSEY CITY BOARD ED

OAL DKT. NO. CSV 16814-17

CERTIFICATION

I, Diane Brown, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/18/18
DATE

Diane Brown
NAME

6-6-18

A-1

STATE OF NEW JERSEY

In the Matter of April Maxwell-Henley
Burlington County Board of Social Services

CSC DKT. NO. 2018-732
OAL DKT. NO. CSV 14999-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 14999-17
AGENCY DKT. NO. 2018-732

IN THE MATTER OF APRIL MAXWELL-HENLEY, BURLINGTON COUNTY BOARD OF SOCIAL SERVICES.

April Maxwell-Henley, appellant, pro se

Richard Strobel, Esq., for respondent, the Burlington County Board of Social Services

Record Closed: May 18, 2018 Decided: May 21, 2018

BEFORE **LISA JAMES BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of April Maxwell-Henley from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 11, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a Settlement Consent Agreement, which is attached and fully incorporated herein.

OAL DKT. NO. CSV 17675-16

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 21,2018
DATE

LISA JAMES-BEAVERS, Acting Director and Chief ALJ:

Date Received at Agency: 5/22/18

Date Mailed to Parties:

/lam

BURLINGTON COUNTY BOARD OF SOCIAL SERVICES
LEGAL DEPARTMENT
BURLINGTON COUNTY HUMAN SERVICES FACILITY
795 WOODLANE ROAD, SUITE 100
MOUNT HOLLY, NEW JERSEY 08060-3335
609-265-2380

FAX 609-702-0683
Richard.Strobel@bcbss.org

RECEIVED
2018 MAY 18 A 11:42
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RICHARD C. STROBEL, ESQ.
CHIEF COUNSEL

May 16, 2018

Honorable Bernard Goldberg, ALJ
New Jersey Office of Administrative Law
P.O. Box 049
Trenton, New Jersey 08625-0049

RE: Maxwell-Henley, April v Burlington County Board of Social Services
OAL Docket No.: CSV 14999-2017 S

Dear Judge Goldberg:

Per your direction, enclosed please find a consent order executed by both parties in the above referenced matter that settles all issues in controversy.

Thank you for your service in this matter.

Very truly yours,

BURLINGTON COUNTY BOARD OF SOCIAL SERVICES

By: Richard C Strobel
RICHARD C. STROBEL, ESQUIRE
Chief Counsel

RCS:ah
c: April Maxwell-Henley

OAL DKT. NO. CSV 14999-2017 S
AGENCY REF. NO. 2018-732

SETTLEMENT CONSENT AGREEMENT

IN THE MATTER OF

Maxwell-Henley, April
Appellant

and

Burlington County Board of Social Services
Respondent

RECEIVED
2018 MAY 18 A 11:42
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

In this appeal regarding release at the end of the working test period effective August 21, 2017, the parties have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them. Specifically, the parties have agreed to the following:

A. The Appellant, April Maxwell-Henley, agrees to resign in good standing which shall be effective August 22, 2017.

B. The Respondent, Burlington County Board of Social Services, agrees to accept the resignation in good standing by the Appellant which shall be effective August 22, 2017.

C. The Appellant, April Maxwell-Henley, withdraws her appeal and request for a hearing, and the Respondent appointing authority, Burlington County Board of Social Services, acknowledges the Appellant's withdrawal.

D. The Respondent, Burlington County Board of Social Services, shall amend Appellant's personnel records to conform to the terms of this Settlement Agreement. All

D. The Respondent, Burlington County Board of Social Services, shall amend Appellant's personnel records to conform to the terms of this Settlement Agreement. All internal records of the Respondent appointing authority, Burlington County Board of Social Services, will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law.

E. The Appellant agrees not to apply for future employment with the Respondent appointing authority, Burlington County Board of Social Services.

F. Appellant waives all claims against Respondent appointing authority with regard to this matter, including any award of back pay, counsel fees, or other monetary relief.

G. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Respondent, Burlington County Board of Social Services, their employees, agents, or assigns, including, but not limited to, all claims under Title VII of the Civil Rights Act of 196 4, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title

OAL DKT. NO. CSV 14999-2017 S

11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, any workers compensation or common law claims, and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. This agreement will become effective only if approved by the CIVIL SERVICE COMMISSION. Any disapproval by the CIVIL SERVICE COMMISSION shall not interfere with the rights of either party to pursue the matter further.

5/15/18
DATE

April Maxwell-Henley
April Maxwell-Henley, *Appellant*

05/15/18
DATE

Richard C Strobel
Burlington County Board of Social Services, *Respondent*
By: Richard C. Strobel, Esq., Chief Counsel

6-6-18

A-2

STATE OF NEW JERSEY

In the Matter of John Mulligan
East Jersey State Prison,
Department of Corrections

CSC DKT. NO. 2017-2469
OAL DKT. NO. CSV 02610-17

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 8, 2018 BW

The appeal of John Mulligan, Institutional Trade Instructor 1, East Jersey State Prison, Department of Corrections, removal effective January 23, 2017, on charges, was heard by Administrative Law Judge Jude-Anthony Tiscornia, who rendered his initial decision on April 18, 2018 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on June 6 , 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority for the period of separation to the actual date of reinstatement. *See N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Public Safety*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues

concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of John Mulligan. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 02610-17
AGENCY DKT. NO. 2017-2469

IN THE MATTER OF JOHN MULLIGAN,
EAST JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.

Rashidah N. Hasan, Esq., for appellant

Aimee Blenner, Esq., Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of The State of New Jersey, attorney)

Record Closed: March 26, 2018 Decided: April 18, 2018

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Appellant, John Mulligan, (Mulligan) appeals removal by respondent New Jersey Department of Corrections (DOC) from employment as an Institutional Trade Instructor 2 at East Jersey State Prison. Respondent alleges that appellant stole a wristwatch that belonged to another DOC employee and that appellant provided false and misleading

statements to investigators. Appellant does not dispute that he took the watch but argues that he owns a nearly identical watch and that he mistakenly took possession of the watch in question thinking it belonged to him.

ISSUE

Did appellant wrongfully take a co-worker's watch and provide misleading statements to investigators and, if so, may respondent DOC remove appellant based on his actions?

PROCEDURAL HISTORY

On January 23, 2017, John Mulligan was served with a Final Notice of Disciplinary Action (FNDA), calling for his removal from the position of Institutional trade instructor 2, cooking. (R-1.) The following charges were sustained against appellant:

1. N.J.A.C. 4A:2-2.3(a)(6) – conduct unbecoming a public employee;

2. N.J.A.C. 4A:2-2.3(a)(12) – other sufficient cause;

3. HRB 84-17, as amended, C.8 – falsification: Intentional misstatement of material fact in connection with work, employment application, attendance of any record, report, investigation or other proceeding;

4. HRB 84-17, as amended, C.11 – conduct unbecoming an employee;

5. HRB 84-17, as amended, C.13 – actual or attempted theft of state property or equipment or the property of other employees, residents, clients, or inmates;

6. HRB 84-17, as amended, E.1 – violation of a rule, regulation, policy, procedure, order or administrative decision.

The matter was transmitted to the Office of Administrative Law on February 22, 2017. A Motion for Summary decision was filed by respondent, heard by me on November 8, 2017, and ultimately denied. A plenary hearing was conducted on January 3, 2018. The record was kept open pending submissions of post-hearing transcripts and closing arguments. Closing arguments were received on March 26, 2018, at which time the record was closed.

FINDINGS OF FACT

The alleged theft at the center of this appeal was caught on surveillance camera. The recording was admitted into evidence and was viewed several times during the hearing. Having had an opportunity to consider all the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

Appellant has been employed with East Jersey State Prison since 2000, where he served as an institutional trade instructor charged with supervising and instructing inmates in preparing meals.

On September 28, 2016, Senior Correction Officer Carr, (Carr) an employee of East Jersey State Prison, entered into what has been described on the record as the "inner front door area" of the prison, herein after referred to as the "area." This area is under twenty-four-hour surveillance and is heavily guarded. There is a free-standing metal detector in the area. All who enter the front door of the prison must pass through this metal detector including prison employees. Immediately in front of the metal detector there is a heating element attached to the wall, the top of which is a flat surface. This flat surface is about waist high and is wide enough to accommodate a few small objects being placed upon it.

Upon entry Carr removed the contents of his pockets and placed them on the top of the heater. He then removed his wristwatch and placed it on top of the heater next to

the contents of his pockets. He then proceeded through the metal detector, circled around back to the heater and retrieved the items he had placed there. He neglected to retrieve his wristwatch. The wristwatch remained on top of the heater for approximately fifteen minutes, at which time appellant, returning from a cigarette break, entered the front-door area, emptied the contents of his pockets onto the top of the heater and proceeded through the metal detector. He then circled around back to the heater and collected the items he had placed there and also picked up Carr's wristwatch. He then exited the front-door area and proceeded inside the prison in order to return to work. The timeframe within which appellant entered the area, cleared security, and exited the area was less than ten seconds.

Later that day Officer Carr realized he had misplaced his watch and reported the missing watch to the prison authorities. The authorities viewed the surveillance video wherein Carr is seen leaving his watch on the heater in the area. The authorities noted that the appellant was the next individual to enter the area, and noticed the appellant placed his possessions on the heater in the same location where Carr placed his watch, and thereby deduced that the appellant must have taken the watch from the heater when he went back to retrieve his own possessions.

On October 4, 2016, appellant was formally interviewed regarding the missing watch at which time appellant denied taking the watch or any items that did not belong to him. Appellant explained to the prison authorities that he owned two watches; the one he was wearing at the time (which did not fit the description of Carr's watch) and one that was located in the center console of his vehicle. The missing watch was described as a Movado watch with a silver band and a black face.

The appellant was then briefly excused so that he may go to his vehicle and retrieve his other wrist watch so the authorities could inspect it. The appellant returned a short time later having retrieved two silver colored watches, both with black faces, from his vehicle. One of the watches belonged to appellant, the other was Carr's missing watch. Appellant explained to the authorities that he must have inadvertently

picked up Carr's watch and put it in his center console thinking it was his own, noting that the two watches were very similar in appearance, to which one of the prison authorities responded, "you make me sick." The foregoing removal ensued.

At the hearing, Carr's watch, the item at the center of this case and controversy, was not produced. Appellant did produce his own watch which was silver in color, with a black face with the letters ESQ printed on it. Appellant testified that ESQ was a line of watches manufactured by Movado, the same manufacturer as Carr's watch. The watch produced by appellant appeared to match the description of Carr's watch as described by both respondent's and appellant's witnesses and I therefore **FIND** the two watches to be similar, if not identical, in appearance.

LEGAL ANALYSIS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A: 1-2, 11A: 2-6, 11A: 2-20; N.J.A.C. 4A: 2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

In the case at bar the sole question is whether appellant wrongfully took the watch. If so, appellant is subject to discipline. In the foregoing case, appellant is

accused of theft of a coworker's property and of providing misleading statements to authorities upon investigation. Given the egregious nature of the alleged act removal may be warranted if it is found appellant actually stole the watch and intentionally mislead the ensuing investigation when he denied the theft.

DISCUSSION

The outcome of this case lies largely on a determination of credibility. Respondent asserts that appellant took the watch with the intent to deprive the rightful owner of same. I **FIND** that appellant could not have possibly known of the presence of the watch on the heater until the moment he entered into the security checkpoint area at the entrance of the prison. Given that the entire occurrence wherein appellant obtained possession of the watch took a matter of seconds and based on all evidence presented at the hearing, I **FIND** that appellant inadvertently took possession of Carr's watch on September 28, 2016.

Respondent argues that due to the lapse of time between September 28, 2016, and October 4, 2016, even if the watch was inadvertently taken on September 28, appellant would have had ample time to realize his mistake and return the watch. Appellant's failure to report the mistaken possession of the watch would then constitute a wrongful act subject to discipline. This argument is rebutted by the fact that appellant kept the watch in the center console of his vehicle. I **FIND** it irrational and improbable that an individual, upon realizing his mistaken possession of another's property, who then makes the affirmative decision to deprive the rightful owner of same, would continuously transport the now stolen item back and forth to work for several days.

Respondent presented two witnesses, Kenneth Luongo (Luongo) and Major James J. Jones (Jones), in support of its case. Luongo is employed with the Special Investigations Unit at the NJ Department of Corrections. He was the lead investigator regarding this matter. He testified that he reviewed the surveillance tape, was involved in the interview of the appellant, but did not make a final determination of intent or

culpability regarding appellant's actions. He simply gathered evidence and reported same to his supervisors who then made the final determination.

Kenneth Luongo testified that appellant went to the parking lot and retrieved two silver watches from his vehicle; one his and the other belonging to Carr. This account was reiterated by the appellant who added that that he would routinely store his own watch in the center console of his vehicle. Appellant further testified that he would periodically retrieve the watch and wear it from time to time.

Jones is the Administrative Major at East Jersey State Prison. He testified that he is responsible for policy and procedures at the prison as well as any disciplinary proceedings. He was not presented as a fact witness but to discuss DOC disciplinary policies generally. Jones testified to the general policies and procedures regarding DOC employees. He noted that truthfulness is a character required of all employees.

Jones then went through some of the rules contained in the employee handbook pertaining specifically to theft. Jones testified that theft of any kind violates the agency's ethics policy and would bring into question an employee's trustworthiness and would therefore be grounds for termination. Jones was asked whether he understood the act of theft to include an element of intent. Jones testified that all DOC employees are held to a higher standard and as such, an employee may still be disciplined even if he inadvertently took possession of another's property. I **FIND** this testimony to be inaccurate on its face and I **FIND** that an employee that inadvertently takes another employee's property by mistake cannot be found to have committed theft and cannot be disciplined for theft.

In the case at bar the respondent failed to produce any witness or evidence that tended to show appellant knowingly took wrongful possession of the watch. The surveillance tape at the center of respondent's case shows no evidence of premeditation and no conclusion regarding appellant's state of mind can be drawn from it. Appellant acknowledges that he took the watch but argues he mistook it for his own.

Respondent's case relies heavily on the argument that appellants own silver colored watch does not match the description of officer Carr's watch. I find appellant's watch does match the description of officer Carr's watch. Since only appellant's watch was presented at the hearing there is no evidence to rebut the argument that the two watches are alike if not identical.

ORDER

Based upon the foregoing, it is **ORDERED** that the forgoing appeal is **GRANTED** and appellant's removal be overturned.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B10.

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

4/18/18
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 20 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Appellant:

John Mulligan

For Respondent:

Kenneth Luongo

James J. Jones

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

Final Notice of Disciplinary Action

6-6-18

A-1

STATE OF NEW JERSEY

In the Matter of Joanne Palatucci
Passaic County Sheriff's Department

CSC DKT. NO. 2017-3712
OAL DKT. NO. CSV 07814-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 07814-17
AGENCY DKT. NO. 2017-3712

IN THE MATTER OF JOANNE PALATUCCI, PASSAIC COUNTY SHERIFF'S DEPARTMENT.

Kevin Sisco, Esq., for appellant Joanne Palatucci (Ricci, Fava & Bagley, attorneys)

Jose R. Santiago, Assistant County Counsel, for respondent Passaic County (William J. Pascrell, III, County Counsel)

Record Closed: May 8, 2018 Decided: May 8, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant Joanne Palatucci filed an appeal from a Final Notice of Disciplinary Action dated May 3, 2017, issued by respondent Passaic County Sheriff's Office. The Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed on June 2, 2017, for determination as a contested case. A telephone prehearing conference was held on July 11, 2017. The hearing scheduled for February 5 and 9, 2018, were adjourned at the request of the parties to provide more time toward finalizing a settlement. Subsequently, under cover letter dated May 4, 2018, counsel for

respondent forwarded the attached Settlement Agreement and General Release, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

5/8/18

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: ____

MAY 11 2018

Date Mailed to Parties: ____

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WILLIAM J. PASCRELL, III,
PASSAIC COUNTY COUNSEL
401 GRAND STREET
PATERSON, NJ 07505
(973) 881-4466
Attorneys for Respondent

RECEIVED
2018 MAY -8 P 1:53
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JOANNE PALATUCCI, Petitioner, vs. PASSAIC COUNTY SHERIFF'S DEPARTMENT, Respondent.	: : : : : : : : : :	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW AOL DOCKET NO: CSV-07814-2017N SETTLEMENT AGREEMENT AND RELEASE

WHEREAS Petitioner Joanne Palatucci is employed by the Respondent Passaic County Sheriff's Department as an ID Officer in the Bureau of Crime Investigation,(BCI) a non-sworn law enforcement position; and

WHEREAS on February 14, 2017 BCI Director, Michael L. McLaughlin Sr. prepared an employee disciplinary report for the Respondent Passaic County Sheriff Department administration's consideration, concerning Ms. Palatucci's chronic and excessive absences as well as patterned absenteeism, **(Exhibit 1)**; and

WHEREAS, that report contained a copy of Ms. Palatucci's prior disciplinary history, establishing prior discipline for chronic or excessive absenteeism and patterned absenteeism, from a period beginning in 19997 through 2010, **(Exhibit 1)**; and

WHEREAS, after having considered the report prepared by Mr. McLaughlin, the Sheriff's administrative review committee recommended that a 31A Preliminary Notice of Disciplinary Action be issued to Ms. Palatucci concerning the matter; and

WHEREAS, on March 13, 2017, a 31A was issued charging Ms. Palatucci as follows, with a violation of, NJAC 4A:2-2.3(a)4 Chronic or excessive absenteeism and patterned absenteeism, and violations of departmental disciplinary rules and regulations,

11.15 Repeated violations of rule and regulation or any other course of conduct indicating that a member has little or no regard for her responsibility as a member of the department

11.16 conduct subversive of good order and discipline of the department.

11.72 Excessive absenteeism; and

WHEREAS, on May 4, 2017, after an opportunity for hearing, a 31B Final Notice of Disciplinary Action was issued sustaining the charges, and imposing a 60 day suspension without pay, beginning on 2017 September 11, 2017 through December 6, 2017, which Petitioner has served, **(Exhibit 2)**; and

WHEREAS, Petitioner, promptly filed an appeal of the FNDA to the Civil Service Commission, and

WHEREAS, on June 2,2017, Petitioner's appeal was forwarded to the Office of Administrative Law, as a contested case, with

Honorable Michael Antoniewicz being assigned to hear the matter; and

WHEREAS, this matter was scheduled for hearing on February 5 and 9 before the Honorable Michael Antoniewicz, and

WHEREAS, prior to that hearing the Parties decided to reach an amicable resolution of this matter; and

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth in this Settlement Agreement and Release rather than proceed with a hearing; and

WHEREAS, this proposed agreement is in the best interest of the Parties; and

NOW, THEREFORE, intending to be legally bound hereby respectively, The Respondent Passaic County Sheriff's Department and Petitioner Joanne Palatucci (jointly the Parties) have voluntarily resolved all disputed matters between them and enter into the following Settlement Agreement and Release, (The Agreement) which fully disposes of all issues in controversy between them as follows:

A 1. The charges against Petitioner Joanne Palatucci as contained in the FNDA of May 3, 2017 are sustained.

2. The Penalty imposed shall be reduced from a 60 day suspension without pay, to a 30 day suspension, without pay.

3. Upon acceptance by the Civil Service Commission of this Settlement Agreement as a Final Decision and within ten "business days", (Monday through Friday) after service of the Final Decision upon the Sheriff's Department or Department of the Passaic County Counsel, by the Civil Service Commission, Ms. Palatucci shall be reimbursed by the Passaic County Sheriff's Department for 30 days pay, with all regular and customary deductions at 2017 rates, being made for those thirty days' wages.

4. The Passaic County Sheriff's Department will issue an amended W2 showing wages earned and deductions for the calendar year 2017.

5. The Passaic County Sheriff Department's personnel and payroll records shall be amended consistent with this Agreement.

B. Nothing herein shall preclude the Sheriff's Department from releasing information on this matter to anyone who has a release executed by Joanne Palatucci or as consistent with law.

C. Joanne Palatucci waives any and all other claims for other monetary relief whatsoever, against the Passaic County Sheriff's Department for the discipline imposed.

D. This Agreement shall not constitute a precedent in any other matters involving Ms. Palatucci or other employees.

E. Joanne Palatucci waives all claims, suits or action, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against Passaic County, Passaic County Board of Chosen Freeholders, The Sheriff's Department, all employees, agents or assigns, including but not limited to those which have been or could have been made, including, but not limited to, all claims under The New Jersey Torts Claims Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits law, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Agreement

and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

F. The Parties agree that if any portion of this Agreement is deemed illegal, unenforceable, or ineffective in a legal forum, such portions shall be deemed severable such that all other portions of this Agreement shall remain valid and binding upon all parties and shall be fully enforceable. No Party, shall act or seek to have this Agreement and declared illegal or unenforceable in any legal forum, specifically as to its terms and conditions, including the waiver of rights as set forth herein.

G. This Agreement is executed voluntarily and without any duress or undue influence on the part of or behalf of any and all parties signing hereto, with the full intent of releasing all claims. They Parties acknowledge that:

1. They have carefully read this Agreement and it has been explained to them in full;
2. They have been represented in the preparation, negotiation and execution of this Agreement by legal counsel and competent counsel of their own choice or that they have voluntarily declined to seek such counsel;

3. They fully understand the terms and consequences of this Agreement and of the releases it contains;
4. They are fully aware of the legal and final binding effect of this Agreement;
5. They freely and voluntarily enter into this Agreement without duress or coercion;
6. The Parties are completely satisfied that this Agreement is fair, reasonable, and acceptable;
7. The parties are satisfied with their respective counsel, if any, and believe their counsel has effectively represented their independent interests.

H. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them, under the terms and conditions of this Agreement. Each Party warrants and represents that there are no actions filed or pending in state or federal court, liens or claims of lien or assignments in law or equity or otherwise of, or against, any of the claims or causes of action released herein.

I. Each executing Party represents that it has had the opportunity to consult with an attorney and has carefully read and understands the scope and effect of the provisions of this Agreement. Neither Party has relied upon any

representation or statement made by the other Party hereto, which is not specifically set forth in this Agreement.

J. This Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner, orally or otherwise, except by an instrument in writing of concurrent or subsequent date, signed by a duly authorized officer or representative of each of the parties hereto. The Parties agree that they waive the rule of construction against the drafter of this Agreement.

K. The laws of the State of New Jersey shall govern this Agreement.

L. The Agreement is effective after it has been signed by all of the Parties set forth below.

M. This Agreement may not be executed in counterparts.

N. This Agreement represents the complete and full understanding between the Parties, and is signed as their own free act.

O. The recitations set forth above in the recitals (WHEREAS clauses) are incorporated herein as substantive provisions and are not mere recitals.

P. BY SIGNING BELOW, THE UNDERSIGNED FURTHER INDICATE AND ACKNOWLEDGE THAT THIS IS A LEGALLY BINDING DOCUMENT AND THEY ARE FREELY AND VOLUNTARILY GIVING UP CERTAIN RIGHTS TO FILE LEGAL CLAIMS AND TO RELEASE PRIVATE AND CONFIDENTIAL

INFORMATION AND INTEND TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT WITHOUT EXCEPTION.

IN WITNESS WHEREOF, the Parties have executed this Last Chance Agreement on the respective dates set forth below.

3/20/18
Date

Joanne Palatucci
Joanne Palatucci

3-22-18
Date

Kevin Sisco
Kevin Sisco

3-1-18
Date

Richard H. Berdnik
Passaic County Sheriff

Date

6-6-18

A-03

STATE OF NEW JERSEY

In the Matter of William Shorter,
Department of Corrections

CSC Docket No. 2018-1384
OAL Docket No. CSR 17546-17

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: June 22, 2018 (EG)

The appeal of William Shorter, a Correction Sergeant[1] with South Woods State Prison, Department of Corrections, of his removal effective October 3, 2017, on charges, was heard by Administrative Law Judge Catherine A. Tuohy (ALJ), who rendered her initial decision on May 8, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 6, 2018, did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a 120-calendar day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant violated departmental policy by taking cannabidiol oil and neglecting to indicate this on the medication sheet prior to a random urine test and that his urine sample tested positive for Carboxy-THC. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

[1] Pursuant to P.L.2017, c.293, the title of Correction Sergeant has been retitled to Correctional Police Sergeant.

The ALJ set forth in her initial decision that appointing authority witnesses testified that on September 12, 2017, the appellant was subjected to a random drug test in which he was required to submit a urine sample. As part of the testing procedure the appellant was required to complete a Drug Testing Medication Information sheet indicating the names of all prescription and nonprescription medication he had taken in the past thirty days, the date last taken, and the prescribing physician. Completion of the form was not witnessed by the monitor but is placed in a separate envelope and sent to the lab with the urine sample. A second sample was maintained frozen in case of a positive result to allow for the appellant to have an independent test done on the urine. The results of the test indicated a positive result for cannabinoids (THC) that was not related to any of the medications listed on the medication form. The State Toxicologist testified that the appellant's sample indicated THC carboxy levels of 23 nanograms per milliliter which was over the 15 nanograms per milliliter cutoff for a positive sample. The State Toxicologist also testified that the source of the THC was not clear and that there was no way knowing or identifying the source of the THC. Upon the appellant being notified of the positive result he provided investigators with a handwritten note on a prescription pad dated October 20, 2107, from Russel Little, APN, indicating the appellant was under his care and was prescribed CBD oil.

The appellant testified that he failed to list the CBD oil he had been taking for just a few days on the medication form. He indicated that he was concentrating on listing all of the prescription medication he had been on for a while and simply forgot to list the CBD oil. The appellant provided a copy of a receipt indicating that he had purchased the CBD oil on September 7, 2017. He testified that he had taken 15 droplets under his tongue twice a day as directed by his physician on September 8, 9, 10, 11 and again on he morning of the urinalysis, September 12, 2017. The appellant stated that he was taking the CBD oil due to debilitating pain caused by degenerative arthritis of his spine. Additionally, the appellant testified that he was not aware that the website for the CBD oil he was taking indicates that their oil contains 0.3% THC. The appellant did state that he was aware that THC was a prohibited substance.

Dr. Gary Lage, who testified on behalf of the appellant, was accepted as an expert in the field of toxicology. Dr. Lage indicated that in his professional opinion, the low level of THC present in the appellant's sample was consistent with the use of CBD oil rather than the use of marijuana. Dr. Lage also testified that the website for the CBD oil the appellant used indicated that it was produced from hemp, which would contain small quantities of THC.

The ALJ found the testimony of the appellant, that he forgot to list a cannabis product he took as recently as the morning of the drug test, not credible. The ALJ also found the testimony of the State Toxicologist more persuasive than

that of Dr. Lage. She stated that the appointing authority has a zero tolerance drug use policy. Additionally, the ALJ found that the appellant failed his random drug test by testing positive for THC. She indicated that as a Correction Sergeant, the appellant represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is conduct which adversely affects the morale and efficiency of a governmental unit and has a tendency to destroy public respect. Therefore, that ALJ found that the appointing authority met its burden of proof in establishing conduct unbecoming, other sufficient cause, and violation of policies. Further, the ALJ found that the appellant's argument that his substantive due process rights were violated because the State lab did not advise his testing lab, Relievus, of what were the proper parameters for the testing of the frozen sample was without merit. The ALJ determined that Relievus lab did not check with the State lab prior to running its test and the appellant's own expert witness, Dr. Lage, concurred with the State toxicology lab report that the THC was present in the appellant's urine sample. With regard to the penalty, the ALJ found that the appointing authority's drug policy provided that the only option for a violation of the drug policy was removal. Therefore, the ALJ concluded that removal was the appropriate penalty.

In his exceptions, the appellant argues, in pertinent part, that the evidence presented at OAL indicated that the presence of THC in his system was due to the prescribed CBD oil and not an illegal or controlled substance. He argues that the State Toxicologist and his own expert witness testified that hemp, an ingredient in the CBD oil he took, does contain small amounts of THC. Further, the appellant relies on Dr. Lage's testimony that in his professional opinion, the low levels of THC present in the appellant's sample was consistent with the use of CBD oil rather than the use of marijuana. Moreover, the appellant argues that he was not terminated for not disclosing the CBD oil on the medication sheet but rather for failing a drug test. The appellant also argues that his due process rights were violated because the State lab did not advise Relievus lab of what were the proper parameters for the testing of the frozen sample. In this regard it argues that the failure of the appointing authority to provide the testing parameters was contrary to administrative precedent and the Attorney General guidelines regarding the testing of a second urine sample by an outside agency.

In its reply to the exceptions, the appointing authority argues, in pertinent part, that it does not need to prove the source of the THC that resulted in a positive drug result. It argues that it has a zero tolerance policy with regard to positive drug tests. In addition, it contends that it followed its policies and procedures with regard to the handling of a second or frozen sample, which does not indicate that it is responsible for ensuring the appellant's laboratory of choice uses the proper cut off level. Further, it asserts that it is exempt from and not subject to the Attorney General's Law Enforcement Drug Testing Policy.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's recommendation to uphold the removal. Rather, the Commission modifies the removal to a 120-calendar day suspension. In his exceptions, the appellant argues that the evidence presented at OAL indicated that the presence of THC in his system was due to the prescribed CBD oil and not an illegal or controlled substance. The appointing authority responds that it does not need to prove the source of the THC that resulted in a positive drug result. The Commission agrees. The fact that the appellant tested positive for THC is sufficient to uphold the charges against him. Given the myriad of ways an individual could end up with a drug in their system, it would be unreasonable to require an appointing authority to pin point the exact cause which led to a positive drug result. Further, while the appellant contends that he was terminated for not disclosing the CBD oil on the medication sheet, such a listing prior to the testing would have alerted the appointing authority to a prescribed drug he was taking which could result in a positive drug test.

Moreover, the Commission agrees with the ALJ's credibility determination regarding the appellant's failure to list the CBD oil on the medication sheet. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In the instant matter the ALJ clearly stated that she did not find the appellant's reason for not including the CBD oil on the medication sheet credible. The Commission agrees with this finding. It is not credible that the appellant would forget to indicate a drug that he just took the morning of the drug screening and that required a more elaborate method of ingestion, 15 drops under the tongue, than merely taking a pill. Therefore, based on the foregoing the Commission agrees with the ALJ's determination that the appellant tested positive for THC and that the appointing authority met its burden of proof with regard to the charges.

With regard to the appellant's contention that his due process rights were violated because neither the State lab nor the appointing authority advised

Relievus lab of the proper parameters for the testing of the frozen sample, the Commission agrees with the ALJ's findings. The ALJ concluded that Relievus lab did not check with the State lab prior to running its test and Dr. Lage concurred with the State toxicology lab report that the THC was present in the appellant's urine sample.

In determining the proper penalty, the Commission's review is *de novo* and it is not bound by an appointing authority's penalty schedule. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, the appellant had no prior major disciplinary actions since his employment began in May 2001 and his record indicates that he received one minor disciplinary action, a written reprimand in 2003. Moreover, given the actual incident in question, the Commission does not find removal to be appropriate under these circumstances. In this regard, while it is clear the appellant tested positive for small amounts of THC, the record also indicates that the CBD oil, for which the appellant had a valid prescription, likely caused the positive result. Further, while the appellant should have indicated his CBD oil use on the medication form, in the present case his failure to do so should not result in his termination. Accordingly, the Commission imposes a 120-calendar day suspension, which will serve as an indication that any further infractions committed by the appellant will potentially subject him to removal from employment. In addition, the appellant is advised that he must properly and fully complete any future medication forms given as part of a drug screening.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the 120-calendar day suspension up to his date of reinstatement. With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. *See N.J.A.C.* 4A:2-2.12. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert* Dean (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, charges were upheld and major discipline imposed. Consequently, as the

appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips*, *supra*, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the removal to a 120-calendar day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 120-calendar day suspension through the date of his actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdrè L. Webster Cobb

Deirdrè L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 17546-17
AGENCY DKT. NO. N/A

IN THE MATTER OF WILLIAM SHORTER, SOUTH WOODS STATE PRISON.

Frank M. Crivelli, Esq., for appellant (Crivelli and Barbati, LLC, attorneys)

Jessica M. Saxon, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 13, 2018 Decided: May 8, 2018

BEFORE **CATHERINE A. TUOHY,** ALJ:

STATEMENT OF THE CASE

Appellant, William Shorter, a Corrections Sergeant at South Woods State Prison (respondent) appeals his removal, effective November 7, 2017, after testing positive for tetrahydrocannabinol (THC) following a random drug urine screening on September 12, 2017. Appellant was charged with violations of N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12, Other sufficient cause; Human Resources Bulletin (HRB) 84-17, C-11, Conduct unbecoming a public employee; HRB 84-17, C-2, Reporting for duty while under the influence of intoxicating liquors or drugs; HRB 84-17 C-30, Use, possession, or sale of any controlled dangerous substance

(custody); HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. The appellant denies the allegations and states he was taking cannabinoid (CBD) oil for back pain on the advice of his healthcare provider.

PROCEDURAL HISTORY

On October 20, 2017 respondent issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against the appellant (J-1). Appellant waived a departmental hearing. On November 6, 2017 the respondent issued a Final Notice of Disciplinary Action sustaining the charges in the Preliminary Notice and removing appellant from employment, effective November 7, 2017 (J-2). Appellant filed a direct filing removal appeal on November 13, 2017 to the Office of Administrative Law (OAL) where it was filed on November 21, 2017 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearing was held on March 23, 26 and 27, 2018. The record remained open to allow the parties to submit post-hearing submissions and the record closed on April 13, 2018.

FACTUAL DISCUSSIONS AND FINDINGS

Dwayne Grade testified on behalf of the respondent. He has been employed by the New Jersey State Department of Corrections (DOC) for twenty-two years and has been the Chief Investigator of the Special Investigations Unit since July 2017. As Chief Investigator, he oversees the criminal and administrative investigations for the DOC. He is familiar with the drug screening process and he has undergone several random drug screenings throughout his career. There is a zero-tolerance policy for drug use in the Department and all sworn law enforcement personnel are subject to random drug testing. The first workday of every month the special investigations unit receives from OIT a computer printout list of those random individuals selected by a computer algorithm to be drug tested. All of the union representatives are made aware of the random urine selection process (R-29). William Shorter was on the Master List for Donor Notifications for the period September 1, 2017 to September 30, 2017.

Law Enforcement Personnel Rules and Regulations, Article IV, Section 1 states

> No officer shall
>
> a. Report to duty under the influence of alcohol.
>
> b. Use, possess or sell any illegal drug or controlled dangerous substance, whether on or off duty,
>
> c. Frequent any business, private house or establishment where illegal drugs or controlled dangerous substances may be used, purchased or sold with the exception of any appropriate medical establishment for the purpose of receiving appropriate medical care. (R-34)
>
> Section 2 provides that an officer shall report the use, possession, or sale of any illegal drug or controlled dangerous substance by another officer, whether on or off duty. The report shall be made as soon as possible to the institutional Administrator or his/her designee. (R-34)

All new employees acknowledge that they receive the various policies. William Shorter acknowledged that he received the Rules and Regulations when he was hired (R-25).

The Department of Corrections Human Resources Bulletin 99-01, Amended November 6, 2009 sets forth the Drug Testing Policy (R-22).

Section IV, paragraph 3 provides that "Prior to the submission of a urine specimen, all individuals shall complete a medical questionnaire which clearly describes all medications, both prescription and over the counter (non-prescription), ingested in the past thirty days (R-22, page 5).

Section VIII entitled "Consequences of a Positive Result"

A. Any covered person who tests positive for illegal drug use shall be:
   1. Suspended immediately from all duties and subjected to Loudermill and Departmental disciplinary procedures;
   2. Processed for termination from service;
   3. Reported by Internal Affairs to the Central Drug Registry maintained by the Division of State Police, and
   4. Barred permanently from future law enforcement in New Jersey. (R-22, page 8)

Sgt. Shorter acknowledged that he received Human Resources Bulletin (HRB) 99-01 (Drug Testing Policy) dated February 26, 1999 on August 22, 2001 (R-27, page 091).

Chief Grade is familiar with Human Resources Bulletin 84-17 as amended and the Table of Offenses and Penalties (R-23). Section C.2 Personal Conduct – Selling or possession of alcoholic beverages or controlled dangerous substances while on State

property and/or duty. The penalty for the first offense is removal. (R-23, page 072). C.11 Conduct unbecoming an employee, the first offense is a minimum of a three-day suspension to removal (R-23, page 074). C.30 Use, possession or sale of any controlled dangerous substance (custody), the first offense is removal (R-23, page 077). E.1 General Violation of a rule, regulation, policy, procedure, order or administrative decision, the first offense warrants anywhere from an official written reprimand to removal (R-23, page 082). Sgt. Shorter acknowledged receipt of this policy (R-25, page 085).

Chief Grade is familiar with Sgt. Shorter's work/disciplinary history (R-24) which was moved into evidence for purposes of progressive discipline only.

Bryan Bonomo testified on behalf of the respondent. He is a twenty-two -year employee of the N.J. DOC and has been employed as a Principal Investigator at South Woods State Prison since August 2017. Prior to that he was employed as a Special Investigations Division (SID) Officer since February 2001. His responsibilities as an Investigations officer is to conduct all administrative and criminal investigations for the department in the field unit that he is assigned. They maintain all the evidence at the facility and investigate all crimes that occur in the facility and monitor the staff drug testing. He has monitored hundreds if not a thousand of drug tests. When first hired as an investigator, they receive the policy as to how the drug testing should be administered and then are assigned to a senior investigator to conduct the drug testing until they are ready to administer it on their own. He himself has undergone several random drug tests in the course of his career.

The first working day of the month, the central office draws a list of random names and social security numbers of those officers to be tested that month. Central office notifies the investigator who then goes to central office to pick up the list and then goes to the facility with the list of those to be drug tested. Sgt. Shorter's name was on the Master List for Donor Notifications for September 2017 (R-17). Investigator Bonomo called the shift commander to have Sgt. Shorter report to SID and when Sgt. Shorter reported, he was advised that he had been selected to provide a random urine sample for that month. Investigator Bonomo monitored Sgt. Shorter's drug test. There is a drug testing booklet that is filled out with the individuals' name and social security number (R-11). There are

monitor instructions that are checked off outlining the procedures to be followed. Attachment A-1 is the Drug Testing Employee Notice and Acknowledgement form signed by Sgt. Shorter and witnessed by Investigator Bonomo dated September 12, 2017. It provides as follows:

> "I understand that if I produce a positive test result for illegal drug use, I will be dismissed from the New Jersey Department of Corrections and from my position as a "Covered Person".
> I understand that if I produce a positive test result for illegal drug use, that information will be forwarded to the Central Drug Registry maintained by the Division of State Police, Information from the registry can be made available by court order as part of a confidential investigation relating to law enforcement employment.
> I understand that if I produce a positive test result for illegal drug use, I will be permanently barred from serving as a law enforcement officer in New Jersey." (R-11, page 022).

After Sgt. Shorter signed the acknowledgement, he was given the Drug Testing Medication Information sheet to fill out indicating the names of all prescription and nonprescription medication he had taken in the past thirty days, the date last taken and prescribing physician (R-11, page 025). This form is not witnessed by the monitor but is placed in a separate envelope and sent to the lab with the urine sample.

The medication form and the urine sample are the only two things that are sent to the laboratory. The Continuity of Evidence – Urine Specimen form (R-12, page 026) summarizes the procedure for the drug testing. It indicates that it was a random drug screening on September 12, 2017 of Sgt. Shorter that was ordered at 9:20 a.m. on September 12, 2017 at the South Woods State Prison facility. Sgt. Shorter gave the urine sample at 9:39 a.m. on September 12, 2017. Investigator Bonomo placed the specimen in the evidence refrigerator at 9:40 a.m.

The procedure followed is that after the medication form is filled out and the employee advises that they are ready to provide a sample, they are taken into the bathroom and wash their hands with soap and water to make sure there is nothing on their hands that could dilute the sample. There is a box of sealed urine containers, they are directed to pick a container or two if they are going to be providing a second sample to be

frozen. There are labels inside the sealed containers that the employee fills out using a number two pencil to write their social security number and the date and place back in the container away from the temperature strip, so it can be read once the sample is provided. Then they are walked into the bathroom with the containers and are directed to provide at least thirty milliliters or more in each container. They seal it up in the restroom and bring it to the monitor who verifies the social security number and the date. The temperature is checked to make sure it reads between ninety to ninety-six degrees on the temperature sticker on the side of the bottle. This is to ensure the sample was not tampered with. Mr. Shorter provided two samples simultaneously at 9:39 a.m. The last thing Investigator Bonomo did was place the sample into the freezer. Mr. Shorter also provided a second sample that was to be frozen in case of a positive result to allow for the employee to have an independent test done on the urine (R-13). The second sample is maintained in their freezer until such time as they are notified the test was negative or the employee directs that the sample be released to another lab for testing as was done in this case.

Pursuant to the directions of Sgt. Shorter, Investigator Bonomo released the frozen sample to Hamwon Seo (Jayden), a courier for Relievus, at 3:40 p.m. on October 25, 2017, after verifying the identity of the courier (R-13, page 029). A summary worksheet is prepared of the process: on September 12, 2017 at 9:41 at South Woods State Prison, a random drug test was administered to Mr. Shorter, Principal Investigator Bonomo was the monitor; there was an order to submit to the random test; the medication form was completed; an acknowledgement form was signed; the chain of evidence form was signed; the sample was obtained on September 12, 2017 at 9:39 a.m.; Sgt. Shorter provided a second sample to be frozen; water was made available to him; and the sample was sealed (R-14, page 031). Investigator Bonomo acknowledged that he received the frozen specimen provided by Sgt. Shorter on September 12, 2017 at 9:39 a.m. (R-15, page 032). The lab submission form is maintained in their office with the social security number, the test basis which is or "officer random", the date collected, that the temperature was checked, and the monitor's initials (R-16). This form is submitted to the laboratory with all of the urine samples taken around that time.

Investigator Bonomo was notified of the results that there was a positive of one of the samples that was not related to any of the medications listed on the medication form.

Sometimes there may be a positive reading related to a medication that an employee is taking. The toxicology report for Sgt. Shorter's social security number came back positive for cannabinoids (THC). The medical review officer's review indicated that the controlled substance was found and was not listed on the medication sheet (R-10).

After Sgt. Shorter was notified of the positive results, he provided the investigations unit with a handwritten note on a prescription pad dated October 20, 2017, from Russel Little, APN indicating that William Shorter was under his care and was prescribed CBD oil (R-18, page 037).

Investigator Bonomo prepared and signed an administrative investigation report summarizing this incident and consistent with his testimony (R-9).

On cross-examination Investigator Bonomo was asked what conversation he had with the lab courier when he handed the lab courier the frozen sample. He did not provide him with any information as to what levels the specimen should be tested. Investigator Bonomo just requested that the courier provide his drivers' license as identification to make sure the individual Sgt. Shorter had advised was coming to pick up the sample was the correct person. Investigator Bonomo only monitored one urine test that month and it was the one involving Sgt. Shorter. He is the supervisor and only had time to do one that month and that sample came back positive.

Maria Jackson has been an investigator with the special investigations unit of the DOC for two years. She has been employed by the DOC for sixteen years. She was an instructor at the DOC academy for four and a half years and a corrections officer for nine years. As an investigator they do criminal and administrative investigations and monitor urine drug tests. She has monitored approximately two hundred urine tests. The process is that they receive a master donor list of those to be tested. They then notify those staff on the list and give them the option of producing one or two samples. They fill out the paperwork including the medication sheet indicating all medications they are taking and put their social security number on it and sign and initial it. They put the white copy in the envelope and seal it and write their social security number on the outside and the date the sample is produced. They seal it up and then the monitor takes them into the bathroom

to wash their hands and instruct them on how to fill out the label. The cup is sealed in a plastic bag that is sealed. They open it up take out the white label and write their social security number and the date they produced the sample on the label. They put it back inside, go into the bathroom to produce their urine, they void and then they seal it up themselves and put it in the freezer. The monitor does not review the medication sheet. The monitors are assigned male to male, female to female.

She is familiar with William Shorter as a sergeant at South Woods state prison. She is aware that he was randomly drug screened by Investigator Bryan Bonomo. She did not play any part in the collection or storage of the urine sample. The samples are stored in the SID office in a secured closet inside of which is a secured freezer. When the donor comes with their sample it is unlocked in front of them and they place the sample on the one side that is going to the lab and the other side is for the frozen sample. Attachment E2 is part of the packet that Investigator Bonomo prepared. At the bottom of the form is Investigator Jackson's signature indicating that she took the specimen out of the freezer for it to be taken to the lab on September 13, 2017 (R-12). The booklets are stored in a file cabinet and there is also a white sealed envelope containing the donor's medical paperwork. Investigator Jackson makes sure all three items, the booklet, medical paperwork and the urine sample all match with the dates and social security numbers. Then she puts the envelopes and the urines in a box and gives it to the driver who also inspects them and then he signs the booklet at the time he is taking the samples out. R-16 is kept by the freezer and every time a urine sample is done, the social security number of the donor, the test basis or, the date of collection, and the monitor's initials are all listed on the form. This document also goes with the urine samples, booklets and envelopes and everything has to match. Once she gives it to the courier she waits for the courier to return with the paperwork showing they were delivered to the lab.

Paul Zoyac testified on behalf of the respondent. He has been employed by the DOC as a courier for ten years and his title is ITI 2. He is assigned to the institutional warehouse at South Woods State Prison. He does daily runs to Trenton and does urine runs for the staff to the Medical Examiners' office in Newark as needed, usually once a week. On September 13, 2017, he transported urine to the Medical Examiner's office. R-16 is the log of urine samples he took that day. He makes sure the number of urines match

the log. The urines are transported in a divider box and transported in a van. When he gets to the lab he signs in and gives his identification and goes to the lab on the second floor. His signature is on the log indicating he picked up the samples at the facility and delivered it to the lab (R-16).

On cross-examination Mr. Zoyac stated he signed R-16 when he received the samples at South Woods facility at approximately 8:00 a.m. The lab signs off on the form under 'received by'. The box is open and has thirty-six slots. He transported seven samples of urine that day. He delivered the box opened. He could remove urine and others could be placed in there. The box is never sealed.

On re-direct Mr. Zoyac stated that he has never removed a urine sample from the box.

Robert Havier testified on behalf of the respondent. Dr. Havier is the Acting Director of the state toxicology laboratory in Newark, N.J. He has been employed by the state for thirty-nine years as a forensic toxicologist. As the acting director, he sets the goals for the laboratory and specifies the methods for analysis, certifies data and finalizes reports for law enforcement drug testing. He has a B.S. degree in chemistry from Long Island University, an M.S. from Adelphi University in organic chemistry and biochemistry, and a Ph.D. from the State University of New York at Buffalo in Biochemistry with a minor in organic and medicinal chemistry (R-31). Forensic toxicology is an interdisciplinary field of science that involves analytical chemistry, pharmacology and toxicology towards the analysis and interpretation of drugs in a legal setting. He has been conducting drug tests for thirty-nine years. There are two sections in the lab, the post-mortem and law enforcement drug testing. Seventeen thousand tests are done a year for the law enforcement drug testing, approximately fourteen hundred a month just from the urine drug testing. Of those seventeen thousand tests, only about two percent or less are positive for drugs. He has qualified as an expert witness in approximately thirty cases. Dr. Havier was qualified as an expert witness in drug testing and toxicology.

He is familiar with the DOC's drug testing policy. The state toxicology lab is the only lab authorized to conduct the drug testing for the law enforcement drug testing. When

he finalizes a report for a case, he reviews all the data submitted from the screening and confirmation testing as well as the certification from the medical review officer. Exhibit R-30 is the litigation packet for a law enforcement drug testing case. The first page is the submission form containing the social security numbers of the people donating specimens for analysis. The form is filled out by the monitor in charge of collecting the specimens. The donor will give the specimen to the monitor who will check the temperature of the specimen and indicate that the temperature was checked. The date of submission must be within thirty days of its submission to the lab and preferably overnight or the same day. This form is presented with all the specimens that are submitted for testing and usually are sent by courier or overnight mail. A receptionist in the laboratory receives all drug testing specimens. In this case, Jean Smith received the specimens and accepted each specimen for testing as indicated by her initials after each specimen and her name at the bottom of the submission form (R-30, page 176). The criteria she follows for accepting the sample is to check that the container has not been opened once it was sealed or tampered with in any way. She also checks the volume and appearance of the sample. The social security on the label inside of the container is checked and compared to the submission form and put into the computer which generates a toxicology number. The case is then referred to by the toxicology number. The toxicology number assigned to Mr. Shorter was 17L012120 (R-30, page 194).

After the samples are received and accepted for testing they are stored in the refrigerator and collected by an analyst from the law enforcement drug testing section and placed in a secured refrigerator in that unit. The sample will be subjected to a first screening procedure, an immunoassay procedure using antibodies to identify drugs or classes of drugs that may be present in the sample. If the sample is screened positive, that is, it contains one or more of the drugs they are looking for, the original specimen will be tested by a confirmation method completely different from the screening method. The equipment used for the screening procedure is the Architect which is manufactured by Abbot laboratories.

The drugs tested for are amphetamines, barbiturates, benzodiazepines, cocaine, creatinine for validity (to make sure the urine is human), methadone, opiates, oxycodone, phencyclidine (PCP) and tetrahydrocannabinol (THC) the major metabolite of

tetrahydrocannabinol, the active ingredient in marijuana. The results of the immunoassay drug screening test in this matter were positive for cannabinoids (R-30, page 190). The creatinine level was normal. The test identifies whether a certain level of drug is present or not. Once a sample screens positive for a drug another aliquot of the original sample will be confirmation tested by a procedure called gas chromatography/ mass spectrometry (GCMS) which is the benchmark for the whole industry as far as confirming the identity and the amount of any particular drug. An aliquot is a small portion of the original sample for testing. An aliquot of the original sample is taken and is subjected to an extraction procedure to obtain a metabolite of marijuana, tetrahydrocannabinol. The criteria for identifying a particular compound includes the retention time, the weight of the fragments that it produces and the ratio of the fragments to one another. The GC/MS drug confirmation report identified the drug as a metabolite of THC 11th carboxy THC and the amount of that metabolite was twenty-three nanograms per milliliter (R-30, page 194). This information was sent to the medical review officer to review whether anything listed on the medication sheet would account for this positive result. In this case, there was not.

Dr. Havier reviewed all the screening and confirmation data and the report from the medical review officer. He concluded all the testing was properly conducted and he generated a final report for this case. The medication form submitted by the urine donor was reviewed only by the medical review officer and was not submitted to the lab (R-30, page 193). The medical review officer certification indicated that the screening results were positive for cannabinoids and the GC/MS results were positive for 11 carboxy THC. This was not accounted for on the medication sheet (R-30, page 191).

The electronic chain of custody record for 17L012120 sets forth precisely what was done to the sample, when it was done and by whom (R-30, page 222).

All of the instruments that are used for the screening and confirmation testing are tested and checked in advance to make sure they are functioning properly and calibrated properly before the tests are run that day (R-30, pages 177 – 190, 196-197).

The cutoff level of fifteen nanograms is used because that is the industry accepted level for the drug based on possible passive inhalation or casual exposure that cannot produce a reading over fifteen nanograms.

The toxicology report indicated that the screening result by immunoassay was positive for cannabinoids and the confirmation results by mass spectrometry were positive for eleven carboxy THC with a cutoff limit of fifteen nanograms per milliliter (R-30, page 221) The toxicology report indicated carboxy levels of twenty-three nanograms per milliliter. Dr. Havier was aware that a second sample was tested by Relievus lab at the request of Sgt. Shorter and requested a copy of the results. All of the drugs listed were not detected (R-20, page 48). The cutoff level the Relievus lab used for THC was one hundred nanograms per milliliter and not the fifteen nanograms per milliliter which is the accepted cut off level used by the state toxicology lab.

Dr. Havier also had occasion to review the ToxicLogics expert report of the appellant. He disagrees with the statement that most laboratories recognize that any reported value have a margin of error recognizing the uncertainty associated with quantitative value. For Delta-9 – carboxy THC this uncertainty is usually +/- 20-25% of the reported value. Dr. Havier disagrees with this statement and believes that margin of error is too high. However, Dr. Havier points out that even if he accepted that premise, the conclusion that "This means that Mr. Shorter's value of 21 – 23 ng/ml on September 12, 2017 could be as low as 15.75 ng/m" support respondent's position that Sgt. Shorter's levels were over the 15 ng/ml acceptable level (P-2, page 4). Furthermore, Dr. Havier points out that Dr. Lage supports Dr. Havier's analysis of the test results. "Since the Relievus product is an extract of hemp it would contain both Cannabidiol and small levels of THC. This small level of THC is, in my opinion, responsible for the very low level of THC – COOH identified in Mr. Shorter's urine." (P-2, page 4). Dr. Havier said there is no way of knowing the source of the THC.

Dr. Havier's expert report considered all of the information from the confirmation analysis and all of the criteria for identification and quantification of the metabolite, and concluded that the urine specimen contained the metabolite of THC at the level of 23 ng/ml which is above the generally accepted cutoff value of 15 ng/ml (R-32).

On cross-examination, Dr. Havier admitted that analysts perform the testing so there is a human element as well as the instruments used to test the sample. The screening is done by a machine called the Architect and there are five machines for the confirmation test. The submission form contains stickers on the far-right hand side of the form which is a laboratory number used as the identifier once the drug sample is accepted by the laboratory (R-30, page 176). Labels are printed out with the toxicology laboratory number and the stickers are attached to the sample and the medication form. There is a label printed to identify the aliquot (R-30). An aliquot is taken from the original container and placed in a smaller plastic conical tube that is labeled with a bar code. Moving the urine from the container to the various smaller containers is reflected in the electronic chain of custody. As far as he is aware, no mistakes have been made in the transfer of the urine in the thirty-nine years Dr. Havier has been with the state lab, even though seventeen thousand tests are done a year. If the instrument used to perform the test is not functioning properly, no test will be performed until the equipment is working properly. The machine malfunctioned in a preliminary test for testing oxycodone the first time (R-30, page 177). The analyst made a mistake the second time (R-30, page 178). The third time the test was checked, it was found to be running properly (R-30, page 179). Blanks, urine samples that contain no illegal substances, are used as controls and are purchased from a commercial source.

The sample at issue in this case came back positive for the active metabolite for THC in the screening test and thereafter was sent through GC/MS for confirmation.

The tabulation of the confirmation testing for cannabinoids from instrument five, one of the GC/MS machines, was set forth at R-30, page 196. The instruments are not inspected for accuracy by any outside agency, but are maintained internally according to the manufacturers guidelines. This particular test was run with a cutoff analysis of 15 ng/ml. The frozen sample sent to the outside lab used a cutoff off of 100 ng/ml. No information was provided to the second lab as to what standards they should have used but the state lab should have been notified. The donor can choose the lab, but the lab has to be certified to do the testing. Dr. Havier was not notified that the second sample was released to the second lab. If he had been notified, they would have advised the other lab as to the proper cutoffs that should have been used for the testing.

There were twenty-eight samples that were tested. Items 1-12 are controls and blanks samples. Items 13-23 were actual urine samples that were received by the lab and tested (R-30, page 196). Items #1 – 5 were also urine samples received by the lab for testing (R-30, page 197). There were two aliquots taken for testing of Mr. Shorter's urine which produced positive readings for THCC at 21 ng/ml (diluted) and 23 ng/ml. (R-30, page 197). Another urine sample at Item # 19 had a reading of 806.6 and item # 20 had a reading of 605.5. The concentration was too high and fell outside the normal range for accuracy. The reason for this may be that the donor of the sample metabolized the THC either at a high dose or that the exposure to the drug occurred shortly before the urine sample was collected. Items # 19 and #20 were not accepted as a positive because the concentration was too high. The analysis would be repeated.

Dr. Havier was asked if he was familiar with the term cross-contamination as it pertains to urine testing for controlled dangerous substances and that is when one sample gets mixed in with another sample.

There is no way to confirm how the metabolite got into the urine in the case of THC. The exposure is not identifiable. The exposure from a pure CBD oil would not produce a positive result for THC. However, exposure to hemp oil would produce a positive result for THC.

On redirect-examination, Dr. Havier stated that the other laboratory did not contact the state laboratory regarding how to conduct the testing or standards to be used prior to performing the testing on the frozen sample.

Charles Warren testified on behalf of the appellant. He is currently employed as the Deputy Warden for the Cumberland County jail but was previously employed by the DOC for twenty-six years. He started his career in 1987 at the New Jersey State prison; moved to the rank of sergeant at South Woods State Prison in Cumberland county; then became the assistant superintendent at the New Jersey State Prison; left that position to become the associate administrator at Southern State Correctional Facility; then became the Administrator at Southern State Correctional Facility; then returned to the New Jersey

State Prison as the Administrator from where he ultimately retired. The administrator oversees every facet of the correctional facility and is also known as the warden.

He has known Sgt. Shorter since 2001 and was one of his supervisors when he first started working at South Woods State Prison. They socialized together at Christmas parties and family events since one of Sgt. Shorter's cousins is a very good friend of his. He has never known Sgt. Shorter to use illegal drugs or talk about using illegal drugs. His opinion as to Mr. Shorter's character as a sworn law enforcement officer is that he knows him to be an upstanding young man. Mr. Warren has no time for people who use or sell drugs and certainly would not invite him into his home if that was the case.

Cesare Coslop IV testified on behalf of the appellant. He is a lieutenant presently employed as a shift commander at South Woods State Prison. He has been a corrections officer with the DOC since June 1997. In 2004, he made sergeant and was transferred to Southern State Correctional facility for approximately six months and then returned to South Woods. He knows Sgt. Shorter since 2001 when he started and they were officers together and worked at the same facility. They ended up being partners together and they continue to work together. They have a mutual friend in common outside of the department and socialize outside of work as well as attending retirement and graduation parties. When Lt. Coslop returned as a sergeant to South Woods in 2004, he was Sgt. Shorter's direct supervisor until Lt. Coslop made lieutenant. Lt. Coslop was Sgt. Shorter's last direct supervisor at South Woods. He has never known Sgt. Shorter to use illegal substances. He has never heard him speak about using illegal substances. His opinion is that Sgt. Shorter is a fantastic officer and a great guy, he speaks to him daily and he has never been under the influence of any narcotics. He is proud of his family and proud to wear the badge and would never do anything to jeopardize this by using drugs.

On cross-examination, Lt. Coslop admitted he was not with Sgt. Shorter at night or on weekends.

William Shorter testified on his own behalf. He is not employed at the present time. He was employed as a sergeant with the DOC at South Woods State Prison until he was terminated in October 2017. He is forty years old and lives and grew up in Vineland. He is married and has a sixteen- year old daughter. He had been a sergeant for five and

a half years and prior to that was a corrections officer for eleven and a half years, since May 2001. Sgt. Shorter was the Vice President of his labor union, the New Jersey Law Enforcement Supervisors Association (NJLESA). Prior to working for the DOC, Sgt. Shorter worked as a class I special officer for the City of Vineland Police Department for two and a half years. He then worked for four months with the Federal Bureau of Prisons as a corrections officer until he switched to the State of New Jersey DOC because of better benefits and pay.

Sgt. Shorter attended the corrections officer training academy before starting work with the DOC. Besides the instant matter, he had one prior discipline in his work history (R-24). In December 2003 his power went out and his alarm did not go off and he was late for work. He received a written reprimand.

He has received several commendations. In 2003, during a snow emergency he came to work in a blizzard and stayed an extra shift to cover for the shortage. He received a letter of commendation from the administrator at the time. In 2008 he received a letter of commendation for gathering information that led to a major drug bust at South Woods. In April 2013 he received a letter of commendation for saving an inmates life who had been stabbed several times.

Sgt. Shorter is familiar with the DOC policy on illegal drug use. It is against policy to own, distribute, use and be in possession of illegal narcotics. This has been the policy as long he has been a corrections officer.

On September 12, 2017, he was working as the master center sergeant/ manpower sergeant. As master center sergeant, he was to keep up with the blotter and keeping up with the inmates going in and out for trips or transfers. As the manpower sergeant he was in charge of any extra officers as well as all of the general assignment officers as well as assigning anyone to go out on any emergency trips. Back in September 2017, his regular shift was Monday through Friday 5:30 a.m. – 1:30 p.m., with Saturday and Sunday being his regular days off.

On September 12, 2017 at 9:00 a.m., Sgt. Shorter received an order from his shift commander, Lt. Cesare Coslop, to report to SID (Special Investigations Division). Lt. Coslop told Sgt. Shorter that Investigator Bonomo needed to see him in SID. Sgt. Shorter asked what it was in regards to and Lt. Coslop said that Investigator Bonomo did not specify what it was in regards to but that he did not need a union representative. Sgt. Shorter did not respond to SID immediately because Lt. Coslop needed Sgt. Shorter to train someone to take over his duties while Sgt. Shorter reported to SID. That took about a half hour. Sgt. Shorter then telephoned Investigator Bonomo as to why he needed to report. Sgt. Shorter explained that as a union representative, they never encourage anyone to report to SID without knowing why they were going there. Sgt. Shorter stated that Investigator Bonomo advised him that he did not need a union representative and to report to SID immediately. Sgt. Shorter then reported to SID following the phone call. When he arrived at SID, Investigator Bonomo wanted to know why it took Sgt. Shorter so long to report to SID and why Sgt. Shorter did not respond to his orders. Sgt. Shorter responded that Investigator Bonomo was not in his chain of command and that his commander, Lt. Coslop had ordered him to train another sergeant to take over so that Sgt. Shorter could report to SID. He also reminded Investigator Bonomo that it only took a half hour.

Investigator Bonomo informed Sgt. Shorter that he would be taking a urine test and provided Sgt. Shorter with the paperwork. Prior to taking the test, Sgt. Shorter filled out a medication sheet in his own handwriting (P-9 and R-30, page 193). Looking back, Sgt. Shorter admitted that he failed to list the CBD oil he had been taking for just a few days that was prescribed by Dr. Young Lee, his pain management doctor. Sgt. Shorter indicated that his adrenaline was running after the confrontation with Investigator Bonomo and he was concentrating on listing all of the prescription medication he had been on for a while and simply forgot to list the CBD oil he had been on for only a few days. CBD oil is not listed on the medication sheet Sgt. Shorter filled out. P-7 is a photocopy of a photograph of a droplet bottle reading "Relievus CBD Oil" that was taken by Sgt. Shorter of what Dr. Lee had prescribed for him.

At the time of the urinalysis, Sgt. Shorter had been using the CBD oil for four days. He purchased the CBD oil from Relievus at Dr. Lee's office in Vineland. Dr. Lee

recommended that he take the CBD oil. Sgt. Shorter purchased the CBD oil on his debit card and received a receipt for the purchase dated September 7, 2017 (P-4). Dr. Lee suggested he take it the next morning on September 8, 2017. He was to take fifteen droplets twice a day under his tongue in the morning and again at night before bedtime. He took the CBD oil twice a day on September 8, 9, 10 11 and again the morning of the urinalysis, September 12, 2017 before reporting to work. Sgt. Shorter was taking this medication for pain relief due to debilitating pain caused by degenerative arthritis of his spine which he has suffered from for two years. Sgt. Shorter also takes an anti-inflammatory, a muscle relaxer and Tylenol 5 for his pain, all of which were listed on his medication sheet (R-30 & P-9, page 193).

Sgt. Shorter took the random drug test on September 12, 2017 and was informed in October by his major that it came back positive. He was telephoned at home and told to report with his union representative to the prison within two hours which he did and that is when he learned the test had come back positive.

When he gave samples for the urinalysis on September 12, 2017, he voided a second sample to be frozen for later testing if needed. This is the normal procedure he always followed whenever he took a urinalysis. He had the second sample tested. He was informed that he would bear the cost and Investigator Bonomo told Sgt. Shorter to follow the policy. Sgt. Shorter reached out to Lab Corps and Quest lab who advised that they only test urine samples for their clients, one of them being the state of New Jersey who would have to request that the sample be tested. Sgt. Shorter did not reach out to anyone from the State of New Jersey thereafter. His doctor, Dr. Lee volunteered to have his lab test the second sample for Sgt. Shorter. Sgt. Shorter reached out to Investigator Bonomo as to how to accomplish this. The lab had to be accredited, written instructions on the company letterhead and identification had to be provided to allow the lab to pick up the frozen sample. These procedures were followed and the Relievus lab did perform the urinalysis test on the frozen sample (R-8).

Since starting his employment with DOC, he has never ingested any illegal substances. He has had approximately ten random urinalyses since becoming employed by the DOC. Prior to voiding the urine sample on September 12, 2017, he never smoked

or ingested marijuana in any way. He has been suspended since October 2017. He is not working and is collecting unemployment. He wants to return to the DOC and continue his career as a sergeant.

On cross-examination, Sgt. Shorter admitted that he was prescribed the CBD oil on September 7, 2017 and took it twice a day for four days, yet on September 12, 2017, he did not remember he was taking it and failed to list it on the medication sheet. Sgt. Shorter did not go to a pharmacy to get the CBD oil. Dr. Lee's office is Relievus. Sgt. Shorter did not do any research on CBD oil or look on the Relievus website. He was not aware that the Relievus website listed their CBD oil as containing 0.3% THC. He is aware that THC is a prohibited substance. Sgt. Shorter was asked if he is aware that as a law enforcement officer he cannot have THC in his system. He replied that he is aware that he cannot take any illegal substances, but that he was taking the medication that his doctor prescribed.

Stephanie Shorter testified on behalf of the appellant. She has been married to William Shorter for eight years. As a couple, they are homebodies. They like to stay home and watch movies. They will go out to dinner on weekends or attend family events or work- related events such as retirement parties. Every once in a while, Mr. Shorter will go out with his friends. Since she has been with Mr. Shorter, she has not known him to have ever used any illegal substances at any time.

Gary Lage testified on behalf of the appellant. He has a B.S. degree in pharmacy from Drake University and a M.S. and PhD. In pharmacology from the University of Iowa, all of which were conferred in the 1960's. He has been employed since 1996 by ToxiLogics in Landenberg, Pa. He is the president and founder of the company. After he received his PhD., he became an assistant professor of pharmacology and toxicology at the University of Kansas for approximately six years. He then became an associate professor of pharmacology and toxicology at the University of Wisconsin for approximately six years. Then he became a professor of Toxicology at the Philadelphia College of Pharmacy and Science for approximately nine years, the last four of which he was the Chairman of the toxicology and pharmacology department. In the late 1980's he left academia and became a consultant for Roy F. Westin for five years. After that, he became a consultant with Environ Corp. in Princeton for approximately five years and then consulted for ERM for a

couple of years before starting ToxiLogics in 1996 (P-1). At toxiLogics he works on a wide range of projects involving drugs, alcohol and chemicals and their effects on the human body and the analysis relating to those chemical substances in relation to their toxic effects. He was board certified in toxicology until 2015 when he let his certification lapse. Board certification in toxicology began in 1980 and required experience in the field of toxicology demonstrated by peer review and taking an extensive test to be board certified. Board recertification was required every five years. He belongs to the American Society of Pharmacology and Experimental Therapeutics which is the major scientific society for pharmacology. Dr. Lage is also a member of the Society for Toxicology, which is the major scientific society for toxicology. He has written numerous articles and peer review publications. His major interest is in the relation of toxic chemicals to their effects on the human body. Dr. Lage has qualified as an expert witness in the field of toxicology in the state courts in New Jersey, New York, Pennsylvania, Wisconsin, Indiana, Arizona and Alaska. He has also been accepted as a toxicology expert in the OAL in other cases.

Dr. Lage was accepted as an expert in the field of toxicology. Dr. Lage was contacted by Mr. Crivelli's office to serve as an expert witness in this case. Dr. Lage was asked to evaluate the urine drug sample of Mr. Shorter in relation to whether it represented use of marijuana or whether it was consistent with his use of CBD oil. Based upon his review of the material that was sent to him, it was his opinion that the low levels of the marijuana metabolite identified in Mr. Shorter's urine was most likely the result of his use of the CBD oil. This opinion is reflected in his expert report and supplemental report (P-2, P-3).

Marijuana is a recreational drug that causes euphoria, sedation, changes in mood and in certain doses it can cause changes in coordination and memory. The active ingredient of the marijuana plant is THC, tetrahydrocannabinol, and most of the effects are due to THC. Marijuana is most commonly smoked but can be ingested as well in any kind of food substance such as brownies and would be absorbed through the intestinal tract. CBD is an abbreviation for cannabidiol which is another ingredient of the hemp plant which is where marijuana comes from. It is not a psychoactive substance that causes the effects that THC does and it has been shown to have some positive medical benefits in terms of pain and anxiety and is being recognized as a significant medical treatment for a lot of

people. Hemp oil is an extract and will have small levels of THC present but not enough to cause a psychoactive effect. CBD oil can be more purified than hemp oil and not have any small levels of THC in it. In comparison to marijuana, the difference in the toxicology of hemp oil and CBD oil is that they will not produce the psychoactive effect that marijuana will produce and although hemp oil may contain small levels of THC, it is insufficient to produce a psychoactive effect.

Dr. Lage visited the Relievus website and found that the product that Mr. Shorter was prescribed and using was an extract of the hemp plant and by definition would contain small quantities of THC. The website did disclose that there were small amounts of THC in the product. He also reviewed the urinalysis test results at issue in this case and found that the state initially and appropriately used an immunoassay screening test commonly used in the drug testing industry which gives a positive or negative for different drug classes. Then the procedure that is used and was used in this case, once the screening test was positive, is to do the more definitive, confirmatory and quantitative test using the GC/MS to confirm that the drug is present and in what amounts. The GC/MS test was done twice, which was appropriate. The first test showed 23 ng/ml and the diluted test showed 21 ng/ml. Both readings are relevant. The cutoff used in this test was 15 ng/ml. Mr. Shorter's readings were quite low, just above the cutoff. He has seen quite high levels in the several hundreds up to thousands. All scientific tests have a margin of error a plus minus for the results obtained. Some laboratories actually report the test results with the plus/ minus margin of error with their analysis. NMS Labs in Willingrove, Pennsylvania. one of the largest toxicology labs in the country, in the last two years has reported their test results for THC drug testing with a 20 – 25% margin of error. This is used because nanograms per milliliter is an extremely small quantity and the analysis is not that accurate. Although they did not find THC in Mr. Shorter's urine, they found THC carboxy which is an inactive metabolite of THC. Based on the margin of error, Dr. Lage calculated that the amount of THC in Mr. Shorter's urine could be as low as 15.75 ng/ml or slightly above the 15 ng/ml cutoff. Drug levels measured in concentrated urine would read higher than drug levels present in diluted urine. The concentration of urine is measured by the creatinine levels. Mr. Shorter's 188.6 creatinine level is mostly normal, maybe slightly concentrated, but not very concentrated. Most labs use a twenty-creatinine level as a cutoff as urine being too diluted to test.

In Dr. Lage's opinion, the positive results of Mr. Shorter's urine test were consistent with his CBD oil use and not consistent with marijuana use. Dr. Lage bases his opinion on the fact that Relievus recognizes that there are small levels of THC in their CBD oil and this would be consistent with Mr. Shorter's use of the CBD oil. The levels of 23 ng/ml and 21 ng/ml found in Mr. Shorter's urine are consistent with his use of the CBD oil. Dr. Lage's opinion is based upon a reasonable degree of scientific certainty.

On cross-examination, Dr. Lage was referred to his expert report where he opined that "Since the Relievus product is an extract of hemp it would contain both Cannabidiol and small levels of THC. This small level of THC is, in my opinion, responsible for the very low level of THC-COOH identified in Mr. Shorter's urine" (P-2, page 4). Dr. Lage accepts the fact that the carboxy THC was present in Mr. Shorter's urine.

Stephen Serbeck testified on behalf of the appellant. Sgt. Serbeck has been employed by the N.J. DOC for twenty-one years, eight years as a sergeant, and has been assigned to the South Woods State Prison the entire time. He has known Sgt. Shorter for approximately twenty-four years since high school where they were friends and football team mates. He socializes with Sgt. Shorter a couple of times a year outside of work. He has never seen Sgt. Shorter use or discuss using illegal drugs. In his opinion, Sgt. Shorter is one of the best men he knows and always does his job in the most honorable way he can. Besides his abilities as a sergeant, he is a good man and cares about others and helps whenever he can.

Russell Little testified on behalf of the appellant. He has a masters of science in nursing (MSN) from Rutgers Camden and is a nurse practitioner/advanced practice nurse currently employed by Relievus Pain Management. He identifies any problems that his patients are experiencing and recommends treatment options and pain medications based on their diagnosis. A nurse practitioner is an advanced practice nurse who is able to diagnose, treat and prescribe medications, order x-rays and recommend treatment options. A regular nurse carries out orders whereas an advanced practice nurse can diagnose a patient, write orders and prescribe medications. Relievus is mainly an interventional pain management practice. They do injections, nerve blocks and epidurals.

Mr. Little has been a nurse practitioner for approximately three years and has worked at Relievus for two and a half years.

Mr. Little knows Mr. Shorter who has been a patient approximately one year and who Mr. Little has seen at least six times. Mr. Shorter has degenerative changes in his spine as well as bulging and herniated discs that cause pain. They initially treated Mr. Shorter with a sacroiliac joint injection, nerve blocks and nerve burning as well as an epidural. Mr. Shorter was referred by a chiropractor and tried chiropractic therapy first, which is usually the first line of treatment. They tried oral medications and that is when Mr. Little recommended the CBD oil because Mr. Shorter wanted to get better without the use of narcotics. Mr. Little recommended the CBD oil product to Mr. Shorter. The CBD oil was a product sold by Relievus. Mr. Little knew where Mr. Shorter worked and was aware that Mr. Shorter was subject to urine drug screenings. He recommended Mr. Shorter try the CBD oil because as far as Mr. Little was aware, it would not cause a positive THC result. He had a conversation with Mr. Shorter as far as whether the drug would show up in a drug screen and Mr. Little told Mr. Shorter it would not. Mr. Little had discussions with the head doctors at Relievus during monthly meetings regarding the best way to treat patients and they said it would not show up. Mr. Little wrote a letter dated October 23, 2017 "To Whom It May Concern: Mr. William Shorter has been under our care and was prescribed CBD oil. There is a difference between CBD oil and THC, however CBD can give a false positive to THC. It is required that a second test called a GC/MS test be done in order to confirm that it is in fact not THC. Please call me if you have any questions. Thank you so much. Sincerely, Russell Little, APN Relievus" (P-12).

Mr. Little also authored an undated note on Relievus letterhead which stated as follows:

> "Mr. William Shorter came to our practice to help alleviate pain in his lumbar spine. He has been through multiple treatments with us as well as prescribed medication with no relief. After seeing William multiple times, it was my recommendation that he try CBD oil also known as hemp oil. This has been proven to help with inflammation and pain. He did not want to rely on narcotic medication and I believed this to be our best alternative. On September 7, 2017 William purchased the CBD oil through our practice with his credit card. We will provide original receipt with this letter. William has been a great patient and only doing as

> recommended by our practice and that is why he tried the CBD oil to begin with. If there are any questions please contact me personally. Thank you so much."

Mr. Little no longer recommends CBD oil to any of his patients as a result of this incident.

On cross-examination, Mr. Little stated that CBD oil is not a prescription medication so a prescription is not required although he wrote the recommendation on a prescription blank dated October 20, 2017 (R-18, page 037). Mr. Little was the provider who recommended Mr. Shorter take CBD oil, not Dr. Lee. Relievus was also the facility that tested Sgt. Shorter's frozen urine sample (R-20, page 048). Prior to testing, the urine Mr. Little did not contact the state lab as to how the test should be conducted. Mr. Little had written that there was a difference between CBD oil and THC, however CBD can give a false positive to THC (P-12, page 039). Mr. Little was aware Mr. Shorter retained an expert in this case although he did not review the expert's report. Mr. Little could not answer whether it would come as a surprise to him that the expert confirmed the presence of THC in Mr. Shorter's urine sample.

On redirect-examination, Mr. Little admitted that he has no formal training or degrees in toxicology. The drug screening by Relievus was ordered by Mr. Little (P-20). He made the arrangements to obtain the second sample to run the confirmation testing, but did not speak to anyone at the state lab as to what levels should be used to run the confirmation test.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne

by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958).

Sgt. Shorter was a corrections officer for eleven and a half years and a sergeant of corrections for five and a half years before his removal. He also was the vice president of his labor union, the New Jersey Law Enforcement Supervisors Association. He was familiar with the DOC drug testing protocol and has submitted to approximately ten random drug screenings as a condition of his employment. Prior to producing the urine sample for testing on September 12, 2017, Sgt. Shorter completed "Attachment D, Drug Testing Medication Information" (P-9 and R-30, page 193). The form indicates that "As part of the drug testing process, it is essential that you inform us of all medications you have taken in the last thirty (30) days. Please carefully complete the information below." Sgt. Shorter indicated that during the past thirty days he had taken the following medication prescribed by a physician:

Name of Medication	**Prescribing Physician**	**Date Last Taken**
Tylenol 4	Dr. Young Lee	8/12/17
Nucynta	Dr. Young Lee	9/10/17
Metformin	Dr. Young Lee	9/11/17
Ramipril	Dr. Young Lee	9/11/17
Meloxicam	Dr. Young Lee	9/11/17
Amrix	Dr. Young Lee	9/11/17

Sgt. Shorter further indicated that during the past 30 days, he had taken the following non-prescription medications (cough medicine, cold tablets, aspirin, diet medication, nutritional supplements, etc.)

Non-prescription Medication	**Date Last Taken**
Centrum multi vitamin	Daily
Excedrin migraine	9/5/17
Rolaids	9/8/17

Sgt. Shorter did not list the CBD oil he testified was prescribed by Mr. Little on September 7, 2017. Sgt. Shorter did not list the CBD oil on the medication sheet despite the fact that he testified he took fifteen droplets of the CBD oil under his tongue twice a day in the morning and again before bedtime on September 8, 9, 10, 11 and again on the morning of the urine drug test, September 12, 2017. He testified that his adrenaline was running after the confrontation with Investigator Bonomo and he was concentrating on listing all of the medication he had been on for a while and simply forgot to list the CBD oil he had only been on for a few days. Sgt. Shorter's testimony in this regard is not believable. He was very familiar with the drug testing protocol and the need to list every medication he was taking, both prescription and non- prescription. He listed Rolaids and Excedrin that he took the week before the random drug test, yet he forgot to list a cannabis product he took as recently as the morning of the drug test. I **DEEM** that Sgt. Shorter's testimony in this regard is not credible.

The testimony of Dr. Havier was highly credible. His knowledge of the laboratory testing and procedures were precise and technical. He disagreed with Dr. Lage's opinion that there was a margin of error of 20-25% in the testing, however pointed out that even calculating with that number, Sgt. Shorter was still over the accepted cut off rate at 15.75 ng/ml. Dr. Havier also testified that there is no way of knowing the source of the THC metabolite, only that the THC metabolite was present in Sgt. Shorter's urine. Dr. Havier also pointed out that Dr. Lange agreed with Dr. Havier's test results. The Relievus lab did not test the frozen sample according to the accepted cut off level of 15 ng/ml but rather used a much higher cut off level of 100 ng/ml. Although both Dr. Havier and Dr. Lage testified credibly, I **DEEM** Dr. Havier's testimony to be more persuasive.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

On September 12, 2017, Sgt. Shorter was randomly selected for a urine drug screening pursuant to the DOC drug testing policy set forth in HRB 99-01 (R-22). Sgt. Shorter was fully familiar with the drug testing policy and the consequences of a positive result. Investigator Bonomo monitored Sgt. Shorter's drug testing and the drug testing

booklet was completed outlining the procedures followed (R-11). Prior to producing the specimen, Sgt. Shorter filled out a medication sheet listing all prescription and non-prescription medications he had taken in the last thirty days (P-9, R-30, page 193). Sgt. Shorter did not list the CBD oil as a medication he was taking.

At approximately 9:39 a.m. Sgt. Shorter provided two urine samples, one for testing at the N.J. State Toxicology Lab and a one to be frozen for later testing if the first sample tested positive. Both samples were placed in the evidence refrigerator by Investigator Bonomo at 9:40 a.m. On September 13, 2017 at 8:00 a.m. Investigator Maria Jackson removed the first sample from the evidence refrigerator and gave it to Paul Zoyac, the South Wood State Prison courier, for transport to the State Toxicology Lab for testing (R-12.) The sample was received at the State Lab on September 13, 2017 and an electronic chain of custody was maintained (R-30, page 222). The continuity of evidence was maintained at all times and there was no break in the chain of custody of the urine samples from the time it was produced up to and including the time it was confirmation tested at the state lab. The equipment used to test the urine was functioning and calibrated properly before the urine was tested (R-30, pages 177-190, 196-197).

The immunoassay drug screening test was positive for cannabinoids (R-30, page 190). A further confirmation drug test was performed using gas chromatography/mass spectrometry (GC/MS) which indicated that 11 – Carboxy-THC was detected in the amount of 23.0 ng/ml with a confirmation cutoff concentration of 15.0 ng/ml (R-30, page 194). The Medical Review Officer reviewed the results and indicated that the controlled substance found was not listed on the medication sheet (R-30, page 191, 221).

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained -of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In reZeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellants status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority

cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304. N.J. Super. 191, 199 (App. Div. 1997).

The DOC has a zero tolerance for drug use policy and requires that as a condition of employment officers submit to random urine drug testing. The DOC policy requires that a negative result is required to maintain employment and a positive result will result in termination. Sgt. Shorter failed his random drug test on September 12, 2017 by testing positive for the metabolite of THC. The New Jersey DOC Rules and Regulations for Law Enforcement Personnel prohibit an officer from using any illegal drug or controlled dangerous substance, whether on or off duty. As a sergeant of corrections, Sgt. Shorter represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is certainly conduct that adversely affects the morale or efficiency of a governmental unit and has a tendency to destroy public respect in the delivery of governmental services. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing conduct unbecoming.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Sgt. Shorter tested positive for the THC metabolite following his random drug test on September 12, 2017. Law enforcement personnel are prohibited from using illegal drugs or controlled dangerous substances. Appellant's conduct violates the implicit standard of good behavior one would expect from a sergeant of corrections. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause.

Appellant has also been charged with various offenses set forth in HRB 84-17, including C-11, Conduct unbecoming a public employee; HRB 84-17, C-2, Reporting for duty while under the influence of intoxicating liquors or drugs; HRB 84-17 C-30, Use, possession, or sale of any controlled dangerous substance (custody); HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. As stated above, the same reasons for finding that the respondent has met its burden of proof for the conduct unbecoming violations set forth in N.J.A.C. 4A:2.3(a)6 apply to the C-11

conduct unbecoming charge. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17, C-11.

As far as the violation of HRB 84-17, C-2, Reporting for duty while under the influence of intoxicating liquors or drugs, the fact that Sgt. Shorter was subjected to the random drug test while on duty on September 12, 2017 and tested positive for the THC metabolite supports the fact that he was under the influence of drugs while on duty that day. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17, C-2.

Appellant has also been charged with a violation of HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance. On September 12, 2017 Sgt. Shorter was subjected to a random drug test and tested positive for the THC metabolite. Therefore, I **CONCLUDE** that appellant was in possession and used a controlled dangerous substance and respondent has met its burden of proof in establishing a violation of HRB 84-17, C-30.

Appellant has also been charged with a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. On September 12, 2017 Sgt. Shorter submitted to a random officer drug screening as a condition of his continued employment with the DOC. Sgt. Shorter tested positive for the metabolite of THC. Sgt. Shorter's conduct is in violation of the Law Enforcement Personnel Rules and Regulations prohibiting an officer from possessing or using any illegal drug or dangerous substance whether on or off duty. Sgt. Shorter's conduct is also in violation of the DOC's drug testing policy set forth in HRB 99-01, Amended November 6, 2009. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision.

Appellant argues that his substantive due process rights have been violated because the state lab did not advise the Relievus lab what the proper parameters were for the testing of the frozen sample and the sample was tested far above the cut-off level utilized by the state lab. I **FIND** this argument to lack merit. Mr. Little was the individual

at Relievus who made the arrangements with the DOC to have the second sample released to be tested by the Relievus lab, at the request of Sgt. Shorter. The Relievus lab did not check with the state lab to inquire as to how the test should be run before they tested the frozen sample. However, more importantly, appellants own expert, Dr. Lage, concurs with the results of the state toxicology lab report and the fact that the carboxy THC was present in Mr. Shorter's urine.

Dr. Lage reviewed the State Toxicology Lab test results in this case and found that the state initially and appropriately used an immunoassay screening test commonly used in the drug testing industry which gives a positive or negative for different drug classes. Then the procedure that is used and was used in this case, once the screening test was positive, is to do the more definitive, confirmatory and quantitative test using the GC/MS to confirm that the drug is present and in what amounts. The GC/MS test was done twice, which was appropriate. The first test showed 23 ng/ml and the diluted test showed 21 ng/ml. Both readings are relevant. Dr. Lage does not dispute the state's lab test results. What he does opine is that certain labs recognize that there is a 20-25 %+/- margin of error for THC drug testing. Dr. Lage further opined that if you calculate the margin of error on the high side, Sgt. Shorter's level could be as low as 15.75 ng/ml. In any event, that is still above the 15 ng/ml cut off level.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Pursuant to the DOC HRB 99-01, Amended November 6, 2009, any covered person who tests positive for illegal drug use shall be suspended immediately from all duties and processed for termination from service (R-22, page 5). The DOC drug policy does not call for a range of discipline and removal is the only option for a violation of the drug testing policy. Appellant knew that as a condition of his continued employment he had to pass the random drug urine screens. Sgt. Shorter acknowledged that he understood that if he produced a positive result for illegal drug use, he would be dismissed from his position with the NJDOC (R-11, page 22). Therefore, the only appropriate penalty in this case is removal. I **CONCLUDE** that the removal of the appellant was appropriate.

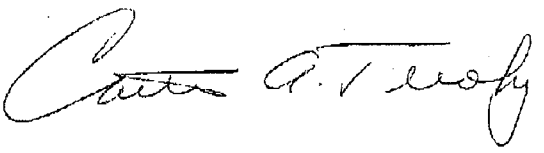
ORDER

Accordingly, I **ORDER** that the action of the respondent is **AFFIRMED**, as set forth above. Appellant's appeal is **DISMISSED**.

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

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

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



May 8, 2018
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: May 8, 2018 (emailed)

Date Mailed to Parties: May 8, 2018 (emailed)

/mel

APPENDIX

WITNESSES

For Petitioner:

Charles Warren
Cesar Coslop, IV
William Shorter
Stephanie Shorter
Gary Lage
Stephen Serbeck
Russell Little

For Respondent:

Dwayne Grade
Bryan Bonomo
Maria Jackson
Paul Zoyac
Robert Havier

EXHIBITS

Joint

J-1 Preliminary Notice of Discipline dated October 20, 2017
J-2 Final Notice of Discipline (31-C) dated November 6, 2017

For Petitioner:

P-1 CV of Gary Lage, Ph.D. – twenty-three pages

P-2 Expert Report of Gary Lage, Ph.D. - five pages

P-3 Supplemental Report of Dr. Lage dated March 14, 2018

P-4 Receipt and Invoice from Advanced Spine & Pain for CBD oil dated September 7, 2017 – two pages

P-7 Photocopy of picture of dropper bottle of CBD oil (038)

P-8 Lab results from Relievus of drug testing on second sample, dated October 26, 2017 – four pages

P-9 Drug testing Medication Information Attachment D (193) same as R-30 (193)

P-12 October 23, 2017 letter from Russell Little (039)

For Respondent:

R-9 Administrative Investigation Report by Bryan Bonomo – two pages (015-016)

R-10 Toxicology Report/LEDT – (017)

R-11 Drug Screening Program Monitor booklet – eight pages (018-025)

R-12 Continuity of Evidence- Urine Specimen Form Attachment E2 – (026)

R-13 Continuity of Evidence- Urine Specimen Form Frozen Specimen Attachment EA2- (029)

R-14 Summary Attachment F – (031)

R-15 Frozen Specimen Receipt – (032)

R-16 Lab LEDT chain of custody – (033)

R-17 Master List for Donor Notification (034)

R-18 Note on Prescription pad (037)

R-20 Relievus Lab Results from testing of second sample- four pages (047-050)

R-22 HRB 99-01, Amended November 6, 2009, Subject: Drug Testing Policy- twelve pages (056-067)

R-23 HRB 84-17 Table of Offenses and Penalties – sixteen pages (068-083)

R-24 Work History (084)

R-25 New Hire Checklist for William Shorter – (085)

R-27 Policy Receipt (091)

R-29 Random Urine Selection process – six pages (170-175)

R-30 LEDT Litigation Packet - forty-eight pages (176-222)

R-31 CV of Robert Havier, PhD. – three pages (223-225)

R-32 Expert Report of Robert Havier, PhD. – four pages (226-229) and additional supporting documents – five pages (270-274)

R-34 Law Enforcement Personnel Rules and Regulations – twenty-two pages (248-269)

6-6-18

A-1

STATE OF NEW JERSEY

In the Matter of Charity Sims
City of Paterson, Department of Economic Development

CSC DKT. NO. 2018-1380
OAL DKT. NO. CSV 18378-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 18378-17
AGENCY REF. NO. 2018-1380

IN THE MATTER OF CHARITY SIMS, CITY OF PATERSON, DEPARTMENT OF ECONOMIC DEVELOPMENT.

Seth Gollin, AFSCME, appearing for appellant Charity Sims pursuant to N.J.A.C. 1:1-5.4(a)(6)

Steven S. Glickman, Esq., (Lite DePalma Greenberg, LLC) attorneys for respondent

Record Closed: May 16, 2018 Decided: May 16, 2018

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

By Final Notice of Disciplinary Action dated December 6, 2017, and made effective November 8, 2017, respondent City of Paterson, Department of Economic Development (City), terminated appellant Charity Sims (appellant) from her civil service position as a Keyboarding Clerk 1 for failing to report back to work after the exhaustion of extended unpaid leaves of absence. Appellant filed a request for a hearing appealing her suspension, which appeal was filed with the Office of Administrative Law by the Civil

Service Commission for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 on December 18, 2017.

The matter was assigned to me on December 20, 2017. On January 12, 2018, I convened a telephonic prehearing conference during which we scheduled the matter for a hearing date of March 2, 2018. At the scheduled plenary hearing, the parties communicated that they were in the process of negotiating a resolution of the matter and, accordingly, the hearing was converted to a settlement conference. When the parties reported that same day that they had reached an accord, all terms and each parties' consent were placed on the record. The parties were given the opportunity to reduce the settlement to writing.

On May 16, 2018, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the applicable law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

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

May 16, 2018
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

Mailed to Parties: MAY 18 2018
id

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
2018 MAY 16 A 10:03
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT

WHEREAS, Charity Sims (hereinafter referred to as "Sims") filed an appeal of her termination of employment by the City of Paterson (hereinafter referred to as the "City") with the New Jersey Civil Service Commission, which was assigned OAL docket number CSV 18378-2017 N, Agency Reference No. 2018-1380; and

WHEREAS, Sims' appeal under docket no. CSV 18378-2017 N was assigned to the New Jersey Office of Administrative Law for a hearing before the Honorable Gail Cookson, A.L.J.; and

NOW HEREFORE, the parties, on March 2, 2018, agreed as follows in full and final settlement of the matter under docket no. CSV 18378-2017 N:

1. The City will rescind Sims' termination from employment with the City, and her separation from employment with the City shall be deemed a resignation in good standing.

2. The City will provide only a neutral recommendation for communications concerning Sims' prospective future employment. Specifically, the City will only provide the beginning and end dates of Sims' employment with the City to the extent requested by prospective future employers.

3. Without prejudice to future employment with the City after November 8, 2019, Sims is hereby ineligible to apply for employment with the City in any capacity for a period of two (2) years commencing on November 8, 2017 and concluding on November 8, 2019.

4. The City will not challenge any past or future application by Sims for unemployment compensation benefits in connection with her separation from employment with the City.

5. The disciplinary charges appealed under docket no. CSV 18378-2017 N are hereby dismissed with prejudice.

6. Sims hereby withdraws her appeal under docket no. CSV 18378-2017 N with prejudice.

7. GENERAL RELEASE

In consideration of the Agreement described above, Sims waives, releases and gives up any claim she, her heirs, executors, administrators, successors and assigns may have against the City and any of its present or past representatives, administrators, supervisors, employees, officers, directors, agents, contractors, etc., and each of their predecessors, successors and assigns, based upon any event arising out of any and all outstanding employment issues between the City and Sims, including her disciplinary appeal and including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A-the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing

effects of actions or practices which arose prior to the date of this Memorandum of Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

8. KNOWING AND VOLUNTARY WAIVER

Sims acknowledges that in the execution of this Agreement she is affecting a knowing and voluntary waiver of any claims, liabilities or causes of action against the City and any of its members of the governing body, employees, agents, successors and assigns of the City by reason of any and all outstanding employment issues between the City and Sims, including her disciplinary appeal. Sims further acknowledges that she has discussed the terms of this Agreement with her union and/or legal representatives and that any questions she may have regarding this matter have been answered to Sims' full satisfaction. Sims also hereby agrees and acknowledges that she has been fully, fairly, and adequately represented in this matter.

9. This Memorandum of Agreement is not precedent setting on either party in that the Union and the employee cannot interpret and construe this Memorandum of Agreement or the terms of this settlement as a waiver of the City of Paterson's policies and procedures, or interpret and construe this settlement as a waiver of the parties' contract and applicable labor laws. The parties and the Union agree that the terms of this Agreement are specific to the facts and circumstances of this particular action and binding only as to this matter.

10. This Agreement represents the entire understanding of the parties and may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

11. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

12. Sims acknowledges that this Agreement does not constitute and shall not be construed as an admission, violation of any law, rule or regulation, breach of any contract or commitment of any wrongdoing whatsoever on the part of the City.

13. Should any of the provisions of this Agreement be declared or determined by a court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

14. IN WITNESS WHEREOF, the parties have set their hands and seals the day and year first above written.

For: City of Paterson

Date: 5/16/18

Charity Sims

Date: April 5, 2018

Steven S. Glickman
Attorney for Respondent City of Paterson

Date: 5/11/18

Seth Gollin
Organizer/Field Representative
AFSCME NJ

Date: 4/10/18

6-6-18

A-4

STATE OF NEW JERSEY

In the Matter of Tia Smith
Camden County Correctional Facility,
Department of Corrections

CSC DKT. NO. 2018-1068
OAL DKT. NO. CSR 15732-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 8, 2018 BW

The appeal of Tia Smith, County Correction Officer, Camden County Correctional Facility, Department of Corrections, removal effective April 16, 2017, on charges, were heard by Administrative Law Judge Dorothy Incarvito-Garrabrant, who rendered her initial decision on April 23, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of June 6, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Tia Smith.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 15732-17
AGENCY DKT. NO. N/A

2018-1068

IN THE MATTER OF TIA SMITH, CAMDEN COUNTY DEPARTMENT OF CORRECTIONS.

Stuart Alterman, Esq. for appellant Tia Smith (Alterman and Associates, LLC, attorneys)

Antonietta Rinaldi, Esquire, Assistant County Counsel, for respondent, Camden County Department of Corrections (Christopher A. Orlando, County Counsel, attorney)

Record Closed: April 19, 2018 Decided: April 23, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Appellant, Tia Smith, a County Correction Officer at the Camden County Correctional Facility (CCCF), operated by the Camden County Department of Corrections, (respondent or CCDOC), appeals from the determination of respondent that she be terminated, pursuant to a first Final Notice of Disciplinary Action (FNDA), dated October 3, 2017, for violations of N.J.A.C.4A:2-2.3(a)(1) Incompetency, Inefficiency,

Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming an employee; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically violations of C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Unbecoming Conduct; 1.3 Neglect of duty; 1.4 Insubordination; 2.1 Abuse of Sick Leave; 2.4 Reporting Off Sick; 2.12 Fictitious Illness or Injury Reports; Internal Affairs Order #001; General Order #28, General Order #73; General Order #74. (R-9.)

The appellant denies the allegations that she falsified information or lied during an internal investigation, that she lied to her supervisor, that she faked an illness to extend her vacation, and that she failed to notify respondent that she was leaving her place of sick confinement.

PROCEDURAL HISTORY

On March 28, 2017, respondent issued a first Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against appellant. (R-9.) Following a departmental hearing on July 18, 2017, the respondent issued a Final Notice of Disciplinary Action on October 3, 2017, sustaining the charges brought in the preliminary notices and terminating appellant from employment. (R-9.) Appellant filed a timely notice of appeal. The matter was transmitted to the Office of Administrative Law on August 26, 2016, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The hearing in this matter was held on March 27, 2018, and March 28, 2018. The parties filed post-hearing briefs and the record closed on April 19, 2018.

FACTUAL DISCUSSION

Testimony

For Respondent

Joseph Coleman (Coleman), Sergeant, is an Internal Affairs (IA) Investigator. He has been employed by respondent for twenty-one years and has been an investigator for twelve years. On February 14, 2017, he was referred appellant's matter to conduct an IA

investigation about her absence from her shifts, which involved a vacation in Las Vegas and an alleged sick call out of work.

As part of his investigation, Coleman reviewed the Absentee Log, Sick Visitation Report, and the Unusual Incident Report. (R-2-R-4.) During his employment as an investigator, his job duties included conducting investigations, interviewing witnesses, reviewing documents and evidence, and writing reports.

Coleman conducted two IA interviews of the appellant. The first was conducted on February 17, 2017. (R-5a.) This was four days after appellant returned from a vacation to Las Vegas, and three days after, she called out sick after her vacation. The second was on February 28, 2017, after appellant had presented an itinerary of her trip to Coleman. (R-7.)

Coleman testified that appellant told him that she went on a four-day Las Vegas trip with her girlfriends for her birthday between Thursday, February 9, 2017, and February 13, 2013. Appellant explained that she found out about the trip a few days before she left, since it was a surprise present.

Coleman stated that appellant knew she had to work on Monday morning, February 13, 2017, the return date for the trip. Appellant did not put in a slip to request off on February 13, 2017, which Coleman noted. The itinerary which appellant subsequently produced after the interview, in response to Coleman's request, indicated that appellant was scheduled to fly to Las Vegas on February 11, 2017 at 7:00 a.m. and return from Las Vegas to Newark on February 13, 2017 at 4:35 p.m.

Coleman testified that appellant stated she attempted to change her flight to return earlier before she left. Appellant indicated that the cost of a ticket was not an issue. However, appellant never changed her flight or bought a different ticket to return earlier. Also, appellant called Vegas.com, the travel company through which the reservation was placed, before she left on Friday, February 11, 2017. Vegas.com advised that the entire trip would have to be cancelled and that there would be a $200 per person cancellation fee. As a result, she did not change her flight.

Appellant went to Las Vegas. Subsequently, on Sunday, February 12, 2017, appellant and her friends went on an ATV excursion in the desert. Appellant alleged she became sick after the excursion.

Coleman testified that appellant made the following statements during her first interview:

1. She left for Las Vegas on Thursday;
2. She did not book her trip because it was a gift from her friends;
3. She found out about the trip a couple days before she left and this was when she first knew the dates for departure and return;
4. She was going to catch an earlier return flight. She had called Vegas.com to change her flight before she left, but the cancellation fees were $200 per person and she decided not to cancel;
5. She went on an ATV excursion on Sunday, February 12, 2017, after which in the afternoon she became ill;
6. She called out of work sick for her Monday, February 13, 2017, morning shift, from Las Vegas on Sunday around noon because she was not feeling well;
7. She said she left at 4:00 a.m. for the airport in Las Vegas by herself. Her friends left at 6:00 a.m. for the airport;
8. She understood that she could not make it back for her Monday, February 13, 2017 shift (or tour of duty).; and
9. She stated she knew she had to get back for her Monday shift; however, when she became ill on Sunday, she said "forget it."

Coleman requested that appellant produce the following after the interview:

1. Airline Ticket Stubs for your Departure and Arrival;
2. Receipt for the purchase of your Airline Tickets;
3. Total cost for you Airline Tickets; and
4. Your Trip Itinerary that Includes Dates and Hotel Information. (R-5b.)

Coleman interviewed appellant again on February 28, 2017, after she produced her itinerary in response to his requests. He conducted this second interview because he believed the itinerary information contradicted her prior statements. The itinerary showed appellant had booked and paid for the trip on January 29, 2017, even though appellant said she only knew about the trip a few days before she left.

During this interview, appellant confirmed that the itinerary was correct and that she left on Friday, February 11, 2017, and not Thursday, February 10, 2017, as she stated previously. Also, the itinerary showed appellant was to return to Newark at 4:35 p.m. on Monday, February 13, 2017. Coleman stated that this raised a red flag for him because there was no way appellant could have made it back for her shift beginning at 6:45 a.m.

Coleman stated that appellant confirmed it was her Visa card that was used to book the trip. She told him that her card was used by her friends to do this because they did not have a credit card. This information was not provided to Coleman during the first interview.

Coleman testified that appellant made the following additional statements during her second interview:

1. She was on the phone with Cook at which time she provided Cook with her credit card number and Cook booked the trip;

2. She called Vegas.com to change the flight to return before Monday;

3. She called Spirit Airlines on Saturday, February 11, 2017 to change her flight;

4. She stated "I could have just paid, I guess not to go...I just know that before I left, I should have just tried to switch the day like you said last time or I could have tried to put in for that day."

Coleman testified about his conclusions. He stated he discussed this investigation with Deputy Warden Foschini who recommended that Coleman generate a Supervisor's

Staff Complaint. Coleman was not the final decision maker about the charges or the penalty.

Christopher Foschini (Foschini), Deputy Warden testified that he has been employed by the CCDOC for twenty-three years. He supervised the IA Division since 2005. His duties included being responsible for overseeing IA, policy and procedures, operations, and discipline at CCCF. He reviewed the investigation and materials in this matter. He approved the charges in this matter.

He spoke with Coleman prior to the first interview and between the two interviews. He also discussed the facts and findings with Warden Karen Taylor and Director Owens, who were the final decision makers. Foschini discussed appellant's prior discipline with them too.

Foschini stated that termination was recommended for appellant because she lied during the IA investigation and violated several policies. Foschini testified that appellant had changed her story about who booked and paid for the trip, lied about being sick on February 13, 2017, while in Las Vegas, had not obtained a plane ticket to return for her Monday shift, and failed to provide any proof that she had made any attempt to return earlier than planned. Appellant's prior discipline was taken into consideration.

Foschini testified about appellant's violations of pertinent policies and procedures. IA Order #001 requires that, "[e]mployees being questioned are obligated to answer all questions truthfully or he or she will be subject to disciplinary action up to an may include termination." Appellant was not truthful during her IA interview.

Appellant violated the following Rules of Conduct:

1. 1.2 Conduct Unbecoming: because she brought the department into disrepute by lying during her IA interview, calling out from her shift while in Las Vegas when she was not ill, and knowing that she was unable to attend work because she had not obtained a ticket to return in time for her shift.

2. 1.3 Neglect of Duty: when she lied to IA, called out sick from Las Vegas, and was untruthful about her whereabouts after her return from Las Vegas.

3. 1.4 Insubordination: when she failed to obey her supervisors' orders by lying to IA and to Lieutenant Earl O'Connor, Shift Commander, when she told him she was at her residence and she was not because she had just landed in Newark.

4. 2.1 Abuse of Sick Leave: when she when she advised that she was at her residence and she was not because she had just landed in Newark.

5. 2.4 Reporting Off Sick: when she feigned an illness in Las Vegas and called out sick because she could not return to New Jersey for her shift. (R-11.)

Foschini testified that appellant also violated General Order (GO) #28 Section 2, subparagraph F and subparagraph C relative to reporting sick, because appellant was not permitted to leave her place of confinement during her scheduled tour of duty except for the purpose of seeking medical attention. (R-12.) Appellant was to notify her Shift Commander that she left her place of confinement; the reason she was leaving her residence, the date, her name, the time and the purpose and estimated time of return. Appellant relayed untruthful information and did not report leaving her place of confinement and flying home.

Foschini further testified that appellant violated GO#073 Personal Conduct of Employee when she failed to come to work, failed to advise she was leaving her place of confinement, failed to comply with all department rules and regulations, and failed to cooperate and provide truthful and full disclosure in IA investigations after having been provided notice that she had to be truthful. (R-13.) Appellant violated GO #074 Professional Code of Conduct because she was unprofessional when she lied during her interview. (R-14.)

Foschini testified that appellant was required to bring in a doctor's note when she returned to work after having called out sick the day after vacation. Appellant failed to bring in such a doctor's note. As a result, the Shift Commander automatically brings

charges. That occurred here by way of written reprimand. (A-1.) That was separate from these charges.

Foschini recommended termination.

For Appellant

Cachet Cook (Cook) testified that she has been appellant's friend since they were twelve years old. She knew appellant was a Corrections Officer and knew that she had off on weekends. She would do anything for appellant.

She and Adams wanted to give appellant a Las Vegas trip for her birthday. Initially, they were going to use her mother's casino comps to book it. However, she was unable to do this.

Subsequently, Cook testified that she booked the Las Vegas trip approximately a week before appellant's birthday on February 7th. Cook could not recall whether she told appellant before or after her birthday about the trip. The trip was a present from Cook and Adams. They used appellant's credit card for the trip and were intending to each pay one-half of the costs of appellant's portion as her birthday present by reimbursing appellant the entire cost of the trip. Cook booked the trip in appellant's name and used appellant's email address because it was linked to the credit card. The confirmation of the trip and itinerary was sent to appellant's email address. Although it was to be a surprise, Cook had not thought it through sufficiently to foresee that the email confirmation would be sent to appellant.

Cook testified that appellant attempted to change her flights. Cook called Vegas.com, not appellant, to determine if they could change appellant's flight, but was advised that it would cost $200 per person to cancel the trip and rebook with other flights. Cook and Adams could not afford that. Appellant attempted to get a buddy pass from a friend, Kyle, to fly home earlier and attempted to change her flight before they left, but could not.

The three friends traveled to Las Vegas. On Saturday, February 11, 2017, the friends shopped, walked the strip, and did sightseeing. She did not know where or when the appellant attempted to call the airlines. She did not recall if appellant stated she could not get a flight back. Cook stated that appellant became sick on Sunday, February 12, 2017, after riding ATV's in the desert. Cook also felt nauseated. Cook heard appellant vomit. Cook declined to purchase over-the counter medicine for appellant because it was too expensive.

When departing Las Vegas, the three friends left the hotel for the airport together and flew home together. They were never separated. Cook denied that appellant traveled to the airport separately from Adams and her, as appellant had stated.

Tia Smith, appellant, Corrections Officer, testified that she began working for the CCDOC in 2011. She has a Bachelor's degree in Business Administration and a Master's Degree from Farleigh Dickenson University.

Appellant testified that in early 2017, she had been suffering from work stress and her friends, Cook and Adams, wanted to surprise her with a trip to Las Vegas for her birthday. She spoke with Cook on the phone and confirmed that Cook should book the trip using her mother's casino comps. However, they were unable to use the comps.

After that, she again spoke with Cook about booking the trip. She provided Cook with her credit card because Cook and Adams did not have one. Cook booked the trip. The itinerary was emailed to appellant, but she did not review it because she never checks her email.

Appellant's birthday, February 7th, is important to her. She threw herself a Karaoke party on February 7th. She requested and was approved for off on February 8, 2017 and February 9, 2017. She always celebrates her birthday as a week-long event. Appellant's regularly scheduled days off were February 10, 2017 through February 12, 2017. Appellant's next shift was Monday, February 13, 2017 at 7:00 a.m.

Appellant testified that she found out about the trip and its details a couple days before her birthday on February 7, 2017. She indicated that she found out about the itinerary on a "Sunday." It was then that she knew she would not return in time for her Monday, February 13, 2017 shift. She was not physically in work to put in a slip for off from her tour of duty on Monday. She could have physically gone into the CCCF and placed a slip in for off on that day. However, she did not.

Appellant testified she attempted to get a buddy pass to fly home earlier from a friend, Kyle, who works for the airlines. However, he did not have any buddy passes. She also had Cook call Vegas.com to change her flight. She reiterated that Vegas.com told Cook that it would be a $200 penalty per person for cancelling the flight.

Appellant went on the trip with the intention of changing her flight and returning home sooner. Appellant conversely testified that she did try to change her flight before she left or after she got to Las Vegas. On Saturday, February 11, 2017, appellant attempted to change her flight by contacting American Airlines. However, every available flight would have returned her later than her scheduled flight. Alternatively, appellant also testified that she was not sure she had not tried to change her flight on February 11, 2017. Appellant specifically testified in response to questioning about calling the airlines as follows: "I'm not sure if it was before or after I left." Appellant specifically testified that she was unsure she called the airlines on February 11, 2017, to change her flight.

Appellant knew before she went to Las Vegas that she would not be able to return in time for her shift. Appellant testified that she knew it was a problem when she could not get another flight home in time for her Monday shift. Appellant testified that she knew before she became sick after ATV riding that she could not return before her shift.

The friends' plans for Sunday included an ATV excursion in the desert and reservations at a high-end restaurant. ATVs were an activity she had done several times before and enjoyed. In fact, she sought out such ATV excursions on her vacations.

Appellant completed the ATV excursion, after which, in the afternoon, she became nauseated and developed a headache. She vomited and spent the rest of Sunday in bed

in the hotel. She asked Cook to purchase over-the-counter medicine; however, Cook did not purchase it because it was too expensive. Appellant did not go to dinner on Sunday night because she still did not feel well.

Appellant called out sick on Sunday around noon, because she was ill and would not be in for her shift on Monday. At that time, she advised that she was in Las Vegas and provided the pertinent information about her location. Appellant also did not work on Tuesday, February 14, 2017, because she was still sick. She did not go to a doctor for treatment, because she only does that as a last resort.

Appellant testified that she and her friends left the hotel for the airport on Monday morning together. She testified that when she landed in Las Vegas and turned on her phone and there was a message from her Shift Commander. She was unaware of the rule that required her to call the department before leaving her place of confinement to travel home, after she called out sick. She called him when she landed in Newark at 5:26 p.m. and stating that she had returned and was in route to her house. She knew if she had lied and said she was home she would have received two to three days of discipline. Lieutenant O'Connor's statement in his Unusual Incident Report that she was home was inaccurate. (R-4.)

Relative to her IA statements, she indicated that she did not lie to Coleman. She was nervous and answered the questions he asked. She did not think she had to provide information if he did not ask for it.

Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder

"is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

The testimony presented by Coleman and Foschini about their investigatory actions, appellant's statements, and the facts as detailed in Coleman's report were consistent. Collectively, their testimony of the events of the incident and the information they gathered during the investigation made sense and hung together to describe what occurred. It was undisputed that appellant departed for Las Vegas with no guarantee or certainty that she could change her flight or book a different flight to return home before her tour of duty on February 13, 2017. Appellant's statements and conduct after her return were designed to cover for this undisputed fact.

Appellant's rendition of the facts repeatedly changed from the first interview through her testimony. In this regard, appellant changed her story about who booked of the trip, when she became aware about the itinerary, what effort she, or others made to change her plans and return before her next scheduled tour of duty, when she reported a feigned illness to call out sick from a tour of duty that she knew she was going to miss, and what she told her Shift Commander about her whereabouts.

In sum, appellant's statements and those of her witness, could not be reconciled to make them consistent or justify her conduct. The other witnesses' renditions of the disputed facts have a greater "ring of truth," than the scenarios offered by appellant, who plainly had a greater interest in the outcome of this proceeding. The discrepancies in appellant's testimony and changing renditions of the facts made appellant's testimony unbelievable.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to also be relevant and credible **FACTS** in this matter:

Appellant was assigned to CCCF as a Corrections Officer. She had been employed by CCDOC in that capacity since 2011.

A few months before appellant's birthday, which was February 7, 2017, appellant's friends, Cook and Adams, decided they wanted to take appellant to Las Vegas to celebrate her birthday. At that time, Cook wanted to pay for the trip using her mother's casino comps. Cook approached appellant and asked if she would like to do this. Appellant responded by telling Cook, "Okay, book it." Subsequently, Cook became aware she could not use her mother's comps and the Las Vegas trip was shelved.

Subsequently, Cook and Adams decided again that they wanted to go to Las Vegas for appellant's birthday. Appellant's birthday celebrations were very important to her. Appellant celebrated not only her birthday each year, but also her birthday week. This was a priority for appellant. She threw herself a Karaoke party on February 7, 2017. She requested and was approved to be off on February 8, 2017 and February 9, 2017, after the party. February 10, 2017 through her February 12, 2017, were her regularly scheduled days off from work. She was scheduled to return to work for her next tour of duty on Monday, February 13, 2017, at 7:00 a.m.

On January 29, 2017, Cook and appellant booked the trip utilizing Vegas.com and paid for a vacation package for appellant, Adams, and herself using appellant's credit card. Appellant knew Cook was using her credit card to book the trip for the three and authorized Cook to use it. She provided Cook with the credit card number on that day to book the trip. Although Cook manually entered the information on the website, appellant aided her by providing her with the mechanism, the credit card, which allowed them to actually book the trip. The package included airfare and hotel accommodations.

The trio was scheduled to fly from Newark to Las Vegas on Friday, February 10, 2017, and return to Newark airport on Monday, February 13, 2017. Cook and Adams intended to reimburse appellant one-half of the cost of the trip each; thereby gifting appellant's trip to her. On January 29, 2017, the itinerary was emailed to appellant's personal email address because her credit card had been used to pay for the trip. This itinerary detailed the flights and accommodations and advised appellant that she would not return to Newark from her trip until Monday, February 13, 2017 at 4:35 p.m. Appellant admittedly knew about the plans on a "Sunday" before her trip. January 29, 2017 was a Sunday.

Appellant learned the particulars about the vacation from the itinerary. Therefore, on January 29, 2017, appellant knew that she would not be returning in time for her shift on Monday, February 13, 2017 at 7:00 a.m. Appellant had Cook call Vegas.com to attempt to change the flights. Vegas.com advised that there would be a $200 per person penalty for cancelling the flights and package. Appellant decided not to cancel because her friends could not afford the penalty and she wanted to go to Las Vegas.

Appellant never changed her return flight with the airline. Appellant did not purchase a different ticket to return from Las Vegas earlier. Appellant did not put in a slip requesting off from her shift on Monday, February 13, 2017, before she left for Las Vegas on Friday, February 10, 2017.

Appellant departed with her friends for Las Vegas on Friday, February 10, 2017, knowing she had no guarantee or certainty of returning before her tour of duty. On

Saturday, February 11, 2017, she shopped, walked the Strip, and did sightseeing. She did not change her flight or purchase another flight home. She did not contact any airlines, despite alleging that she did. Cook never heard or knew about appellant contacting any airlines.

On Sunday, appellant engaged in an ATV excursion in the desert. This was an activity she had done several times before and enjoyed. In fact, she sought out ATV excursions on her vacations. Appellant also had a reservation at a high-end restaurant for Sunday night.

On Sunday, February 12, 2017, knowing she had no possibility of returning home by the time of her shift, she said "forget it." Appellant decided to falsely call out sick for her Monday, February 13, 2017, 7:00 a.m. shift, alleging she became ill as a result of her ATV excursion to cover her actions. Appellant identified her place of confinement as Las Vegas and provided her address.

On Monday, February 13, 2017, appellant, accompanied by Cook and Adams, left the hotel together for the airport for their flight home. They arrived in Newark at approximately 4:35 p.m. At that time, appellant turned on her phone and discovered she had received a voicemail from Lieutenant O'Connor, the Shift Commander, relative to when she left her place of confinement and relative to her whereabouts. Appellant called Lieutenant O'Connor at 5:26 p.m. and advised that she was home. Lieutenant O'Connor recorded this in the Unusual Incident Report memorializing the officer's which were absent on February 13, 2017. Appellant was not home when she made that representation, because she had just landed.

Appellant's conduct resulted in an IA investigation. On February 17, 2017, appellant was interviewed by IA Investigator Coleman about the events and circumstances surrounding her Las Vegas vacation. Appellant lied or materially misstated facts when she stated the following. She did not book or pay for the trip and she had no advance notice of the trip because it was a gift from her friends. She found out that her friends had booked this trip for her a couple days before she left, right around her birthday, and that this was the first she knew about the dates for departure and return.

She attempted to change her trip by calling Vegas.com, at which time she discovered that there was a $200 per person cancellation fee. She left for the trip on Thursday, which was February 9, 2017. She knew she had a shift on Monday morning and intended to catch an earlier return flight. Further, she went on an ATV excursion on Sunday, February 12, 2017, after which in the afternoon she became ill. As a result, she called out of work sick for her Monday, February 13, 2017, morning shift, from Las Vegas on Sunday around noon because she was not feeling well. She said she left at 4:00 a.m. for the airport in Las Vegas by herself. Her friends left at 6:00 a.m. for the airport.

After the interview, appellant provided the Vegas.com itinerary to Coleman in response to his requests for documents substantiating her statements. The itinerary had been emailed to appellant on January 29, 2017. Appellant's credit card had been used to book and pay for the vacation package. The itinerary showed that appellant departed Newark for Las Vegas on Friday, February 10, 2013 at 7:00 a.m. The return flight was scheduled to arrive in Newark on Monday, February 13, 2017 at 4:35 p.m. This was nine and one-half hours after her shift was to begin on that day.

As a result of this itinerary information which contradicted her statements, a second IA interview of appellant occurred on February 28, 2017. During that interview, appellant's version of the facts changed. Appellant stated that her credit card was used to book the vacation by her friends who were paying for the trip as a surprise for her birthday. She stated she was on the phone with Cook when she booked it and provided Cook with her credit card number. She did not read the emailed itinerary even though it was sent to her email. Appellant called Vegas.com to change the flight to return before Monday. She intended to change her flight before she left, but was unable to do so. She stated, "I could have just paid, I guess not to go...I just know that before I left, I should have just tried to switch the day like you said last time or I could have tried to put in for that day."

Also, appellant alleged she called Spirit Airlines on Saturday, February 11, 2017, while in Las Vegas, to change her flight and that all of the flights returned later than the one she had scheduled. However, appellant failed to produce any evidence to demonstrate she actually did these actions or that she had become ill.

Appellant returned to New Jersey at approximately 4:35 p.m. on Monday. This ended her seven-day birthday week celebration.

While testifying, appellant changed her version of the events again. She stated that she attempted to get a buddy pass to fly home on an earlier flight from her friend Kyle before she left. However, he did not have any passes to share. She stated that she had contacted American Airlines to change her flight. Appellant knew before leaving she could not return before her shift on Monday. She shopped and did sightseeing on Saturday. She made ATV plans and dinner reservations for Sunday. Appellant knew when she engaged in the ATV excursion that she would be unable to return for her Monday morning shift. Appellant knew on Sunday before she called out sick that she would not be able to return for her Monday morning shift.

With no other alternative to cover her conduct, appellant falsely called out sick for Monday, falsely reporting she was ill. Appellant also called out of work sick on Tuesday, February 14, 2017. This separate event was addressed in a written reprimand.

The PNDA issued on March 28, 2017, alleging violations of N.J.A.C.4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming an employee; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically violations of C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of duty; 1.4 Insubordination; 2.1 Abuse of Sick Leave; 2.4 Reporting Off Sick; 2.12 Fictitious Illness or Injury Reports; Internal Affairs Order #001; General Order #28, General Order #73; General Order #74. For these charges a FNDA was issued on October sustaining the charges and removing appellant from her employment as a corrections officer.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act

related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects her to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). It is well recognized that correctional facilities operate

through a rigidly hierarchical, almost "paramilitary," structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

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

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge of conduct unbecoming a public employee was that appellant lied during her IA interviews by changing her rendition of the facts, lied to her

Shift Commander, and falsely called out sick to cover for her voluntary inability to return from vacation in Las Vegas for her tour of duty.

Appellant repeatedly lied by making false and contradictory statements to investigators, during the course of her two IA interviews. Appellant's rendition of the facts surrounding the Las Vegas trip and her illness developed as follows: from a denial about booking the trip; to an admission that although Cook manually entered the information on the website, appellant aided her by providing her with the mechanism, the credit card, which allowed them to book the trip; to an acknowledgement that the booking confirmation and detailed itinerary was emailed to her personal email address on Sunday, January 29, 2017, to an inability to recall when she learned about the trip; to an admission she learned about it a couple days before her birthday on February 7, 2017, and that she learned about the trip on a Sunday before her birthday at which time she knew that she would miss her shift on Monday February 13, 2017, because of the time of the return flight; to an allegation that she called Vegas.com to attempt to change her flight and discovered there would be a penalty for cancellation, to an admission that she did not call and Cook did; to stating that she left on Thursday, February 9, 2017 to stating that she left on Friday, February 10, 2017; to an alleged intent to change her flight to return and contacting Spirit Airlines, despite subsequently stating that she called American Airlines and attempted to get a buddy pass in her testimony at this hearing.

Appellant alleged she was ill, when she was not. This was to cover up for her inability to return for her shift.

In sum, it was an ever-morphing version of what occurred from her first interview through her testimony in this proceeding. Simply put, appellant lied about the facts and circumstances surrounding her Las Vegas vacation.

Moreover, appellant's conduct in voluntarily choosing to leave for Las Vegas without any guarantee or certainty of her ability to return was unbecoming conduct and irresponsible. The responsible corrections officer would have purchased a different ticket for an earlier return flight, if any, or foregone the vacation to report to work and serve the public and the department. Her unbecoming conduct was further exacerbated when she

lied about being sick to conceal her actions and inappropriately avoid her shift, for which she already knew she had no excuse to miss.

Finally, appellant lied to her shift commander when she stated she was home at 5:26 p.m., when in fact she had just landed in Newark.

As a corrections officer, appellant was held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's conduct, her lies to investigators, and her voluntary choice to prioritize her week-long birthday celebration by vacationing, adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency.

No circumstances existed to warrant or justify appellant's deceitful conduct.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has met its burden of proof on this issue.

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

Appellant failed to perform her duties when she chose to voluntarily travel to Las Vegas without any guarantee or certainty of her ability to return. This conduct was unreasonable and irresponsible. The responsible corrections officer would have purchased a different ticket for an earlier return flight, if any, or foregone the vacation to report to work and serve the public and the department. Her conduct was further exacerbated when she lied about being sick to inappropriately avoid her shift, for which she already knew she had no excuse to miss.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of incompetency, inefficiency, and failure to perform duties, in violation of N.J.A.C.4A:2-2.3(a)(1). I **CONCLUDE** that respondent has met its burden of proof on this issue.

N.J.A.C. 4A:2-2.3(a)(2) Insubordination

Appellant was insubordinate when she lied during her IA interviews. Additionally, she was insubordinate when she failed to advise the department that she had left her place of confinement in Las Vegas and when she told Shift Commander Lieutenant O'Connor that she was home, while she was in route to her home after just having landed at Newark airport. Appellant had a duty not to lie to her superiors. That act was insubordinate.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of insubordination, in violation of N.J.A.C. 4A:2-2.3(a)(2). I **CONCLUDE** that respondent has met its burden of proof on this issue.

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

Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R. 2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R. 2d (CSV) 214.

Appellant neglected her duty when she traveled to Las Vegas knowing she would not be able to return for her morning shift on Monday, February 13, 2017. Appellant could have put a slip in and requested off from her shift on Monday, February 13, 2017. She chose not to do so. Appellant neglected her duty when she falsely reported an illness and called out on February 13, 2017, to cover her actions. Appellant neglected her duty when she lied to investigators and her Shift Commander and did not follow departmental rules, regulations, and orders.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7). I **CONCLUDE** that respondent has met its burden of proof on this issue.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause by violating C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Unbecoming Conduct; 1.3 Neglect of duty; 1.4 Insubordination; 2.1 Abuse of Sick Leave; 2.4 Reporting Off Sick; 2.12 Fictitious Illness or Injury Reports; Internal Affairs Order #001; General Order #028, General Order #073; General Order #074.

CCCF Rules of Conduct 1.1 Violations in General

CCCF Rules of Conduct 1.1 provides in pertinent part as follows:

> Any employee who violates any rule, regulation, procedure, order or directive, either by an act of commission or omission, whether stated in this manual or elsewhere, or who violates the standard operating procedure as dictated by department practice, is subject to disciplinary action in accordance with the New Jersey Department of Personnel (Civil Service) rules and regulations. Disciplinary actions shall be based on the nature of the rule, regulation, procedure, order, or directive violated, the severity and circumstances of the infraction and the individual's record of conduct

1.2 Unbecoming Conduct

Rule 1.2 provides as follows:

> All personnel are required to conduct themselves, both on and off duty, in such a manner as to reflect favorably on the department. Conduct unbecoming an employee shall include that which brings the department into disrepute, reflects discredit upon the employee as a member of the department, or which impairs the operation or efficiency of the department or employee.

Appellant was required to make truthful statements to the IA investigator during her interviews and make truthful statements to her Shift Commander about her whereabouts. Despite this knowledge and duty, appellant lied and otherwise intentionally misstated facts related to her Las Vegas trip repeatedly during her IA interview. She further lied to Lieutenant O'Connor about her location upon her return.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated Rule1.2 by falsifying and intentionally misstating facts in connection with her vacation during her internal affairs investigation and to her superiors.

1.4 Insubordination or Serious Breach of Security

Rule 1.4 provides in pertinent part as follows:

> (a) Personnel shall promptly obey all lawful orders of any supervisor. Failure or deliberate refusal of any employee to obey a lawful order of a supervisor, ridiculing a supervisor or his/her order, in or out of the supervisor's presence, or disrespectful, mutinous, insolent or abusive language directed toward the supervisor, shall constitute insubordination or serious breach of discipline.

Regarding the charge of Insubordination, to the extent that appellant is charged with violation of Rule of Conduct 1.4, which addresses Insubordination and Serious Breach of

Security, consideration of such violation will be addressed in concert with the current analysis. Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation:

> 'Insubordination' is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

When appellant chose to lie to IA investigators about the facts and circumstances related to her Las Vegas vacation and when she chose to leave for Las Vegas knowing she had no certainty of changing her flight and returning before her shift, appellant failed to obey her orders and committed a serious breach of discipline. When appellant falsely reported an illness to avoid her shift and cover her choice to go to Las Vegas, she did not obey her orders. When appellant chose to lie about her whereabouts to the Shift Commander she also did not obey orders and committed a serious breach of discipline. I **CONCLUDE** that appellant's behavior was uncooperative, disrespectful to her supervisors, and adversely affected the efficiency of the department.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated Rule1.4 by failing to obey orders and lying to her shift commander and during an IA investigation.

2.1 Abuse of Sick Leave

Rule 2.1 provides that employees must follow General Order #28, Section 2, which provides in subparagraph C as follows:

> If reporting sick from a location other than the member's own residence, the name of the person from whose residence they are reporting sick, address, city and telephone number

The reporting requirements continue in subparagraph F which provides as follows:

> Personnel may not leave their place of confinement during their scheduled tour of duty except for the purpose of seeking medical attention, securing a prescription or for emergencies including family emergencies, provided however, such information is relayed to the shift commander or the designee before had and such outings are for and limited to the intended purpose. The shift commander or the designee will include the following information in the log. The reason the employee is leaving their residence, the date, their name, the time, the purpose and the estimated time of return.

To begin, appellant failed to present any evidence that she was in fact ill. Notwithstanding same, although she did report her confinement in Las Vegas, she failed to report to the Shift Commander that she was leaving her place of confinement in Las Vegas on the morning of February 13, 2017, to fly home.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated Rule 2.1 and General Order #028.

2.4 Reporting Off Sick

Rule 2.4 provides as follows:

> Personnel who report off sick are required to remain at home during the hours they would normally be on duty. Visits to a physician, dentist, or pharmacy are exempted, provided such information is relayed to the proper authority prior to such outings are for and limited to the intended purpose.

This rule must be read with Rule 2.1 and General Order #028 detailed above. Appellant reported her confinement in Las Vegas. However, appellant failed to report to the Shift Commander that she was leaving her place of confinement in Las Vegas on the morning of February 13, 2017, to fly home.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated Rule 2.4.

2.12 Fictitious Illness or Injury Reports

Rule 2.12 provides that, "[p]ersonnel shall not feign illness or injury, falsely report themselves ill or deceive or attempt to deceive any supervisor as to the condition of their health."

Appellant knew when she departed for Las Vegas that her next tour of duty was scheduled for Monday, February 13, 2017 at 7:00 a.m. Appellant knew on January 29, 2017, when she received the vacation itinerary, that she had to change her flight to return earlier in order to work that shift. Appellant failed to put a slip in to request off on Monday February 13, 2017, because it may or may not have been granted. Instead, appellant departed knowing she had not obtained an earlier return fight.

Appellant took no effort in Las Vegas to purchase a different flight with an earlier return date or to modify her existing reservation to return before February 13, 2017.

Appellant was an experienced ATV excursion participant. At the time appellant returned from this activity on Sunday, appellant knew she was not going to report for work on Monday morning. She said, "forget it." To cover the consequences of her choosing to go to Las Vegas without a guarantee she could return for her shift, appellant alleged and falsely reported she was ill. Appellant took no over-the-counter or prescription medication and did not go to the doctor's. Appellant failed to provide any evidence to substantiate her alleged illness. I **CONCLUDE** appellant feigned her illness in an attempt to cover up her inability to return home and be present for her tour of duty. This was done with design to deceive her supervisor as to the condition of her health.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated Rule 2.12.

Internal Affairs Order #001

Internal Affairs Order #001 provides in Section 9 Interviewing the Subject Officer, subparagraph h, that, "[e]mployees being questioned are obligated to answer all questions truthfully or he/she will be subject to disciplinary action, up to and may include (sic) termination."

Appellant was required to make truthful statements to the IA investigator during her interviews. Despite this knowledge and duty, appellant lied and otherwise intentionally misstated facts repeatedly during her IA interview relative to facts and circumstances related to her Las Vegas trip.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated Internal Affairs Order #001, Section 9, subparagraph h.

General Order #73

The purpose of the policy provided for in General Order #73 is to provide employees with a standard of conduct. It provides in pertinent part as follows:

> All department employees, when on and off duty, will conduct themselves in a manner that will not bring discredit or criticism to the department. Common sense, good judgment, consistency and the department's mission will be the guiding principles for the expected employee standard of conduct.
>
> ...
>
> 4. Employees will comply with all department rules and regulations and all laws of the United States and the State of New Jersey.
>
> ...
>
> 6. Employees will cooperate and provide full disclosure in any department investigations involving employee or offender misconduct.
>
> ...
>
> 12. Employees are responsible to know all department policies as well as county policies and act in accordance with them.

Appellant acted in an unbecoming manner which brought disrepute among other things to the department. She neglected her duties and failed to perform them. She was insubordinate. She abused her sick leave. She reported a feigned illness to cover up the consequences of her actions. She lied during an IA investigation and otherwise did not cooperate during the investigation. Her conduct violated department rules and regulations, state law. Her actions discredited the department.

Additionally, appellant did not report to Lieutenant O'Connor that she was leaving her place of confinement in Las Vegas when she departed for New Jersey. Appellant stated that she did not know that she had to call the Shift Commander and report when

she left her place of confinement. Therefore, appellant did not know department policies which she was obligated to follow.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated General Order #073, Sections 4, 6, and 12.

General Order #074.

General Order #074 provides as follows:

> All sworn personnel in the department will conduct themselves in a professional and ethical manner at all times. Conduct which detracts from a professional and ethical manner is prohibited an circumstances suggesting an officer has engaged in unbecoming conduct will be investigated and disciplinary action will be taken where appropriate.
>
> ...
>
> 1. Sworn personnel will conduct themselves in accordance with the Constitution of the United States, the New Jersey Constitution and all applicable laws and rules enacted or established pursuant to legal authority. Sworn personnel are also obligated to follow all other departmental and county policies.

Appellant acted in an unbecoming manner which brought disrepute, among other things, to the department. She neglected her duty and failed to perform them. She was insubordinate. She abused her sick leave. She reported a feigned illness to cover up the consequences of her actions. She lied during an IA investigation and otherwise did not cooperate during the investigation. Her conduct violated department rules and regulations, state law. Her actions discredited the department.

Therefore, I **CONCLUDE** respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's conduct violated General Order #074, Section 1.

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

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's conduct was such that she violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12).

I further **CONCLUDE** that all charges brought herein against appellant are **SUSTAINED.**

Double Jeopardy Argument

Finally, the appellant argued that because she received a written reprimand, dated March 22, 2018, for failing to provide a doctor's note after she called out on February 14, 2017, for calling out sick the day after a vacation, the respondent was precluded from bringing more serious disciplinary charges against her seeking her termination. This argument is misplaced.

Appellant was charged with numerous separate and distinct offenses which resulted from appellant's deceitful and unbecoming conduct. Those charges are unrelated to the written reprimand for failing to provide a doctor's note for her absence on February 14, 2017. Appellant is not being punished twice for the same offense.

PENALTY

The next question is the appropriate level of that discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty.

The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

The law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See, In re Herrmann, 192 N.J. 19, 33 (2007) (Division of Youth and Family Services worker who snapped lighter in front of five-year-old), in which the Court stated:

> ". . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest."

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Respondent argued that appellant lied about the facts and circumstances which related to her Las Vegas vacation during her IA investigation, that she also failed to report

she was leaving her place of confinement in Las Vegas to return home and that she then lied to the Shift Commander when she reported she was home when she had just landed in Newark. Respondent submitted that appellant's conduct brought disrepute to the department and placed appellant, inmates, the public and the CCCF at risk.

Appellant denied the allegations that she lied during an IA investigation, that she was insubordinate and that she violated rules, regulations, orders, and policies when she called out sick for work from Las Vegas for her February 13, 2017, tour of duty. Appellant argued that the statements to IA were confusions when answering inarticulately asked or compound questions. Appellant argued to terminate her would be harsh, excessive, and flies in the face of progressive discipline.

Appellant received three significant disciplines in the past. In 2015, appellant was suspended for 180 days for conduct unbecoming and neglect of duty. In 2016, appellant was suspended for three days for failure to perform duties, conduct unbecoming and neglect of duty.

A review of the discipline revealed that appellant lied to investigators in relation during an investigation in 2015. This was, in part, the reason for the 180-day suspension. As a result, during the instant IA investigation, appellant knew she had to be truthful and fully disclose all relevant information to the investigators. She chose to act in a contrary and deceitful manner. Appellant's behavior violated the public trust and put the safety of the inmates, the facility, DOC, and the public at risk, when she did not ensure she could return home for her shift and when she then called out for her shift to cover this fact.

Appellant exhibit poor judgment and a cavalier attitude for her position and the department, when she chose to depart for Las Vegas knowing she had no guarantee or certainty of returning before her next tour of duty. Appellant's actions consistently showed that she was more concerned about her birthday week and her vacation time, than she was in following department policies, orders, rules and regulations and protecting the public by working as scheduled. Such conduct placed not only the public, but the CCDOC at risk.

Accordingly, I **CONCLUDE** that removal is the appropriate discipline for the violations of N.J.A.C.4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming an employee; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), Specifically violations of C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Unbecoming Conduct; 1.3 Neglect of duty; 1.4 Insubordination; 2.1 Abuse of Sick Leave; 2.4 Reporting Off Sick; 2.12 Fictitious Illness or Injury Reports; Internal Affairs Order #001; General Order #028, General Order #073; General Order #074 be **AFFIRMED**.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action, dated October 3, 2017, of the Camden County Department of Corrections, against appellant, Tia Smith, is hereby **AFFIRMED**.

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

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

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

April 23, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: April 23 2018

Date Mailed to Parties: April 23. 2018

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

Cachet Cook

Tia Smith, Appellant

For Respondent:

Edward Coleman, Sergeant, Internal Affairs Investigator

Christopher Forschini, Deputy Warden CCCF

LIST OF EXHIBITS

For Respondent:

R-1 Internal Affair Report by Investigator Joseph Coleman

R-2 CCDOC Absentee Log, dated 2/12/17

R-3 CCDOC Sick Visitation Report, dated 2/13/17

R-4 Unusual Incident Report authored by Lieutenant Earl O'Connor, dated 2/14/17

R-5a Internal Affairs Interview, dated 2/17/17

R-5b Documents requested by Coleman

R-6 Vegas.com Itinerary

R-7 Internal Affairs Interview of Appellant, dated 2/28/17

R-8 Supervisor's Staff Compliant, dated 3/8/17

R-9 PNDA dated 3/28/17, FNDA (31B), dated 10/3/17, and FNDA (31C) dated 10/3/17

R-10 CCDOC Internal Affairs General Order #001

R-11 CCDOC Rules of Conduct

R-12 CCDOC General Order #28 Sick Leave

R-13 CCDOC General Order #73 Personal Conduct of Employees

R-14 CCDOC General Oder #74 Professional Code of Conduct

R-15 Appellant's Chronology of Discipline

R-16 Digital Recording Appellant's 2/17/17 IA interview

R-17 Digital Recording Appellant's 2/28/17 IA interview

For Appellant:

A-1 Written Reprimand of Appellant, dated 3/22/17

6-6-18

A-1

STATE OF NEW JERSEY

In the Matter of Dasheek Touchstone
Essex County, Department of Corrections

CSC DKT. NO. 2018-2257
OAL DKT. NO. CSR 02494-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 02494-18

IN THE MATTER OF DASHEEK TOUCHSTONE,
ESSEX COUNTY DEPARTMENT OF CORRECTIONS.

Gina Mendola Longarzo, Esq., appearing for appellant

Jill Caffrey, Esq., for respondent

Record Closed: April 30, 2018 Decided: May 3, 2018

BEFORE **ANDREW M. BARON**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on February 6, 2018, for determination as a contested case pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 3, 2018
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: May 3, 2018

Mailed to Parties: MAY 8 2018

mm

attachment

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

COURTNEY M. GACCIONE, ESSEX COUNTY COUNSEL
BY: JILL CAFFREY, ASSISTANT COUNTY COUNSEL
HALL OF RECORDS - ROOM 535
NEWARK, NEW JERSEY 07102
973-621-4428
Attorney for the County of Essex

IN THE MATTER OF	:	
THE DISCIPLINARY ACTION	:	**STIPULATION OF SETTLEMENT**
AGAINST DASHEEK TOUCHSTONE	:	**AND GENERAL RELEASE**

It is hereby stipulated and agreed to by and between, the County of Essex (the "County") and Dasheek Touchstone (the "Employee") (collectively the "Parties"), that the above-captioned matter be and same is hereby settled upon the following terms and conditions (the "Agreement"):

1. Employee hereby acknowledges being charged as specified in the Preliminary Notice of Disciplinary Action dated May 1, 2017, and the Final Notice of Disciplinary Action, dated January 5, 2018, which were duly served upon employee in accordance with the Civil Service Rules.

2. Employee agrees to resign in good standing, effective April 25, 2017. A copy of said resignation letter is attached hereto as Exhibit A.

3. The charges as specified in the Preliminary Notice of Disciplinary Action dated May 1, 2017, and the Final Notice of Disciplinary Action, dated January 5, 2018, are hereby withdrawn.

4. The Removal issued pursuant the Preliminary Notice of Disciplinary Action dated May 1, 2017, and the Final Notice of Disciplinary Action, dated January 5, 2018, is hereby rescinded.

5. The herein settlement agreement will be filed with the Office of Administrative Law ("OAL") upon execution by the parties and filed with the Civil Service Commission ("CSC") via incorporation with the OAL's Initial Decision.

6. Upon signage of the herein Agreement, the County agrees to amend their records and the Employee's file to indicate the changes mentioned above in paragraphs two (2), three (3), and four (4).

7. The County agrees to provide Employee with a neutral job reference, upon request, and shall advise such person or entity that it is the policy of the County to solely provide information verifying employment, dates and title and that Employee resigned in good standing. Employee is further advised to direct all such inquiries from prospective employers to the Office of the Essex County Counsel.

8. The Employee understands this Agreement may or may not effect decisions regarding claims for benefits, such as, but not limited to pension or unemployment benefits, made by agencies and/or boards not under the control of the County. The employee understands that the County must truthfully answer requests for information made by entities such as, but not limited to, the State of New Jersey, that the County is legally bound to comply with.

9. The County further agrees upon signage of the herein Agreement, the county shall pay the Employee four (4) weeks of pay at the Employee's last rate of pay, via pay check, in settlement of Employee's accrued vacation, sick and personal days; compensatory time; and due days. The employee will also be paid a flat sum of two thousand five hundred dollars ($2500.00) which will not be

subject to any taxes or withholdings by the County. Said amounts will paid to the Employee no later than thirty (30) days of his execution of this Agreement.

10. The Employee and the County agree that the terms and conditions of this Agreement and the discussions and negotiations leading up to it shall be kept absolutely confidential hereafter and shall not be disclosed by the employee to any other employee or former employee of the County or other persons or the general public unless compelled to do so by the judicial process. However, the employee may make disclosures to members of her/his immediate family, attorney, union representative and as may be required by her/his accountant or financial advisor in connection with the discharge of the latter's duties in preparation of tax returns or financial statements/investments.

11. In the event that an action is brought by the County for the employee's breach of the confidentiality conditions set forth in paragraph ten (10) hereof, in addition as to such other relief as is appropriate, the County shall be entitled to reasonable attorneys fees and costs if it prevails. Similarly, should the Employee need to file an action to enforce this Agreement or for a breach of this Agreement, the Employee shall be entitled to reasonable attorneys' fees and costs if he prevails.

12. This Agreement/Stipulation of Settlement and General Release is not and shall not in any way be construed as an admission by the County of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to employee, but instead

constitutes the good faith settlement of a disputed claim and the County specifically disclaims any liability to employee or any other person. The parties have entered into this Agreement/Stipulation of Settlement and General Release for the sole purpose of resolving employee's claims, both asserted and unasserted, concerning his/her employment with the County and to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

13. Employee represents and certifies that s/he has carefully read and fully understands all of the provisions of and effects of this Agreement/Stipulation of Settlement and General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with his attorney. Further, the employee certifies that s/he has voluntarily entered into this Agreement/Stipulation of Settlement and General Release and that the County has not made any representations concerning the terms of effects of this Stipulation of Settlement and General Release other than those contained herein.

14. This Agreement/Stipulation of Settlement shall neither set a precedent nor constitute a past practice.

15. This Agreement/Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Agreement/Stipulation of Settlement and

General Release shall, in all cases, be construed as a whole according to its fair meaning and strictly for or against any of the parties.

16. Should any provision of this Agreement/Stipulation of Settlement and General Release be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

17. This Agreement/Stipulation of Settlement shall not be considered binding and/or final until approved by and executed by the County Administrator.

18. Employee agrees that this Agreement/Stipulation of Settlement and General Release shall operate as a complete and final disposition of this matter. In consideration for the County's satisfactory action in resolving the disciplinary offenses, employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, though, under or in concert with, both in their official and individual capacities, from any and all claims (s)he has now to any relief of any kind from the County, whether or not (s)he now knows about those rights, arising out of his/her employment with the County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy;

intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealing; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that employee is waiving all possible claims against the County, in relation to this matter, from the beginning of employee's employment with the County to the date this Agreement/Stipulation of Settlement and General Release is executed by employee.

19. Employee shall not institute an Appeal in this matter.

20. Employee shall not request relief with respect to this matter, in any forum, beyond that which is contained herein.

21. This Agreement/Stipulation of Settlement and General Release may not be modified, altered or changed, except upon the prior express written consent of the parties.

22. This Agreement/Stipulation of Settlement and General Release is the result of negotiations with Employee and Employee's attorney and/or union representative with whom Employee had an opportunity to consult prior to signing the same.

Dated: 4/24/18

JILL CAFFREY
ASSISTANT COUNTY COUNSEL

Dated: 4/26/18

ROBERT D. JACKSON
COUNTY ADMINISTRATOR

Dated: 4/26/18

ALFARO ORTIZ, DIRECTOR
DEPARTMENT OF CORRECTIONS

Dated: 4/20/18

GINA MENDOLA
ATTORNEY FOR EMPLOYEE

Dated: 4/20/18

~~DASHEEK~~ TOUCHSTONE
EMPLOYEE

Essex County Department of Corrections
354 Doremus Avenue
Newark, NJ 07105

Attn: Director Alfaro Ortiz

Re: Resignation of Employment

Please be advised that I hereby resign my employment with the Essex County Department of Corrections effective as of the date of April 25, 2017.

Thank you for the opportunity to serve.

Very truly yours,

Officer Dasheek Touchstone

Exhibit A

6-6-18

A-1

STATE OF NEW JERSEY

In the Matter of Angel Vazquez
Hunterdon Developmental Center
Department of Human Services

CSC DKT. NO. 2017-4082
OAL DKT. NO. CSR 10745-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10745-17

AGENCY DKT. NO. 2017-4082

IN THE MATTER OF ANGEL VAZQUEZ,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant (Nash Law Firm, attorneys)

Aaron J. Creuz, Deputy Attorney General, for respondent (Gurbir S. Grewal. Attorney General of New Jersey, attorney)

Record Closed: April 26, 2018 Decided: May 3, 2018

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

This matter, concerning petitioner's appeal of his removal as a Cottage Training Technician at the Hunterdon Development Center, Department of Human Services, was transmitted to the Office of Administrative Law on July 31, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following several settlement conferences and continued discussion, the parties have settled this matter and have filed a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement, attached hereto as Exhibit J-1.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 3, 2018
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: 5/4/18

Date Mailed to Parties: 5/4/18

nd

APPENDIX

EXHIBITS

Jointly Submitted

J-1 Settlement Agreement

OAL DKT. NO. CSV 10745-2017 S
CSC DKT. NO. 2017-4082
SETTLEMENT AGREEMENT

ANGEL VAZQUEZ
v.
DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated June 14, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. Physical or mental abuse of a client (C3.1), removal effective 12/19/16
2. Inappropriate physical contact or mistreatment of a client (C5.1) removal effective 12/19/16
3. Any improper conduct ~~with~~ which violates common decency (C11.1) removal effective 12/19/16.
4. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a state employee – removal effective 12/19/16.
5. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective 12/19/16.

B. The parties have agreed to the following:

1. The Appellant withdraws his appeal and request for a hearing with OAL Docket No: CSV 10745-2017 S.
2. The Appellant has agreed to return to work in the title of Senior Laundry Worker.
3. The Appellant agrees not to seek or accept future direct care positions or any position that could result in Appellant having direct or indirect

responsibility for clients or patients within the Department of Human Services or the psychiatric hospitals within the Department of Health.

4. The Final Notices of Disciplinary Action dated June 14, 2017 will be modified as follows:
    a. Demotion to position of Senior Laundry Worker.
5. The Appellant will not receive any back pay or attorney's fees from the appointing authority.
6. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. Department of Human Services shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

E. Except for the assessment of Angel Vazquez's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act

of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

G. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

H. The parties waive the right to file exceptions and cross exceptions.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

4/26/18
DATE

Angel Vazquez

4/26/18
DATE

ON BEHALF OF Appellant

3/14/18
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Angel Vazquez, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4/26/18
DATE

Angel Vazquez

Angiulo, Nicholas

From: Bill Nash <wnash@thenashlawfirm.com>
Sent: Thursday, May 17, 2018 2:37 PM
To: Angiulo, Nicholas; Aaron Creuz
Cc: Messina, JoAnn
Subject: RE: In the Matter of Angel Vazquez, Department of Human Services, Hunterdon Developmental Center - OAL Docket No. CSV 10745-17 and CSC Docket No. 2017-4082 - SETTLEMENT

Good afternoon Deputy Director Angiulo—regarding Mr. Vazquez, I concur with Mr. Creuz that the "gap" time from removal until reinstatement should be treated as an approved leave of absence without pay. Thank you for your patience.

William A. Nash, Esq.

NASH LAW FIRM LLC
ATTORNEYS AT LAW

Nash Law Firm LLC
1001 Melrose Ave., Suite A
Blackwood, NJ 08012
Tel: (856) 228-2206
Fax: (856) 228-1885

This message may have been dictated with speech recognition software and not proofread. Please excuse any spelling errors.

TAX COMPLIANCE STATEMENT: Department of Treasury Circular 230 requires that we notify you that (i) any statement contained in this message or in an attachment to it relating to any Federal tax transaction or matter was not intended or written to be used, and it cannot be used, by the taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer and (ii) such statement may not be used by any person to support the promotion or marketing of or to recommend any Federal tax transaction(s) or matter(s).

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The highest compliment we can receive is a referral or introduction to your friends, family or business associates.

Please consider the environment before printing this email.

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Thursday, May 17, 2018 9:50 AM

To: Aaron Creuz; Bill Nash
Cc: Messina, JoAnn
Subject: RE: In the Matter of Angel Vazquez, Department of Human Services, Hunterdon Developmental Center - OAL Docket No. CSV 10745-17 and CSC Docket No. 2017-4082 - SETTLEMENT

Mr. Nash:

Just checking to confirm you are okay with the below?

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Aaron Creuz [mailto:Aaron.Creuz@law.njoag.gov]
Sent: Wednesday, May 9, 2018 1:42 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; wnash@thenashlawfirm.com
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: In the Matter of Angel Vazquez, Department of Human Services, Hunterdon Developmental Center - OAL Docket No. CSV 10745-17 and CSC Docket No. 2017-4082 - SETTLEMENT

Mr. Angiulo,

We would record it as an "approved leave of absence" without pay. I will wait for Mr. Nash to concur.

Thank you,
Aaron

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Wednesday, May 09, 2018 11:41 AM
To: wnash@thenashlawfirm.com; Aaron Creuz
Cc: Messina, JoAnn
Subject: RE: In the Matter of Angel Vazquez, Department of Human Services, Hunterdon Developmental Center - OAL Docket No. CSV 10745-17 and CSC Docket No. 2017-4082 - SETTLEMENT
Importance: High

Mr. Nash and DAG Creuz:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Miguel Citron from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Mr. Vazquez removal effective December 19, 2016 is being settled to a demotion to Senior Laundry Worker, it does not indicate how to record the time from his removal until his reinstatement in the lower position. Before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be specifically accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

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3-6-18

A-1

STATE OF NEW JERSEY

In the Matter of Khadiatu Wheaton
Trenton Psychiatric Hospital, Department of Health

CSC DKT. NO. 2018-2455
OAL DKT. NO. CSV 04418-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 6, 2018 BW

The Civil Service Commission, at its meeting of June 6, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04418-18

AGENCY DKT. NO. 2018-2455

IN THE MATTER OF KHADIATU WHEATON, DEPARTMENT OF HEALTH, TRENTON PSYCHIATRIC HOSPITAL.

Robert Little, AFSCME New Jersey, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: May 10, 2018 Decided: May 15, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Khadiatu Wheaton from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 27, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 15, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 5/16/18

Date Mailed to Parties: 5/16/18

cmo

OAL DKT. NO. CSV 04418-2018-S

AGENCY DKT. NO. 2018-2455

SETTLEMENT AGREEMENT

IN THE MATTER OF

Khadiatu Wheaton

AND

Trenton Psychiatric Hospital, Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 11/29/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-6.2(b)	RNGS	11/30/17
2. NJAC 4A:2-2.3(a)6	RNGS	11/30/17
3. A.3.1	RNGS	11/30/17
4. E1.1	RNGS	11/30/17
5. NJAC 4A:2-2.3(a) 12	RNGS	11/30/17

B. The Appellant Khadiatu Wheaton withdraws his/her appeal and request for a hearing, and the Respondent Department of Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. NJAC 4A:2-6.2(b)	Sustained	5 days (time Served)
2. NJAC 4A:2-2.3(a)6	Sustained	5 days (Time Served

3. A.3.1 Sustained 5 days | time Served
4. E.1.1 Sustained 5 days | time Served
5. NJAC 4A:2-2.3(a)12 Sustained 5 days | time Served

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of 5 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 0.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Approved Leave of absence w/o pay.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of _____'s (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

05/10/2018
DATE

Khadiatu F. Wheaton
Appellant

5-10-18
DATE

Respondent

5/10/18
DATE

Donna Brown
Department of Health
ON BEHALF OF

DATE

ON BEHALF OF

CERTIFICATION

I, Khadiatu Wheaton, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

05/10/2018
DATE

Khadiatu F. Wheaton
NAME

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

June 29, 2018

Lynsey Stehling, Esq.
Law Offices of Daniel Zirrith
241 Forsgate Drive – Suite 109
Monroe Township, New Jersey 08831

France Casseus, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Carlos Lopez v. City of Newark, Department of Public Safety* (CSC Docket No. 2018-999; OAL Docket No. CSV 15789-17) – **SETTLEMENT**

Dear Ms. Stehling and Ms. Casseus:

The appeal of Carlos Lopez, a Public Safety Telecommunicator, City of Newark, Department of Public Safety, of his resignation not in good standing, effective September 22, 2017, was before Administrative Law Judge Kelly J. Kirk, (ALJ), who issued her initial decision on June 22, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on June 22, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on August 7, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective August 8, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Kelly J. Kirk, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15789-17
AGENCY DKT. NO. 2018-999

CARLOS LOPEZ,
Petitioner,
v.
CITY OF NEWARK DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Lynsey A. Stehling, Esq. for appellant (Law Offices of Daniel J. Zirrith, attorneys)

France Casseus, Esq., Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel, attorney)

Record Closed: June 11, 2018 Decided: June 22, 2018

BEFORE **KELLY J. KIRK**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on October 24, 2017, for determination as a contested case. The parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement and General Release indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 22, 2018

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: June 22, 2018

Date Mailed to Parties:

mm

Carlos Lopez, Appellant,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
v.	:	**OAL DOCKET NO.: CSV 15789-2017N**
CITY OF NEWARK, Respondent	:	

SETTLEMENT AGREEMENT AND GENERAL RELEASE

IT IS HEREBY AGREED by and between the City of Newark ("City"), Newark Council 21 ("Union"), and Employee Carlos Lopez[1] ("Lopez"), to resolve the disciplinary matter as it relates to the Final Notice of Disciplinary Action ("FNDA") dated September 22, 2017.[2] Rather than continuing further with the appeal of Lopez's termination at the Office of Administrative Law on the charges of Resignation not in Good Standing; Incompetency, Inefficiency or Failure to Perform Duties; Chronic Absenteeism or Lateness; Neglect of Duty; and other sufficient causes, as codified at N.J.A.C. 4A:2-6.2(c); 4A:2-2.3(a)(1); 4A:2-2.3(a)(4); 4A:2-2.3(a)(7) and; 4A:2-2.3(a)(12), the City, the Union and Lopez (collectively referred to hereinafter as the "Parties") have determined to resolve this matter by this Agreement, and agree as follows:

1. Lopez hereby retires and resigns from his position with the City of Newark effective March 1, 2018. The City agrees Lopez's record will reflect a retirement date of March 1, 2018.
2. The Parties hereby agree that all charges associated with the FNDA issued on September 22, 2017 will be withdrawn by the Department of

[1] On the date which gave rise to the incident noted in the Final Notice of Disciplinary Action, Mr. Lopez was employed as a Public Safety Telecommunicator, with the Department of Public Safety, City of Newark, New Jersey.
[2] This agreement also resolves the disciplinary matters as it relates to PNDAs dated May 16, 2017 and August 17, 2017 which are merged into the FNDA dated September 22, 2017.

Public Safety, Fire Division. The City will amend the disciplinary action in the FNDA from "Resignation not in Good Standing" to "Retirement & Resignation", effective March 1, 2018.

3. Should the New Jersey Division of Pensions and Benefits deny Lopez's claim for retirement, The City agrees to convert the disciplinary action to "Resignation in Good Standing". Further if denied by Pensions, Lopez agrees not to seek or reinstate any State or Federal action against the City.
4. Lopez shall waive any future employment with the City of Newark.
5. Lopez shall waive and will not be entitled to any back pay from date of original absence date of July 15, 2017 until his Resignation and Retirement dated of March 1, 2018.
6. Lopez agrees that the time elapsed between July 15, 2017 and his Retirement and Resignation dated March 1, 2018, will be credited as an approved Unpaid Leave of Absence.
7. Lopez further waives any and all rights or claims which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the removal penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
8. Lopez and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
9. Lopez and the Union each further agree that there is no consideration due Lopez, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

10. Except for the assessment of Lopez's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.
11. Lopez and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA, except to the extent necessary to enforce the terms of this agreement, or as required by law.
12. Lopez is bound by this Agreement. Anyone who succeeds to Lopez's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.
13. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.
14. Lopez and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
15. This Agreement contains the sole and entire agreement between Lopez, The Department of Public Works and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Lopez specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

16. Lopez agrees and acknowledges that he has been fully and fairly represented by his Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.
17. Lopez agrees and acknowledges that he has had full opportunity to review this Agreement with his counsel and/or union representation and he enters into same knowingly and voluntarily.
18. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
19. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.
20. By signing this Settlement Agreement, Lopez states that:
    a) He has read it;
    b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;
    c) He accepts the terms of this agreement;
    d) His representative negotiated this Agreement with his knowledge and consent;
    e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so; and
    f) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

5/4/18
Date

BY: _____
City of Newark, Department of Public Safety

5/9/18
Date

BY: _____
Union Attorney/Representative

6/7/18
Date

_____
Carlos Lopez

Approved as to Form and Legality:

5/8/18
Date

_____
Law Department

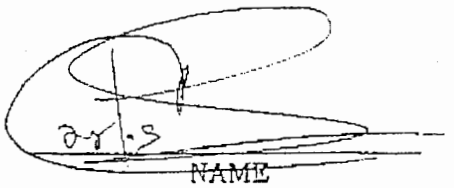
CERTIFICATION

I, Carlos Lopez, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/7/18
DATE


NAME

6-20-18

A-2

STATE OF NEW JERSEY

In the Matter of Frederick Bender
City of Trenton Police Department

CSC DKT. NO. 2013-2228
OAL DKT. NO. CSV 02992-13

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 22, 2018 BW

The appeal of Frederick Bender, Police Officer, City of Trenton Police Department, 90 working day suspension, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo, who rendered her initial decision on May 9, 2018 reversing the 90 working day suspension. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on June 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 90 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Frederick Bender. The Commission further orders that appellant be granted 90 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, Northern Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 02992-13
AGENCY REF. NO. 2013-2228

IN THE MATTER OF
FREDERICK BENDER,
CITY OF TRENTON POLICE
DEPARTMENT.

Stuart J. Alterman, Esq., for appellant (Alterman & Associates, LLC, attorneys)

George R. Saponaro, Esq., for respondent (Saponaro Law Group, attorneys)

Record closed: March 22, 2018 Decided: May 9, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Appellant, Frederick Bender (Bender), a Police Officer with the City of Trenton, Police Department (Trenton), appealed a 90-day suspension he received as major discipline for allegedly engaging with four other officers while off duty in a street fight on January 17, 2011. Trenton sustained the following charges: conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); other sufficient cause, N.J.A.C. 4A:2-2.3(a)(11); and misconduct, N.J.S.A. 40A:14-147. Trenton also determined that Bender

violated the following Trenton Police Department Rules and Regulations: 2:2.38, 3:1.3, 3:1.1, and 4:8.3. Bender denied the allegations as baseless and unjustly harsh.

PROCEDURAL HISTORY

On September 15, 2011, Trenton issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against Bender. Following a departmental hearing held on October 5, 2012, Trenton issued a Final Notice of Disciplinary Action (FNDA) on February 19, 2013 sustaining the charges in the PNDA and suspending Bender from employment for ninety working days. Appellant appealed on February 21, 2013. The matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on March 1, 2013 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

The case was originally assigned to a different Administrative Law Judge (ALJ). Three adjournments were granted for the following dates: February 20, 2014; July 23, 2014; and January 5, 2015. The matter was reassigned to me on February 10, 2017. On March 10, 2017, respondent filed a Substitution of Counsel reassigning the case to Mr. Saponaro. After a telephone conference with the parties on February 28, 2017, I scheduled the hearing for May 17, 2017. The parties mutually requested an adjournment so I conducted a telephone conference on May 16, 2017, granted the request, and scheduled a status conference for August 17, 2017. During the telephone conference on August 17, 2017, Mr. Saponaro informed me that of the four police officers who had been charged regarding the same incident, two were still waiting for their final hearings at the local level. Mr. Saponaro requested additional time to resolve the issues with the other two officers. His intent was to reach a global settlement involving all three officers or a consolidation of the three matters. With Mr. Alterman's consent, I scheduled another status conference for September 27, 2017. At the September 27 conference, Mr. Saponaro reported that he had made no progress with the companion cases. Because

Mr. Alterman objected to any further adjournments, as unduly prejudicial to appellant, I scheduled the hearing dates for October 31, 2017 and November 9, 2017.

On the morning of the hearing, appellant was present and prepared to go forward. Mr. Saponaro appeared for respondent but did not bring any witnesses and represented that respondent was not prepared to go forward. He requested an adjournment of the October 31, 2017 hearing date and represented that respondent would be able to proceed on November 9, 2017. Mr. Alterman objected to this last-minute request. I allowed the parties to state their positions on the record. As Mr. Saponaro was not able to proceed with the hearing on behalf of respondent on the date scheduled for the hearing, I adjourned the hearing dates to allow appellant leave to file a motion to dismiss.

On February 28, 2018, appellant, through counsel, filed a motion to dismiss the disciplinary action due to respondent's failure to proceed. Respondent did not file any opposition to the motion. Respondent has not taken any action in this matter since October 31, 2017 and respondent's counsel has remained attorney of record.

LEGAL ANALYSIS AND CONCLUSION

Appellant moved to dismiss the disciplinary action with prejudice for respondent's failure to proceed at the time of the scheduled hearing date of October 31, 2017 in accordance with N.J.A.C. 1:1-14.14 seeking a sanction of dismissal of the charges with prejudice.

Appellant was present and prepared to go forward on the date of the hearing, October 31, 2017. Respondent's counsel appeared but represented that he was unable to proceed with the hearing because respondent was in the process of changing law firms. To date, there has been no substitution of counsel, and significantly, no opposition to appellant's motion. Despite the filing of appellant's motion to dismiss on February 28, 2018, respondent has yet to provide any explanation for its failure to proceed in this matter.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The County bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Bender filed his appeal on February 21, 2013 for an incident that occurred on January 17, 2011. Respondent has had more than ample time to show that the action taken against Bender was justified.

Based on the foregoing, I **CONCLUDE** that, because respondent failed to proceed on the date of the hearing, October 31, 2017; failed to offer any explanation for its failure to proceed; and failed to oppose appellant's motion to dismiss, the sanction of dismissal under N.J.A.C. 1:1-14.14(a) is warranted. I further **CONCLUDE** that without participating in the due process hearing, the disciplinary charges against appellant, Frederick Bender, cannot be sustained by respondent, City of Trenton Police Department, and must be **DISMISSED** with prejudice.

I hereby **ORDER** that the disciplinary action imposed by respondent against appellant set forth in the FNDA dated February 19, 2013 is hereby dismissed with prejudice.

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

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

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

May 9, 2018 — Kathleen M. Calemmo

DATE — **KATHLEEN M. CALEMMO**, ALJ

Date Received at Agency: May 9, 2018

Date Mailed to Parties: May 9, 2018

cmo

6-20-18

A-1

STATE OF NEW JERSEY

In the Matter of Thomas Bogan Woodbine Developmental Center Department of Human Services	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NOS. 2018-2542, 2018-2543, 2018-2544, 2018-2545 and 2018-2685	:	
OAL DKT. NOS. CSV 4150-18, 4151-18, 4152-18, 4155-18 and 4420-18 **(Consolidated)**	:	

ISSUED: JUNE 20, 2018 BW

The Civil Service Commission, at its meeting of June 20, 2018, acknowledged the attached consolidated settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOs. CSV 4150-18, CSV 4151-18, CSV 4152-18, CSV 4155-18 and CSV 4420-18
AGENCY DKT. NOs. 2018-2542, 2018-2543, 2018-2544, 2018-2545 and 2018-2685

IN THE MATTER OF THOMAS BOGAN, DEPARTMENT OF HUMAN SERVICES, WOODBINE DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: May 24, 2018 Decided: May 29, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

These matters concern the appeal of Thomas Bogan from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matters were transmitted to the Office of Administrative Law for determination as

contested cases on March 20, 2018 and March 27, 2018, respectively, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that these matters are no longer contested cases before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 29, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 6/1/18

Date Mailed to Parties: 6/1/18

cmo

OAL DKT. NO. CSV 4150-2018, 4151, 4152, 4155, 4420
AGENCY DKT. NO. 20 – 2018-2542, 2543, 2544, 2545, 2685.
SETTLEMENT AGREEMENT

IN THE MATTER OF

Thomas Bogan

AND

Woodbine Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The five **Final** Notice of Disciplinary Action dated (5) 2/28/2018; (1) 2/1/2018 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.4.4, NJAC 4A:2-2.3(a)4,6,12	Removal	2/27/2018
2.	A.4.5	"	2/28/2018
3.	A.4.6.	"	3/1/2018
4.	A.2.5.	"	2/27/2018
5.	A.2.6.	"	3/3/2018

B. The Appellant Thomas Bogan withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	The parties have agreed to a general resignation		
3.	as a resolution to the disciplinary appeal.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 2/27/2018 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

_____ resignation in good standing

__✓__ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Thomas Bogan's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall not seek or accept reemployment with the Department of Human Services at any time in the future.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5/24/18
DATE

Appellant

5/24/18
DATE

Respondent - DHS

5-24-18
DATE

ON BEHALF OF APPELLANT

5/24/18
DATE

ON BEHALF OF Woodbine Developmental Center

CERTIFICATION

I, Thomas Bigan, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/24/18
DATE

Thomas Bigan
NAME

6-20-18

A-3

STATE OF NEW JERSEY

In the Matter of Christopher Hines
Woodbine Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-1095
OAL DKT. NO. CSV 15927-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 22, 2018 BW

The appeal of Christopher Hines, Human Services Assistant, Woodbine Developmental Center, Department of Human Services, resignation not in good standing effective June 9, 2015, on charges, was heard by Administrative Law Judge Barry E. Moscowitz, who rendered his initial decision on May 11, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on June 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission affirms the granting of the motion for summary decision and affirms the resignation not in good standing of Christopher Hines.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 15927-16

AGENCY DKT. NO. 2017-1095

IN THE MATTER OF CHRISTOPHER HINES, WOODBINE DEVELOPMENTAL CENTER, DEPARTMENT OF HUMAN SERVICES.

Samuel Gaylord, Esq., for appellant Christopher Hines (Gaylord Popp, LLC, attorneys)

Kimberly A. Eaton, Deputy Attorney General, for respondent Woodbine Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 13, 2018 Decided: May 11, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On June 5, 2014, Christopher Hines was injured at work. He was granted a leave of absence but never returned to work after it expired. Did Hines resign not in good standing? Yes. Under N.J.A.C. 4A:2-6.2(c), an employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall

be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing.

PROCEDURAL HISTORY

On June 7, 2016, the Woodbine Developmental Center served Hines with a Preliminary Notice of Disciplinary Action. In that notice, Woodbine specified that on May 22, 2015, it advised Hines that his leave of absence would reach one year on June 9, 2015, and that it could only grant him a leave of absence for up to one year. Woodbine further specified that on June 9, 2015, it advised Hines to return to work or resign, and that he had failed to apply for accidental disability retirement. Moreover, Woodbine specified that on June 13, 2015, it advised Hines that his leave of absence had reached one year on June 9, 2015, and Woodbine reminded Hines that it could only grant him a leave of absence for up to one year. Therefore, Woodbine charged Hines with having violated N.J.A.C. 4A:2-6.2(c), because he had been absent from work without permission for five consecutive days, and sought his resignation not in good standing.

On September 21, 2016, Woodbine served Hines with a Final Notice of Disciplinary Action sustaining the charges and specifications in the Preliminary Notice of Disciplinary Action following a departmental hearing.

On September 28, 2016, Hines appealed the determination.

On October 18, 2016, the case was transmitted to the Office of Administrative Law as a contested under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On December 11, 2017, Woodbine filed a motion for summary decision. Although Hines is represented by counsel, Hines refused to communicate with his attorney and participate in his own appeal. Therefore, the motion for summary decision will be decided unopposed.

FINDINGS OF FACT

Based on the exhibits attached to the Certification of Kimberly Eaton, DAG, in support of the motion for summary decision, I **FIND** the following as **FACT**:

Appellant, Christopher Hines, was employed by the Woodbine Developmental Center as a human services assistant since March 31, 2007. Ex. G. The job requirements for a human services assistant include lifting and/or moving residents as required, bathing and/or assisting residents with bathing, and rendering basic first aid and emergency care to residents when necessary. Ex. H. On June 5, 2014, Hines was injured while working, and filed a Workers' Compensation claim, which was approved. Ex. A. Hines's Workers' Compensation claim eventually expired, and he did not return to work following the injury. Ibid.

On May 22, 2015, Angela Santandrea, the Manager of Human Resources, notified Hines by letter that his leave of absence had exceeded one continuous year, in violation of N.J.A.C. 4A:6-1.1. Ibid. That letter also advised Hines that he had three possible options: (1) return to work, if medically possible, prior to June 9, 2015, with appropriate documentation from his physician; (2) apply for accidental disability retirement benefits from the Public Employees' Retirement System; or (3) resign effective June 9, 2015. Ibid. That letter further advised Hines that if Woodbine received no response by June 9, 2015, the appointing authority would pursue his removal. Ibid.

On August 19, 2015, Hines applied for an Americans with Disabilities Act (ADA) accommodation of occasional lifting of no more than thirty-five pounds, and no push/pull greater than sixty-three pounds. Ex. B. These restrictions were outlined in his Functional Capacity Evaluation, dated June 17, 2015. Ibid. The job specification for a human services assistant states that "[p]ersons with mental or physical disabilities are eligible as long as they can perform essential functions of the job with or without reasonable accommodation. If the accommodation cannot be made because it would cause the employer undue hardship, such persons may not be eligible." Ex. H.

Gina M. Wasik, the ADA coordinator, informed Hines in a letter dated September 4, 2015, that Woodbine was unable to accommodate this request, "as it would result in the removal of an essential function of your position as Human Services Assistant." Ibid. Ms. Wasik advised Hines that due to the expiration of his one-year leave of absence, he was not eligible for any additional leave time. Ibid. Ms. Wasik further advised Hines that he might be eligible for accidental disability retirement benefits or, alternatively, could resign in good standing effective immediately. Ibid. Ms. Wasik instructed Hines that he had until September 14, 2015, to notify her of his decision, or he would be considered a resignation not in good standing. Ibid.

Subsequently, Hines applied for accidental disability retirement benefits, and was denied due to his failure to provide medical documentation. Ex. C. On June 13, 2016, Ms. Wasik advised Hines by letter that if he did not resign by June 24, 2016, the appointing authority would seek his removal as a resignation not in good standing. Ibid. On June 27, 2016, Hines was served with a Preliminary Notice of Disciplinary Action. Ex. D.

A departmental hearing was held on September 13, 2016, in which Woodbine recommended a resignation not in good standing. Ex. E.

CONCLUSIONS OF LAW

Motions for summary decision shall be entered if no genuine issue of material fact exists and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5. When a motion for summary decision is made and supported, an adverse party, in order to prevail, must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. Ibid. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered. Ibid.

In this case, it is undisputed that Hines's last day of work was June 5, 2014, and that Angela Santandrea advised Hines in the May 22, 2015, letter that he had three options: (1) return to work, (2) retire, or (3) resign. Ex. A. It is also undisputed that Hines

failed to return to work or resign, and that his application for accidental disability retirement benefits was denied because he failed to supply supporting medical documentation. Ex. E. Indeed, the record confirms that Hines was instructed to provide medical documentation clearing him to return to work, and that he failed to do so. Moreover, Ms. Santandrea stated in the letter that "[i]in the event that our physician clears you to return to duty with limitations, the interactive process must be initiated to determine if an accommodation can be approved." Ibid.

Since Hines did not return to work, retire, resign, provide medical documentation clearing him to return to work, participate in the process to determine if his accommodation could be approved, or even participate in his appeal, I **CONCLUDE** that Hines has abandoned his job and that his position shall be recorded as resigned not in good standing under N.J.A.C. 4A:2-6.2(c).

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the motion for summary decision is hereby granted, and that Hines resigned not in good standing under N.J.A.C. 4A:2-6.2(c).

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

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

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

5/11/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 5/11/18

Date Mailed to Parties: MAY 14 2018

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

6-20-18

A-4

STATE OF NEW JERSEY

In the Matter of Jasen Mitchell
Borough of Wildwood Crest,
Department of Public Safety

CSC DKT. NO. 2013-618
OAL DKT. NO. CSV 12849-12

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 22, 2018 BW

The appeal of Jasen Mitchell, Emergency Medical Technician, Borough of Wildwood Crest, Department of Public Safety, removal and resignation not in good standing effective June 1, 2012, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on May 15, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on June 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing and resigning the appellant not in good standing was justified. The Commission therefore affirms those actions and dismisses the appeal of Jasen Mitchell.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

6-20-18

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 12849-12
AGENCY DKT. NO. 2013-618

IN THE MATTER OF JASEN T. MITCHELL,
BOROUGH OF WILDWOOD CREST
DEPARTMENT OF PUBLIC SAFETY.

Amie E. DiCola, Esquire, for appellant (Fusco & Macaluso Partners, L.L.C., attorneys)

Kyle D. Weinberg, Esquire, for respondent (Blaney and Karavan, attorneys)

Record Closed: April 3, 2018 Decided: May 15, 2018

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

The Borough of Wildwood Crest ("respondent") sustained a charge of "Resignation Not In Good Standing" in violation of N.J.A.C. 4A:2-6.2. The discipline stemmed from an allegation that appellant failed to report for training from June 4, 2012 through June 8, 2012, as a public safety telecommunicator without approval of his superior. He was considered to have abandoned his position. Appellant contends that he acted appropriately and did not abandon his position.

PROCEDURAL HISTORY

On June 11, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action because of his actions. A Final Notice of Disciplinary Action was issued on August 23, 2012, sustaining the charge and penalty. A timely appeal was filed and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law ("OAL") as a contested case on September 20, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings were held on March 10, 2014, February 12, 2016, April 20, 2016 and May 25, 2017. The matter was originally assigned to The Honorable Bruce M. Gorman, who retired from the bench and the matter was then reassigned to The Honorable W. Todd Miller, who was appointed to the Atlantic County Superior Court in 2016. The Honorable Edward T. Delanoy, Jr., Assignment Judge, sent correspondence to counsel on August 24, 2016, notifying them of the appointment of Judge Miller and requesting a telephone conference. A telephone conference was held on October 18, 2016, with counsel and Judge Delanoy to discuss how the parties wished to proceed. This matter was reassigned to the undersigned in late October 2016 and a final hearing was held on May 25, 2017. Post-hearing briefs were scheduled to be received by the parties on March 15, 2018. However, appellant's brief was received on April 2, 2018 and the record closed on that date.

FACTUAL DISCUSSION

Testimony

For Respondent

Kevin Yecco ("Yecco") was the Borough's administrator and clerk from 1986 through 2013. In his role as Borough administrator/clerk, part of his responsibility was

dealing with employee and personnel matters. He was familiar with the circumstances surrounding this case and his office was responsible for insurance matters. He knew Mitchell was injured and would no longer be able to function in full capacity as an EMT. Yecco received documentation from Shore Orthopedic University Associates indicating Mitchell could return to work on modified duty and placed restrictions and limitations on his future assignments including, but not limited to: climbing stairs, running, jumping, ladder climbing, and squatting.

As a result, Yecco had a conversation with the Borough's Mayor, Carl Groon, and Chief of Police Thomas DePaul, about the possibility of appellant becoming a public safety telecommunicator ("dispatcher"), a position still in the Department of Public Safety, because appellant's limitations did not preclude him from completing the Civil Service Commission's job functions of a dispatcher. After conferring with both the Mayor and the chief of police, Yecco determined there was a position of employment available for appellant. The Borough had previously discussed creating a relief dispatcher position and believed appellant could fill schedule voids. The need to add a dispatcher was because of low retention rates and having to pay police officers overtime to fill the voids.

At the time, the exact title for appellant's new position could not be determined, it would either be as a public safety telecommunicator or public safety telecommunicator trainee, because Mitchell had to undergo training for the position. Thereafter, in April 2012, Yecco, the Chief of Police, and the Borough's chief financial officer, Neil Young, met with appellant to advise him that a dispatcher position would be made available, which would not conflict with his work restrictions as expressed by his doctors. Yecco indicated to Mitchell that he would be keeping the same salary he had while serving as an EMT, and would be made whole in all respects, including but not limited to, retaining all seniority rights and benefits afforded to him as an EMT. In fact, in his new position of dispatcher, Mitchell would receive more money than the already employed dispatchers at that point in time. During the above meeting, Yecco does not recall Mitchell ever indicating that he had concerns with attending training for the dispatcher position. However, Yecco recalled having a discussion with Mitchell about his hesitation with being able to fully

understand the requirements of the dispatcher position. After appellant expressed his apprehensions, Yecco informed him that the Borough would find out exactly what his limitations were but the training would determine his ability to perform in one of the two capacities. Yecco was under the impression Mitchell voluntarily wanted to take the training.

Yecco testified the training for Mitchell was scheduled at the expense of the Borough for June 4 through June 8, 2012 and June 11 through June 14, 2012. Additionally, notice was provided to appellant of the training schedule. T1:26-14. Yecco acknowledge he received a letter on June 1, 2012 dated May 30, 2012, from appellant indicating he was pursuing an accidental disability retirement and would remain on sick leave until that time. Yecco wrote back to Mitchell on June 1, 2012 indicating that his disability request would not preclude him from serving as a dispatcher and he was ordered to appear for the training as required. Yecco added the Borough was making reasonable accommodations to appellant and there would be problems with his disability application because he was not totally and permanently incapacitated. Yecco reviewed the New Jersey Administrative Code with regard to Civil Service transfers and it was determined appellant's transfer would be considered lateral, which does not require the consent of appellant. The Borough never received anything from appellant or someone acting on his behalf objecting to the transfer.

Mitchell was scheduled to appear for training on June 4, 2012, but he did not appear. On the same date, Yecco stated the Borough received notification from the Borough police department that Mitchell was lugging heavy-duty sound equipment to and from the Borough's elementary school. This observation was later confirmed through video. Yecco indicated that from the time appellant received notice to appear at training he did not receive any notification from appellant that he would not be attending the training or that he was requesting an extended leave of absence. According to Yecco, Mitchell did not attend the training as instructed for a period of five (5) consecutive days without authorization to otherwise be absent, which constituted a resignation not in good standing. Thereafter, a Preliminary Notice of Disciplinary Action (31-A) was generated.

Aside from his employment with the Borough, Yecco stated Mitchell had his own landscaping business, a position with the Borough elementary school, and a Christmas light decorating business.

On cross-examination, Yecco explained his understanding of what a permanent/lateral transfer meant, that it was a transfer simply within one department and that the Administrative Code gives the Borough the right to make such a transfer without the consent of the employee. Mitchell was being moved to a public safety telecommunicator trainee on a permanent basis. Yecco acknowledged that under the Administrative Code a thirty-day notice requirement for a permanent transfer is needed and the permanent transfer needs to be approved by the Civil Service Commission. Yecco said in this case, Civil Service approval was not yet sought related to appellant's transfer because the Borough did not know the title for Mitchell until he completed his training. During Mitchell's training, Yecco indicated Mitchell would have remained in his Civil Service title of EMT, and paid as such, until the Borough could determine if he would be titled as a dispatcher or dispatcher trainee. At no time would he have lost Civil Service protection and his rights under the Administrative Code because his status was guaranteed.

Yecco stated that although Mitchell never signed an agreement with respect to the transfer to dispatcher, there was an oral agreement between the parties. As noted above, at the meeting between Yecco, chief of police, chief financial officer, and Mitchell, the job specifications of the dispatcher position and his salary were discussed. Yecco added that Mitchell was being paid a higher salary than other full-time dispatchers because the Borough was trying to maintain his employment. Yecco acknowledged that Mitchell had some misgivings about the dispatcher position, specifically, he was unsure if he could perform the duties of a dispatcher. However, Yecco stated had he not been able to fulfill his duties, Mitchell would have been placed in the position of dispatcher trainee and he would have had the opportunity to learn the position.

The position of relief dispatcher was created because of the void primarily in the Borough's dispatch department as well as to accommodate Mitchell. Yecco stated that Mitchell's experience as an EMT would be invaluable to his transfer to the position of dispatcher. Appellant had experience in dealing with calls as an EMT and handling the same, although Yecco did not know whether or not EMTs in the Borough ever used dispatching computer equipment.

Yecco reiterated he had a meeting with Mitchell on April 20, 2012. At the meeting, Mitchell was offered the position of dispatcher or dispatcher trainee. It was relayed to him that he would be made to suffer no loss of wages and he would be making the same amount of money working less hours, no loss in seniority. Prior to offering this position, Yecco did not recall the Borough having the position of relief dispatcher. After the meeting, Yecco believed Mitchell understood and accepted the conditions of the dispatcher position, including that he would be going to training. Yecco was not sure whether or not the training provided by the Borough to Mitchell was in compliance with N.J.A.C. 17:24-2.2. However, Yecco stated Mitchell made no requests for accommodations related to the training because of his mental or physical hardships or incapabilities. Although Mitchell stated he had some concerns with the training, he did not ask for further assistance or accommodations. Additionally, the Borough indicated to Mitchell the training would be provided and if there were issues, they would deal with them. Yecco testified the Borough determined sometime in March 2012 that appellant would be transferred once he had a declaration from his doctor that he was being released with limitations.

Yecco acknowledged he received Mitchell's letter dated May 30, 2012 indicating he was applying for disability pension. However, at the time of the April 20, 2012 meeting, Yecco understood that Mitchell was going to appear for the training and the Borough would schedule the same through the police department. In response to Mitchell's May 30, 2012 letter, Yecco sent a letter to Mitchell stating he was still required to attend the training because the Borough maintained that Mitchell and his doctor certified that he was not totally and permanently incapacitated. The assignment of dispatcher was a reasonable accommodation so that Mitchell could continue as a productive employee in

the Borough through retirement. The Borough could not approve Mitchell's request for a pension or disability pension because he was not totally and permanently incapacitated.

Yecco was not aware that Mitchell filed for retirement in March of 2012 because the letters sent from the Division of Pension and Benefits would have been sent to the Borough's CFO, not Yecco. Yecco held the April 20, 2012, meeting based on the receipt of Mitchell's doctor's note indicating he had limitations, not because he was aware that he filed for retirement. Yecco was unaware of whether any police officer, EMS employee, or firefighter was working as a full-time scheduled dispatcher. However, Yecco felt Mitchell could do the job because it was in the same Department that he was currently situated and the duties of the two positions were related. Yecco had no knowledge as to what appellant's schedule would have been as a dispatcher.

Yecco felt Mitchell's disability pension claim was not a legitimate claim because he had three other jobs, all of which involved lifting heaving lighting and sound equipment. In fact, on the day he was supposed to report to training, appellant was at the elementary school doing just that. Additionally, Yecco personally observed Mitchell moving heavy-duty sound equipment at a park and was provided photographic evidence that Mitchell was operating a lawn mower on September 12, 2012, well after he was deemed to be permanently restricted as to the type of work he could perform.

Neil Young ("Young") is the former chief financial officer ("CFO"), for the Borough of Wildwood Crest. Part of Young's duties were to review budgetary items. He would occasionally meet with the Borough's commissioners to review budgets. Young recalled having discussions with DePaul or Mayor Groon regarding excessive pay to the police officers to cover when dispatchers did not come in or when they did not have a relief dispatcher available. In fact, salary and wage line items were always on their minds. As a result, Young remembered discussing the possibility of adding a relief dispatcher to eliminate the use of police officers on overtime to cover dispatch duties.

Young had little involvement with Mitchell until he was on a workers' compensation case. At that time, the workers' compensation check would be sent to Young, and in turn he would give it to Mitchell. Aside from his role as Borough CFO, Young served as the Borough's certifying officer for pension reasons. As far as pensions, Young recalls receiving documentation from the Division of Pensions with regard to Mitchell and sending records/letters back and forth. Young acknowledged he received a letter from the Division of Pensions dated April 10, 2012, asking if there was a job available for the Mitchell. As to whether there was a position available for Mitchell, Young would not have determined that, rather the Borough administrator would make that decision. After it was determined if a job was available, Young's response to the pension board would be based upon the Borough administrator's determination.

Young sent a letter dated May 1, 2012 to the Division of Pension and Benefits. (T1:161-10.) In said letter, Young stated he was unable to complete the pension forms because Mitchell was not totally and permanently disabled. His understanding of the law was that an applicant must be permanently and totally disabled to receive a disability retirement; Mitchell was not. The letter stated that Young was notifying the Division that a reasonable accommodation had been made and that a job was offered and subsequently accepted by Mitchell. This representation was based upon a meeting Young had with Mitchell, Yecco, DePaul and Mr. Hawthorne.

According to Young, Yecco presented Mitchell with the offer to become a dispatcher. Mitchell had some concerns about a learning disability and that he may not be able to complete the training. However, at the end of the meeting, Young assumed all parties were on board with the assignment. Young thought Mitchell was going to take the position as dispatcher and would attend the training. Additionally, the Borough paid for the training. Young testified that also at the meeting, Mitchell was informed that he would keep the same salary as he had as an EMT, the same benefits, and the same seniority. Young added Yecco told Mitchell the Borough would do everything in its capacity to help him make it through the training. Mitchell did not attend training.

On cross-examination, Young reviewed letters and determined appellant applied for his pension before May 1, 2012. The reason it took the Borough some time to respond to the Division of Pension and Benefits letter of March 2012 was because the Borough disagreed with Mitchell's application for disability retirement. Although there was no actual letter sent to Pensions until May, Young recalled being in communication with the Division throughout the process.

Young stated Yecco dealt with personnel matters, including making reasonable accommodations. Young had no involvement in title changes or position changes of employees, only salaries. (T2:182-7.) There were no adjustments to appellant's salary because he never showed up for work after the April 2012, meeting as he was out on paid personal leave until training was to begin on June 4, 2012.

Chief Thomas DePaul ("DePaul") is the Borough's former chief of police. Part of his duties included supervising the dispatchers and the rescue squad, both fell under the Department of Public Safety. Although the dispatchers were under his command, DePaul did not directly supervise the dispatchers, they were supervised by sergeants or medium level supervisors.

DePaul became involved when the Borough was attempting to find continued, suitable employment to accommodate Mitchell. After discussions with the Borough's administrator, DePaul made the determination that a position of dispatcher could be offered to him. DePaul stated during budgeting that he frequently had discussions with administration related to overtime payments to police officers for fill-in dispatcher duties. If he made Mitchell a dispatcher, it would have allowed the Borough to have a relief dispatcher on staff and eliminate the overtime payments to the police officers.

DePaul testified he first spoke to Mitchell about the position in March 2012. It was a short conversation and DePaul advised Mitchell they needed to sit down with the administrator with respect to the dispatcher position. During this first meeting, Mitchell did not indicate to DePaul that he did not want to consider the job being offered to him.

(T2:193-17.) Additionally, during the conversation, DePaul did not recall if Mitchell indicated he was going to submit his retirement papers. (T2:193-20.)

Thereafter a second meeting was held in April between DePaul, Yecco, Young and Mitchell. At the meeting, the individuals discussed the position of dispatcher for Mitchell, the time he had on the books, how the time would be utilized, seniority and the job duties. Mitchell's salary was to remain the same as the EMT job and he would maintain his seniority. In order to have the position of dispatcher, he would have to complete training just as any other dispatcher would; 911 training and EMD training. At the meeting, it was DePaul's understanding that Mitchell was going to be enrolled at training. DePaul stated that Mitchell was concerned whether or not he was able to complete the training, but DePaul compared the dispatcher position/training to the EMT job he already had and expressed to Mitchell the similarities between the two. DePaul believed the training for the EMT position is more difficult than the dispatcher training.

DePaul first learned that Mitchell was not going to attend the training on June 4, 2012; the first day he was scheduled to report. DePaul received a call from Borough Administrator Yecco advising him that Mitchell was down at the elementary school with DJ equipment. In response to the telephone call, DePaul viewed the video of the cameras from the elementary school which showed Mitchell coming in and out of the school on the day he was supposed to be at training. Mitchell never informed DePaul that he would not be at the training or that he intended to file for retirement.

DePaul was aware of Mitchell's additional businesses, including a landscaping business and a lighting business. DePaul had asked his officers that if anyone noticed Mitchell working a second job, that they document the same. As to the particular incident of August 17, 2012, DePaul personally saw Mitchell pushing a wheelbarrow working with mulch.

DePaul indicated that he did not know the extent of Mitchell's limitations but knew they included lifting. Additionally, had there been concerns about his ability to sit for

extended periods of time; it would have been a non-issue because the Borough was in the process of redoing the dispatch center to include tables that allowed the employee to stand and work.

On cross-examination, DePaul recalled the April 20, 2013 meeting and the participants which included: Yecco, Young, Mitchell, and himself. DePaul did not recall if Hawthorne was present. Although DePaul could not remember if Mitchell used the exact words of "yes, I am accepting the position of dispatcher", DePaul recalls that was his understanding of what was being said. DePaul reassured Mitchell the Borough would get him the proper training and would work with him, as they all were experiencing a learning curve with this situation. It was never discussed that if Mitchell was not able to obtain the certification through training that he would be subject to termination. At all times relevant, DePaul stated that he did not know if Mitchell had notified anyone of his intentions to retire until after training had started.

Mayor Carl Groon was Mayor of Wildwood Crest for twelve years and in charge of the Department of Public Safety. Mitchell was initially hired as an EMT and had one prior discipline about lying about some issue on the job.

Mitchell was offered the job of Dispatcher but declined it and does not know why. "He was able to do the EMT job. . . even with his issues, he would have been able to be a dispatcher." Mitchell was offered the job because "it would have been a good fit" and "it was close to his then current salary as an EMT." Incidentally, his salary would have been higher than the rest of the dispatchers.

Two years later, the offer of the dispatcher position was open and, again, rejected by Mitchell. After that, they discussed the County dispatch system and the job was no longer opened (March 12, 2015) but instead a local dispatcher, not county dispatcher.

On cross-examination, Mayor Groon testified that Mitchell was not the reason that the Borough joined the County dispatch, in fact, it was a monetary issue with the 2 percent

cap that the Governor imposed, coupled with the fact that a fifth dispatcher is not financially possible.

He confirmed that the offer to Mitchell of the dispatcher position was never put in writing. Mitchell as a dispatcher would have been "good" for Wildwood Crest, but he never took accepted the position and never showed up for training. In fact, Mitchell submitted a letter prior to training that said he would not be attending.

For Appellant

Jasen Mitchell, is currently thirty-seven years old and had been employed by Wildwood Crest as an EMT. He responded to emergencies and provided medical assistance. In 2003, he passed the EMT exam and started at Wildwood Crest soon after. Admittedly he had a hard time passing the test but spent eight years as a full-time EMT.

He recalled that in February 2010, he slipped on ice and fell while on a call as an EMT loading a patient and hurt his knee. He went to a workers' compensation doctor for two years before reaching maximum medical improvement. However, he was told that he was going to need knee surgery by the age of forty-seven.

After the two years, he applied for PERS accidental disability because the doctor said he could not perform the duties of an EMT. Sometime thereafter, he received a letter offering him the position of dispatcher (March 21, 2012; R-2). (R-6). At that time, Mitchell had a lot of questions, especially what would happen if he could not pass the test, or if he could not perform the duties of the job. He had concerns about performing the job duties because, by himself he was concerned about "doing 7 things at once" and the "high turnover rate."

He claims that he was told that if he received an accidental pension, it would cost the Borough "one to two million dollars" over the course of his life and if he had trouble with the job, the town would "cross that bridge" when they got to it. He noted that he

never received anything in writing regarding training. Only orally was he noticed that he must go to training. (R-10). Mitchell thought he was being scammed and was uneasy about the job of dispatcher. Although the salary and seniority were the same, the raises were different and it made no sense to him because the "top out" salary for dispatcher was a little lower. He said he never accepted the position and said he would let them know.

There was clearly an "expectation" from Gecko that he would go to training. However, Mitchell never led them on that he was going to accept the job. In fact, his impression was that he was only offered the job because if he got a pension it would cost the City too much money.

When confronted with Exhibit R-34, Mitchell described that "this was what the Borough was supposed to fill out but did not." However, Mitchell received several letters from pensions that stated. (Exhibits R-8 through R-11.) When confronted with (R-13), Mitchell claimed that the letter came "after the fact" and was "late" on June 5, 2012 or June 6, 2012, and was in response to his May 30 letter and was clearly a rejection of his accidental pension application.

Mitchell testified that he did not go to training because he did not want to go and that he rejected the job to pursue his pension claim. He recalled that on June 4, 2012, the day of training, he was at school performing duties as a DJ for "Play Day" in the school. A detective did surveillance on him and used school video to do surveillance on him. (R-33).

There are allegations that he can perform the duties of the job and is not injured. However, appellant explained that he makes accommodations to get through the day. He is a DJ and owns a Christmas lighting company. He uses hand-trucks and has employees do the work. He noted that the Borough never restricted side-job participation.

He indicated that the PNDA lists for removal on June 11, but nothing after June 4, 2012 (day of training) that said removal. In fact, (R-1) indicates that he failed to show up for work for five consecutive days, from June 4, 2012 through June 8, 2012.

Lastly, he noted that the sedentary nature of the job is also a problem because his knee bothers him when sitting for a long period of time. Also, the fact that the Borough has not brought on a fifth dispatcher is a problem because when there are money problems the people who get fired first are the ones not needed.

On cross-examination, Mitchell testified that he had a diagnosis of a disease similar to dyslexia but was not sure what it was and did not disclose it in his application to Wildwood Crest where it asks for his disability. His application enclosed twenty certificates that he performed fine but he was still worried about not passing the dispatcher test because he thought he would be fired. Again, he was told "we would cross that bridge when we cross it." (R-37).

When he decided to pursue the disability, he claimed that a dispatcher is more complicated and "harder." "An EMT has one job, a dispatcher has as many as five." He claims that Yecco threatened that he would not get a pension. Mitchell claimed that he corresponded to the Borough that he was not attending the training. (R-12). However, the letter is not indicative of that fact.

He still has the DJ and tree lighting business. Fortunately, now as a DJ he has six trailers and the Christmas lighting is "not a small business." He has employees for every business and does not really have to be involved.

Mitchell Hawthorne was formerly employed by Wildwood Crest as a lieutenant in the police department.

He alleges that he talked to Mitchell in March 2012, about putting in papers for disability for the injury that he sustained. He recalled a meeting where Mitchell expressed

concerns about what the dispatcher job entailed and whether or not an EMT and dispatcher were similar.

He recalled that he was ordered by DePaul to issue a letter and scheduled training for Mitchell. So, he did it. He was never "ordered to cancel training" and the Borough still paid for it. (R-10). On June 4, DePaul told him to check the school security cameras and observe Mitchell around the school. He made the recordings as ordered and gave them to the Chief. He remembered that Mrs. Yecco was the one who called the Chief and reported Mitchell at the school on June 14.

There was an indication that there was a "Brady Letter" issued by prosecutor Robert Taylor regarding Michael Hawthorne. The letter noted that Hawthorne is "deceitful and demonstrated dishonesty and lacks integrity." Hawthorne noted that Taylor was the "Judge, Jury and Executioner of Michael Hawthorne." He thinks it is "hogwash" and would never not tell the truth.

On cross-examination, Hawthorne testified that the letter says he is "deceitful and demonstrated dishonesty and lacks integrity." Also, Mitchell never asked for a Union representative, wife, or witness at the meeting, contrary to what Mitchell said.

He was ordered by DePaul to photograph Mitchell if he saw him when not working as an EMT. He saw him using a "stand on and steer" lawn mower. Also, he was asked to be a soccer coach on July 16, 2013. He said the Chief asked him to move one of the school cameras so that it would cover the soccer field. He took photo R-33, because he was following up on DePaul's request (September 10, 2012 lawn mower photo).

Findings Of Fact

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the

circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, **I FIND** as **FACT** that Mitchell was injured on the job when employed as an EMT while loading a patient. **I FURTHER FIND** as **FACT**, that as a reasonable accommodation, Mitchell was offered a position as dispatcher. **I FURTHER FIND** as **FACT** that Mitchell was ordered to attend training as dispatcher and failed to do so.

Interestingly, the underlying facts in this case are somewhat uncontested. In that I mean, all the witnesses testified that Mitchell was injured and offered the job of a dispatcher. However, the divergence is explanations on how it was offered and why he failed to show for the training. It is this explanation where Mitchell lacks credibility. The testimony of appellant's witnesses was especially credible and persuasive. Their testimony, as a whole, was more convincing and explained the logical facts without embellishing or piling on.

Conversely, Mitchell's testimony was not credible in terms of his factual recitation of the cases nor with the manner in which it was given. His own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. Mitchell

simply was not credible, he was evasive and condescending in the tone of his testimony as well as sarcastic. He claims that he was bullied by the Borough in taking the dispatcher job but just wanted to be out on disability. However, it was the conspiracy theory he attempted to portray against him that fell short on believability.

It was obvious that Mitchell attempted to "sell" his version of the facts to the undersigned. His recitation and demonstration of the contact with the Borough officials was not credible nor true.

LEGAL ANALYSIS AND CONCLUSION

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended or removed, the employer must show just cause for its proposed action. The law provides that the duty is to ensure the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and

regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty. In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in Bock, 38 N.J. at 519. In Bock, the officer had received a thirty-day suspension and seventeen minor disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24.

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), http://njlaw.rutgers.edu/collections/oal/ (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a) (2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't., CSV 7553-02, Initial Decision (October 27, 2003), http://njlaw.rutgers.edu/collections/oal/ (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

The rule governing resignation not in good standing is found at N.J.A.C. 4A:2-6.2(b). It provides:

> Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

The Civil Service Code also provides "the appointing authority or the Board may modify the resignation not in good standing to an appropriate penalty or to a resignation in good standing," Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (1963). Although the record may clearly establish that an appellant was absent without authorization in excess of five consecutive business days, if the appellant was unable to work due to medical reasons (no evidence was presented on this issue), a resignation not in good standing should be modified to a resignation in good standing. Sykes v. New Jersey Judiciary, Middlesex Vicinage, CSV 4461-04, Initial Decision (July 12, 2005), adopted, Comm'r (September 23, 2005), <http://njlaw.rutgers.edu/collections/oal/final/csv4461-04.pdf>; Taylor v. New Lisbon Medical Center, CSV 2842-05, Initial Decision (December 9, 2005), adopted, Comm'r (January 18, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv2842-05.pdf>; Salley v. Hudson County Dep't of Roads and Public Property, CSV 11813-09, Initial Decision (January 4, 2011), adopted, Comm'r (February 18, 2011), <http://njlaw.rutgers.edu/collections/oal/final/csv11813-09.pdf>. The validity of modifying a resignation not in good standing has been settled law in this New Jersey for some time. See Weil v. Atl. County Dep't of Public Safety, 97 N.J.A.R.2d (CSV) 413, 418; McLaughlin v. N.J. Civil Serv. Comm'n, 137 N.J. Law 338 (Sup. Ct. 1948), aff'd, 1 N.J. 284 (1949); Griffin v. City of Jersey City, 4 N.J. Super. 81 (App. Div. 1949).

Here, there is no dispute that appellant had medical issues that precluded him from performing the duties of an EMT. There also is no dispute factually that Mitchell was offered a job as a dispatcher, was scheduled to appear for training and failed to appear for the training without notice to the Borough. Respondent argues that Mitchell is seeking relief by asserting he filed his paperwork seeking a disability pension and, unfortunately,

his application for a disability pension does not excuse his failure to appear at training without notice under either the law or equity. I agree.

The Borough of Wildwood Crest is a Civil Service municipality and is, therefore, governed by the Civil Service Act, N.J.S.A. 11A:1-1, et seq. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed towards attainment of merit appointment and broad tenure protection. Moore v. Central Transp. New Jersey Dept. of Corrections, 92 N.J.A.R.2d (CSV) (N.J.Admin.), 1992 WL 240328 (citing Essex Cty. No. 1, N.J. Civ. Serv. Assoc. v. Gibson, 114 N.J. Super. 576, 580-581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972). The Act recognizes the public policy of this State that an appointment authority must not be saddled with an employee who is "absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing." Id.; see also N.J.A.C. 4A:2-6.2.

Here, appellant admits he did not attend the dispatcher training sessions on June 4, 2012 through June 8, 2012. At that time, he was still an employee of the Borough and would have been compensated as such, had he appeared for training. Mitchell argues that he was unaware the training was required because he was not going to accept his accommodation to the position of dispatcher and instead would continue his claim for a disability pension. It is argued that his application for a disability did not act as a resignation of his employment. Respondent argues that he cannot "have his cake and eat it too." "Had appellant simply filed a disability pension application and resigned from his position as an EMT using proper procedures, we would not be in this Court." I agree.

Factually, by his own admission, after filing a disability pension application in March 2012, Mitchell continued to meet with Borough administration and explore reasonable accommodations that would allow him to continue his employment with the Borough. This led to the Borough offering him dispatcher training with the ultimate intent of a lateral transfer to public safety telecommunicator or trainee with the same pay and

status. He never rejected this proposed accommodation, allowing the Borough to make arrangements for training and appellant's future employment.

Respondent's counsel correctly argues that Mitchell's indecisiveness in accepting or rejecting a reasonable accommodation resulted in an expense to the Borough when he failed to show for training. As expressed through the testimony of Yecco, appellant's claim that his filing of a disability pension application somehow altered his position with the Borough is without merit. Respondent further correctly argues that, in order to collect as an employee in the Public Employees' Retirement System ("PERS"), said employee must be permanently and totally disabled from participating in work their employer has available. Kelly v. Board of Trustees, Public Employees' Retirement System, 2017 WL 1548705 (App. Div. 2017), (citing Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 130-31 (App. Div. 2008) (finding in order to establish entitlement to ordinary benefits, an applicant must establish an incapacity to perform duties in the general area of their regular employment, rather than merely showing an inability to perform his or her specific job). By contrast, a public safety employee under the Police and Firemen's Retirement System ("PFRS"), may collect a disability pension and continue working in a non-police and fire related position. See State of New Jersey Division of Pensions and Benefits Fact Sheet #86, Post-Retirement Employment Restrictions. Because of this distinction, appellant's argument that his application for a disability pension somehow impacts his obligations to the Borough, under the circumstances, is not appropriate because he was not permanently and totally disabled and could complete the duties which the Borough was attempting to assign. Bueno at 131 (finding an applicant is not entitled to benefits by merely "establishing incapacity to performing duties in the general area of their employment," but rather the applicant must demonstrate physical inability to perform substantially different duties or produce evidence of general physical unemployability).

Respondent argues correctly that it was obvious that Mitchell sought to keep the Borough and the potential dispatcher position in limbo while proceeding with his disability application. The determination as to whether or not there is a reasonable accommodation

for his disabilities must pre-date a determination on a PERS disability application because the application cannot be processed until a determination on whether a reasonable accommodation was necessary. Mitchell would have had to resign from his position as EMT or be terminated for inability to perform duties. That is not the case here.

Under N.J.A.C. 4A:2-6.2(b), five or more consecutive days absence without approval of an employee's supervisor is regarded as abandonment of the position and deemed a resignation not in good standing. In the current instance, Mitchell did not return to work for training.

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Perth Amboy v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at this de novo hearing are whether Kinion is guilty of the charge brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry, 81 N.J. 571; Bock, 38 N.J. 500. In this matter, the City bears the burden of proving the charges against Kinion by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Suero, CSV 5039-04, Final Decision (June 22, 2005), <http://njlaw.rutgers.edu/collections/oal/>.

There is no debate that Mitchell failed to report to work for training, or that he failed to contact anyone to advise them. Mitchell's attempts to cloud the issue by arguing that he was confused, did not understand, and was unaware of the training is not persuasive.

The record establishes that Mitchell had the duty to appear for training. Based upon the foregoing, I **CONCLUDE** that the Borough has met its burden of proving by a preponderance of the credible evidence, that Mitchell was absent from training duty for five or more consecutive business days without approval of his supervisor. It is within the discretion of an appointing authority as to whether a request for a leave of absence should

or should not be granted. See Smith v. College of New Jersey, CSV 977-98, Final Decision (October 14, 1998), <http://njlaw.rutgers.edu/collections/oal/>. I, therefore, **CONCLUDE** that the Borough did not grant Mitchell any leave of absence from the training. Accordingly, I **CONCLUDE** that Mitchell's absence from training effectuated a resignation not in good standing. Mitchell is charged with resigning from his position, not in good standing, pursuant to N.J.A.C. 4A:2-6.2(b). Based upon the above findings, I **CONCLUDE** that Mitchell has resigned from his position not in good standing effective June 1, 2012.

In an appeal, from a major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.A.C. 11A:2-21, N.J.A.C. 4A:2-1.4(a). This burden requires the appointing authority to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty of the stated offenses. Atkinson, 37 N.J. 143; Polk, 90 N.J. 550. Here, the respondent charges the appellant with resignation not in good standing.

Based on testimonial and documentary evidence presented, in regard to charges creating violations of N.J.A.C. 4A:2-2.3(a), I **CONCLUDE** that the Civil Service Rule N.J.A.C. 4A:2-6.2(b), resignation not in good standing, if an employee is absent from duty for five or more consecutive business days, or has not returned to work for five or more business days following an approved leave of absence, without the approval of his superior, he shall be considered to have abandoned his position and shall be recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b)(c). In the instant matter, appellant was absent for more than five consecutive days without a supervisor's approval. Respondent has proven that Mitchell abandoned his employment by failing to attend training. I, therefore, **CONCLUDE** that the penalty of a resignation not in good standing on the charges as set forth herein, is reasonable and warranted and the charge should be upheld.

ORDER

It is **ORDERED** that Jasen T. Mitchell is hereby deemed to have **RESIGNED** from his position not in good standing, effective June 1, 2012.

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

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

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

May 15, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 5/15/18

Date Mailed to Parties: 5/15/18

/dw

APPENDIX

WITNESSES

For Appellant:

Jasen T. Mitchell

Michael Hawthorne

For Respondent:

Kevin Yecco

Neil Young

Former Borough Chief of Police Thomas DePaul I

Former Borough Mayor Carl Groon

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action to Jasen Mitchell dated June 11, 2012

R-2 Letter dated March 21, 2012, by clerk/administrator Kevin Yecco to Mr. Mitchell

R-3 Letter dated April 10, 2012, from NJ Division of Pension and Benefits to Borough asking if there is "any other job duty available" for Mr. Mitchell

R-4 Shore Orthopedics modified duty form dated April 10, 2012

R-5 Shore Orthopedics maximum medical improvement discharge with restrictions dated April 17, 2012

R-6 Exchange of emails dated April 17, 2012, between clerk/administrator Yecco and the Borough's workers' compensation senior lost time adjuster at Scribal Associates concerning reasonable accommodation position

R-7 Letter from NJ Division of Pensions dated April 23, 2012, to Borough CFO Neil Young - notice of Mitchell submission application for disability retirement

R-8 Second notice letter from NJ Bureau of Retirement dated April 27, 2012, to Mitchell for documents needed

R-9 Letter from Borough CFO Neil Young dated May 1, 2012, to NJ Division of Pensions as to CFO's inability to complete form

R-10 Letter from Lieutenant Michael Hawthorne, Sr. to Mitchell dated May 16, 2012 – depletion of accumulated time and assignment to telecommunicator operator notice effective June 2, 2012, with copies of training enrollment

R-11 Final notice from NJ Bureau of Retirement to Mitchell dated May 29, 2012 – documents needed for application

R-12 Letter from Mitchell to "Whom It May Concern" dated May 30, 2012 – submission of application, accidental disability pension

R-13 Letter dated June 1, 2012, from Kevin Yecco, Clerk, to J. Mitchell regarding depletion of time, reassignment of duties, opposition to disability retirement, no approved sick leave

R-14 Memo from Lieutenant Michael Hawthorne to Chief DePaul dated June 27, 2012, with copy of May 16, 2012, letter of instructions to J. Mitchell providing required training and dates and instructions for same [See exhibit No. 10]

R-15 Copies dated June 2, 2012, NJ Civil Service Commission job specifications for public safety telecommunicator and emergency medical technician job specifications

R-16 Agreement between Borough of Wildwood Crest and Wildwood Crest police safety telecommunicators, January 1, 2011 through December 31, 2013, with approval resolution

R-17 Agreement between Borough of Wildwood Crest and Wildwood Crest rescue career employees, January 1, 2012 through December 31, 2014, with approval resolution

R-18 Copy of N.J.A.C. 4A:2-6.1, resignation in good standing

R-19 Copy of N.J.A.C. 4A:2-6.2, resignation not in good standing

R-20 Employment application of Jasen Mitchell dated January 12, 2006

R-21 NJ Civil Service Commission disciplinary action history, J. Mitchell suspension, September 21, 2009 to December 4, 2009

R-22 Copy of City of Wildwood resolution and contract awarding grass cutting bid to Back to Roots LLC (entity owned by Jasen Mitchell)

R-23 Wildwood Crest incident report dated August 23, 2012, Chief Thomas DePaul, observation of Jasen Mitchell providing landscaping services at Fox Park, Wildwood

R-24 Final notice of disciplinary action dated August 23, 2012, resignation not in good standing

6-20-18

A-5

STATE OF NEW JERSEY

In the Matter of Michael Polizzi, City of Passaic, Department of Public Safety

CSC DKT. NO. 2016-3805
OAL DKT. NO. CSV 07694-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 22, 2018 BW

The appeal of Michael Polizzi, Fire Fighter, City of Passaic, Department of Public Safety, 44 working day suspension (24-hour days), on charges, was heard by Administrative Law Judge Richard McGill, who rendered his initial decision on April 24, 2018. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 44 working day suspension (24-hour days) to a 32 working day suspension (24-hour days).

Since the penalty has been modified, the appellant is entitled to 12 working days (24-hour days) of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the

penalty was modified by the Commission, charges were sustained and major discipline was imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 44 working day (24-hour) suspension to a 32 (24-hour day) working day suspension. The Commission further orders that appellant be granted 12 working days (24-hour days) of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Unit H
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07694-16
AGENCY DKT. NO. 2016-3805

IN THE MATTER OF MICHAEL POLIZZI, CITY OF PASSAIC DEPARTMENT OF PUBLIC SAFETY.

Colin M. Lynch, Esq., for appellant Michael Polizzi (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Philip G. George, Esq., for respondent City of Passaic Department of Public Safety

Record Closed: April 16, 2018 Decided: April 24, 2018

BEFORE **RICHARD McGILL**, ALJ:

Michael Polizzi ("appellant") appeals from a 144-day suspension on charges from the position of Firefighter with the City of Passaic Department of Public Safety ("respondent").[1] The charges against appellant are chronic and excessive absenteeism, conduct unbecoming a public employee, neglect of duty and other sufficient cause in the form of violation of departmental rules and regulations. The

[1] 144 eight-hour days are equivalent to 44 24-hour days or approximately six months.

specification states that appellant was late for his shift on January 9, 2016, and he failed to report his tardiness to his Battalion Chief.

PROCEDURAL HISTORY

Respondent notified appellant of the charges by Preliminary Notice of Disciplinary Action dated January 13, 2016. Thereafter, respondent informed appellant by Final Notice of Disciplinary Action dated April 6, 2016, that the charges were sustained and that the disciplinary action was a suspension for a period of 144 eight-hour working days.

Appellant requested a hearing on April 21, 2016, and the matter was transmitted to the Office of Administrative Law on May 23, 2016, for determination as a contested case. Hearings were conducted on January 29 and 30, 2018, at the Office of Administrative Law in Newark, New Jersey, and the record closed on April 16, 2018, upon receipt of written summations.

ISSUES

The issues in this proceeding are whether the charges should be sustained and, if so, whether the disciplinary action imposed by respondent is warranted. Appellant's main contention is that the suspension for a period of 144 working days is excessive.

FACTS

Based upon the evidence presented at the hearing, I **FIND** as follows. Appellant has been employed by respondent for nine years as a Firefighter. On January 9, 2016, appellant was scheduled to work a 24-hour shift beginning at 8:00 a.m. Appellant's daughter, who was just under two years old, was seen by a doctor on January 5 and 7, 2016, and was diagnosed with a double ear infection, clinical pneumonia and an exacerbation of her asthma. As a result, appellant's daughter missed school from

January 4 to January 8, 2016, and she was in a hospital emergency room from late January 6, 2016, to early January 7, 2016. Appellant was awake until approximately 5:00 a.m. on January 9, 2016.

Prior to 8:00 a.m. on January 9, 2016, there was a fire in a three-story house in Passaic. Appellant usually arrived before 7:30 a.m. for a shift to begin at 8:00 a.m. When appellant had not arrived by 7:30 a.m., Lt. Stephen Mastroberte called appellant on the phone to find out where he was. Appellant had fallen asleep, and the telephone call woke him up. Appellant said that he would call his Battalion Chief and come to work as soon as possible. Lt. Mastroberte said that he would notify the Battalion Chief, and appellant arrived at work at 8:30 a.m.

At the time, appellant was assigned to Engine 4 at the West Side Fire Department. By the time appellant got to work, Engine 4 had responded to the fire alarm shorthanded.

The Manual of Rules and Regulations of the Passaic Fire Department states in part as follows:

> SECTION 10 Tours of duty for both Superior Officers and members shall be in accordance with the prescribed department's working schedule. All members of the department shall report to their respective company or units no later than **ten (10) minutes** before their prescribed time. Temporary changes to such prescribed departmental tours of duty either for Officers or members shall be made only by permission of the Chief of the Department.
>
> . . . .
>
> SECTION 94 Members shall not absent themselves from quarters, fires, or any assignment without permission of the Officer in command.
>
> . . . .
>
> SECTION 97 Members shall not do anything which may bring discredit to the department.

Respondent's Employee Handbook states in pertinent part as follows:

Causes for discipline include, but are not limited to the following:

. . . .

- Failure to report to work the day or days prior to or following a vacation, holiday and/or leave, and/or any other unauthorized day of absence.

. . . .

- Unauthorized absence from work area, and/or roaming or loitering on the premises during scheduled work hours.

. . . .

- Conduct unbecoming a public employee.

On February 15, 2011, appellant was given a written warning, because equipment was in poor condition when it should be inspected and operational. On October 9, 2012, appellant was given a written reprimand for chronic and excessive absenteeism or lateness, because he was late for duty on October 1 and 5, 2012. On May 20, 2013, appellant was given a written reprimand, because he was late for work on May 17, 2013. On March 12, 2015, appellant was counseled in regard to procedure of calling available after being on sick leave because he had not called to report that he was available for duty. On August 27, 2017, appellant was given a 45.5-day suspension, because he was asleep while on duty and did not respond to three separate announcements with the result that he was left at the Fire Station while other Firefighters responded to the call.

On June 18, 2015, appellant was diagnosed with severe obstructive sleep apnea - hyponea syndrome. The recommendation was use of a CPAP machine nightly with heated humidification. On August 11, 2015, appellant had a fitness for duty evaluation. The determination was that appellant could perform the essential duties of his job as a Firefighter contingent upon his ability to use the CPAP machine during the time that he sleeps while at work.

LAW AND ANALYSIS

An appointing authority may discipline an employee for chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). The appointing authority's action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both the charge and the penalty. West New York v. Bock, 38 N.J. 500, 519 (1962). In an appeal concerning a major disciplinary action, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The appointing authority must prove its case by a fair preponderance of the believable evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971).

The first charge against appellant is chronic and excessive absenteeism, which is interpreted to include lateness. The importance of a firefighter being present for his shift is apparent, and the fire in this matter underscores the point. Appellant was previously disciplined for lateness on October 1 and 5, 2012, and May 17, 2013. Appellant was late again on January 9, 2016. Under the circumstances, the charge of chronic lateness must be sustained. This lateness also violates Sections 10 and 94 of respondent's Rules and Regulations.

The second charge against appellant is conduct unbecoming a public employee. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a government unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). A finding of misconduct need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v.

Police Dept. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dept. of Civil Serv., 17 N.J. 419, 429 (1955).

Here, appellant was scheduled to be on duty for a shift beginning at 8:00 a.m. on January 9, 2016. Appellant was not present when the other firefighters on his shift had to respond to a fire shorthanded. It seems evident that this situation would tend to undermine morale and public confidence in the Fire Department. Appellant's conduct fell short of the implicit standard of good behavior for a public employee. Therefore, the charge of conduct unbecoming a public employee must be sustained.

Another charge against appellant is neglect of duty. Here, appellant was not present for his beginning of his assigned shift. Therefore, the charge of neglect of duty must be sustained. Section 93 of respondent's Rules and Regulations also prohibits neglect of duty.

The final charge against appellant is violation of departmental Rules and Regulations. Based upon the prior discussion, appellant's tardiness violated Sections 10, 93 and 94 of respondent's Rules and Regulations. It follows that this charge must be sustained.

Based upon the above, I **CONCLUDE** that the following charges must be sustained: (1) chronic or excessive lateness; (2) conduct unbecoming a public employee; (3) neglect of duty; and (4) violation of the above-mentioned departmental Rules and Regulations.

Disciplinary Action

The factors to consider with respect to the disciplinary action are the nature of the charges sustained and appellant's past record. West New York v. Bock, 38 N.J. at 523-24. Progressive discipline is a recognized and accepted principle in choosing the appropriate disciplinary action. In re Herrmann, 192 N.J. 19, 33 (2007).

In the context of a fire department, lateness can have serious consequences as demonstrated by the facts in this case. In addition, appellant's past record contains five disciplinary actions including a suspension for the equivalent of two and a half months. On the other hand, the record in this proceeding indicates that appellant's lateness on January 9, 2016, was only the fourth in his nine-year career. Further, there were mitigating circumstances in that appellant was awake until 5:00 a.m. on January 9, 2016, caring for his sick daughter.

Based on progressive discipline, the suspension in this matter should be longer than the previous suspension for two and a half months. Balancing the various considerations in this matter, I **CONCLUDE** that the disciplinary action in this matter should be a suspension for a period of four months.

Accordingly, it is **ORDERED** that:

1. The charge of chronic or excessive absenteeism or lateness be sustained.
2. The charge of conduct unbecoming a public employee be sustained.
3. The charge of neglect of duty be sustained.
4. The charge of violation of departmental Rules and Regulations be sustained.
5. The disciplinary action in this matter shall be a suspension for a period of ninety-six eight-hour working days, which would be equivalent to a four-month suspension.

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

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

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

Apr. 24, 2018
DATE

RICHARD McGILL, ALJ

Date Received at Agency: April 24, 2018

Date Mailed to Parties: April 24, 2018

ljb

APPENDIX

WITNESS LIST

For appellant:

Stephen Mastroberte
Michael Polizzi

For respondent:

Patrick Trentacost
Vivianna Lamm

EXHIBIT LIST

A-4 Letter dated February 2, 2016, from Lt. Stephen Mastroberte
A-5 Letter from Michele R. Segal, M.D.
A-6 Letter dated January 18, 2016, from Michael Polizzi
A-8 Report from The Valley Hospital
A-12 Sleep study records from Department of Veteran Affairs
A-14 Report dated August 11, 2015, from Fitness for Duty Examination

R-1 Excerpt from Manual of Rules and Regulations of the Passaic Fire Department
R-2 Excerpt from the Employee Handbook of the City of Passaic
R-3 Undated letter from Michael Polizzi to Chief Trentacost
R-4 Preliminary Notice of Disciplinary Action dated January 13, 2016
R-5 Hearing Officer's Report dated March 18, 2016
R-6 Final Notice of Disciplinary Action dated April 6, 2016

R-7 Memorandum dated June 1, 2015, from Lt. James Kovacs to Temp. Battalion Chief Kevin Colavitti

R-8 Final Notice of Disciplinary Action dated August 27, 2015

R-9 Memorandum dated May 26, 2009, from Captain K. Payne to Chief P. Trentacost

R-10 Written Warning dated February 15, 2011

R-11 Written Reprimand dated October 9, 2012

R-12 Written Reprimand dated May 20, 2013

R-13 Notice of Action dated March 12, 2015

R-14 Department Order dated March 27, 2014

R-15 Daily Report dated January 9, 2016

6-20-18

A-1

STATE OF NEW JERSEY

In the Matters of Janis Reddick and Sharonda Carraway-Garnes
Newark Public School District

CSC DKT. NOS. 2017-3347 & 2017-3593
OAL DKT. NOS. 06114-17 & 07194-17
(Consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 20, 2018 BW

The Civil Service Commission, at its meeting of June 20, 2018, acknowledged the attached consolidated settlements in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

JANIS REDDICK,
Appellant,
v.
NEWARK PUBLIC SCHOOL DISTRICT,
Respondent.

OAL DKT. NO. CSV 06114-17
AGENCY DKT. NO. 2017-3347

SHARONDA CARRAWAY-GARNES,
Appellant,
v.
NEWARK PUBLIC SCHOOL DISTRICT.

OAL DKT NO. CSV 07194-17
AGENCY DKT NO. 2017-3593

Joseph J. Fusella, Esq., for appellant Janis Reddick

Eugene G. Liss, Esq., for appellant Sharonda Carraway-Garnes

Adam Herman, Esq., for respondent Newark Public School District (Adams Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: May 18, 2018 Decided: May 24, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

The Civil Service Commission transmitted these matters to the Office of Administrative Law (OAL) on May 3, 2017 and May 22, 2017, respectively, for

determinations as contested cases. The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 24, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency:

Date Mailed to Parties: MAY 29 201

lr

attachment

SETTLEMENT AGREEMENT AND RELEASE

Janis Reddick v. Newark Public School District
OAL Docket No.: CSV 06114-2017N
Agency Reference No.: 2017-3347

2018 MAY 21 A 8:12

This Settlement Agreement and Release ("Agreement") is made this _____ day of April 2018, by and between Appellant Janis Reddick ("Reddick" or "Appellant") and Respondent State-Operated School District of the City of Newark, commonly known as Newark Public Schools ("NPS" or "Respondent") (collectively, the "Parties").

WHEREAS, on or about January 31, 2017, Respondent issued a Preliminary Notice of Disciplinary Action to Appellant, Teacher Aide, asserting Charges of Conduct Unbecoming, Failure to Perform Duties, and Other Sufficient Cause; and

WHEREAS, on or about February 10, 2017, Respondent issued a Revised Preliminary Notice of Disciplinary Action to Appellant asserting Charges of Conduct Unbecoming, Failure to Perform Duties, and Other Sufficient Cause; and

WHEREAS, the Departmental Hearings of the above Charges took place on February 21, 2017 and March 21, 2017, during which the Parties presented evidence before Hearing Officer Joseph Licata, Esq.; and

WHEREAS, Hearing Officer Licata issued a Recommended Order dated April 11, 2017 sustaining all charges except for Specification A.1, and recommending the penalty of termination, which was adopted by Respondent on April 12, 2017; and

WHEREAS, Appellant initiated the instant appeal with the Civil Service Commission ("CSC"); and

WHEREAS, without waiving their respective positions and without any admissions as to liability, the Parties wish to fully resolve the pending appeal and Administrative Law Hearing, and all related claims and defenses by and between them pursuant to the terms and conditions set forth below; and

NOW THEREFORE, the Parties hereby agree to the following terms as full and final settlement of the above matter:

1. This Agreement sets forth all of the terms and conditions of the Parties' agreement.

2. Appellant agrees to withdraw the instant appeal and Action with prejudice.

3. The Parties agree that Specification B.2 as set forth in the February 10, 2017 Revised Preliminary Notice of Disciplinary Action is hereby sustained.

4. The Parties agree that the remaining charges are hereby dismissed.

5. The District shall convert Appellant's termination to an unpaid six (6) month suspension. The unpaid suspension period shall be recorded as February 2, 2017 through August 2, 2017.

6. Between August 3, 2017 and the actual date Appellant is reinstated, Appellant will be deemed to have been placed on an unpaid leave of absence.

7. Appellant understands and agrees that Respondent retains the managerial prerogative and sole discretion to assign Appellant to any school it deems fit.

8. The District will issue a revised Final Notice of Disciplinary Action.

9. Appellant shall not receive any back pay or any payment as part of this settlement.

10. Appellant shall not receive any sick, vacation or personal days for any time between February 2, 2017 and the date of her reinstatement.

11. The Parties agree that Appellant is not a prevailing party, and as such, Appellant expressly waives any claims for attorneys' fees incurred in connection with this action.

12. Appellant fully understands that this Agreement can be used by Respondent in future disciplinary proceedings.

13. In exchange for the consideration set forth in Paragraphs 4, 5 and 6, the sufficiency of which is hereby acknowledged, Appellant hereby waives, releases and discharges any and all claims or rights that he has or may have against Respondent, the Superintendent, Board of Education and Board members, and any and all other officers, employees, representatives, agents, successors and assigns of Respondent (collectively, the "Released Parties"), including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Appellant's employment, up until the time that this agreement is fully executed and approved by the necessary administrative agencies. It specifically includes, without limitation, all claims which Appellant may have regarding insurance, COBRA, tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and

Hour Law; the Civil Service Act, the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, insurance, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Notwithstanding the foregoing, Appellant does not waive or release any workers' compensation claim.

14. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Appellant of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has 7 days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Respondent either by hand or by certified mail within the 7 day period.

15. This Agreement may not be modified, altered, changed, discharged, terminated or waived except upon express written consent of the Parties.

16. Appellant acknowledges that she has entered into this Agreement voluntarily and hereby signs it without duress or coercion, and with the opportunity to consult counsel.

17. This Agreement shall be governed by the laws of the State of New Jersey.

18. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.

19. The Parties agree to keep confidential and not share any information as to the terms of the settlement agreement and release, except as required by law.

20. This Agreement shall not serve as a precedent for any other employee or matter.

21. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Agreement shall be fully enforceable.

22. The Parties acknowledge that they have entered into this Agreement voluntarily, with the assistance of counsel, and hereby sign it without duress or coercion.

23. This Agreement shall be governed by the laws of the State of New Jersey.

24. The undersigned representative of the Respondent represents and warrants that she is authorized and empowered to sign this Agreement on behalf of the Respondent and is able to bind the Respondent to the terms of this Agreement.

25. This Agreement is also subject to the approval of the Office of Administrative Law and the Civil Service Commission.

26. This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

The Parties hereby acknowledge their agreement to the terms and conditions set forth above by signing below.

APPELLANT
JANIS REDDICK

By: Janis Reddick

Dated: 5/8/18

RESPONDENT
NEWARK PUBLIC SCHOOLS

By: Dr. Yolanda Mendez

Dated: 5/14/18

SETTLEMENT AGREEMENT AND RELEASE

Sharonda Carraway-Garnes v. Newark Public School District
OAL Docket No.: CSV 07194-17-2017N
Agency Reference No.: 2017-3593

This Settlement Agreement and Release ("Agreement") is made this 3 day of ~~April~~ May 2018, by and between Appellant Sharonda Carraway-Garnes ("Carraway-Garnes" or "Appellant") and Respondent State-Operated School District of the City of Newark, commonly known as Newark Public Schools ("NPS" or "Respondent") (collectively, the "Parties").

WHEREAS, on or about January 31, 2017, Respondent issued a Preliminary Notice of Disciplinary Action to Appellant, Teacher Aide, asserting Charges of Conduct Unbecoming, Failure to Perform Duties, and Other Sufficient Cause; and

WHEREAS, the Departmental Hearings of the above Charges took place on February 21, 2017 and March 21, 2017, during which the Parties presented evidence before Hearing Officer Joseph Licata, Esq.; and

WHEREAS, Hearing Officer Licata issued a Recommended Order dated May 3, 2017 sustaining all charges except for Specification Conduct Unbecoming A.1, A.4 and A.5 in part; Failure to Perform Duties A.1, A.4 and A.5 in part; and Other Sufficient Cause A.1, A.4, and A.5 in part) and recommending the penalty of termination, which was adopted by Respondent on May 4, 2017; and

WHEREAS, Appellant initiated the instant appeal with the Civil Service Commission ("CSC"); and

WHEREAS, without waiving their respective positions and without any admissions as to liability, the Parties wish to fully resolve the pending appeal and Administrative Law Hearing, and all related claims and defenses by and between them pursuant to the terms and conditions set forth below; and

NOW THEREFORE, the Parties hereby agree to the following terms as full and final settlement of the above matter:

1. This Agreement sets forth all of the terms and conditions of the Parties' agreement.

2. Appellant agrees to withdraw the instant appeal and Action with prejudice.

3. The Parties agree that Specification B.2 as set forth in the January 31, 2017 Preliminary Notice of Disciplinary Action is hereby sustained.

4. The Parties agree that the remaining charges are hereby dismissed.

5. The District shall convert Appellant's termination to an unpaid six (6) month suspension. The unpaid suspension period shall be recorded as February 2, 2017 through August 2, 2017.

6. Between August 3, 2017 and the actual date Appellant is reinstated, Appellant will be deemed to have been placed on an unpaid leave of absence.

7. Appellant understands and agrees that Respondent retains the managerial prerogative and sole discretion to assign Appellant to any school it deems fit.

8. The District will issue a revised Final Notice of Disciplinary Action.

9. Appellant shall not receive any back pay or any other payment as part of this settlement.

10. Appellant shall not receive any sick, vacation or personal days for any time between February 2, 2017 and the date of her reinstatement.

11. The Parties agree that Appellant is not a prevailing party, and as such, Appellant expressly waives any claims for attorneys' fees incurred in connection with this action.

12. Appellant fully understands that this Agreement can be used by Respondent in future disciplinary proceedings.

13. In exchange for the consideration set forth in Paragraphs 4, 5 and 6, the sufficiency of which is hereby acknowledged, Appellant hereby waives, releases and discharges any and all claims or rights that he has or may have against Respondent, the Superintendent, Board of Education and Board members, and any and all other officers, employees, representatives, agents, successors and assigns of Respondent (collectively, the "Released Parties"), including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Appellant's employment, up until the time that this agreement is fully executed and approved by the necessary administrative agencies. It specifically includes, without limitation, all claims which Appellant may have regarding insurance, COBRA, tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the Civil Service Act, the New Jersey Equal Pay Law;

the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, insurance, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Notwithstanding the foregoing, Appellant does not waive or release any workers' compensation claim.

14. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Appellant of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has 7 days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Respondent either by hand or by certified mail within the 7 day period.

15. This Agreement may not be modified, altered, changed, discharged, terminated or waived except upon express written consent of the Parties.

16. Appellant acknowledges that she has entered into this Agreement voluntarily and hereby signs it without duress or coercion, and with the opportunity to consult counsel.

17. This Agreement shall be governed by the laws of the State of New Jersey.

18. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.

19. The Parties agree to keep confidential and not share any information as to the terms of the settlement agreement and release, except as required by law.

20. This Agreement shall not serve as a precedent for any other employee or matter.

21. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Agreement shall be fully enforceable.

22. The Parties acknowledge that they have entered into this Agreement voluntarily, with the assistance of counsel, and hereby sign it without duress or coercion.

22. The Parties acknowledge that they have entered into this Agreement voluntarily, with the assistance of counsel, and hereby sign it without duress or coercion.

23. This Agreement shall be governed by the laws of the State of New Jersey.

24. The undersigned representative of the Respondent represents and warrants that she is authorized and empowered to sign this Agreement on behalf of the Respondent and is able to bind the Respondent to the terms of this Agreement.

25. This Agreement is also subject to the approval of the Office of Administrative Law and the Civil Service Commission.

26. This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

The Parties hereby acknowledge their agreement to the terms and conditions set forth above by signing below.

APPELLANT
SHARONDA CARRAWAY-GARNES

By: _____

Dated: 5/8/18

RESPONDENT
NEWARK PUBLIC SCHOOLS

By: _____

Dated: 5/14/18

6-20-18

A-6

STATE OF NEW JERSEY

In the Matter of Mariela Rivera
Essex County, Department of
Corrections

CSR DKT. NO. 2018-1777
OAL DKT. NO. CSV 00265-18

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 22, 2018 BW

The appeal of Mariela Rivera, County Correction Officer, Essex County, Department of Corrections, removal effective January 4, 2018, on charges, was heard by Administrative Law Judge Ellen S. Bass, who rendered her initial decision on May 24, 2018 reversing the removal. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on June 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority from December 18, 2017 to the actual date of reinstatement. *See N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Public Safety*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues

concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to her permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Mariela Rivera. The Commission further orders that appellant be granted back pay, benefits, and seniority from December 18, 2017 to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT.NO. CSR 00265-18
AGENCY DKT. NO. N/A

IN THE MATTER OF MARIELA RIVERA, ESSEX COUNTY DEPARTMENT OF CORRECTIONS.

Nicholas Palma, Esq., for Appellant

Jill Caffrey, Assistant County Counsel, for Respondent (Courtney Gaccione, Essex County Counsel, attorney)

Record Closed: May 23, 2018 Decided: May 24, 2018

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Mariela Rivera, a Corrections Officer formerly employed by the Essex County Department of Corrections (the County), appeals the termination of her employment. The County charged Rivera with conduct unbecoming an employee after she was criminally charged with harboring a criminal. Rivera denies that she engaged in criminal activity; the charges against her were dismissed after she successfully completed a Pretrial Diversion Program.

PROCEDURAL HISTORY

On January 4, 2016, Rivera was indefinitely suspended, per a Preliminary Notice of Disciplinary Action (PNDA) issued on February 25, 2016. That suspension came in the aftermath of a criminal complaint filed against her, and was imposed pending disposition of the criminal charges. The criminal charges were filed on September 24, 2015, and were dismissed on December 18, 2017, after Rivera successfully completed six months of a Pretrial Diversion Program, per an agreement she reached with the U.S. Attorney's Office dated May 17, 2017.

Rivera was still on an unpaid suspension, when, on September 12, 2017, the County again served her with a PNDA in which it sought her removal. The specifications provided as follows:

> On August 30, 2017, it was learned that Employee, a Corrections Officer at the Essex County Correctional Facility, entered into an Agreement for Pretrial Diversion on May 15, 2017. Previously this employee was arrested and charged with United District Court Criminal Complaint Mag. No 15-8033 dated September 24, 2015 for violating Title 18, United States Code, Section 1071 and Section 2.
>
> Specifically, the employee was charged with knowingly and intentionally harboring and concealing Omar Serrano, a person for whose arrest a warrant and process had been issued under the provision of a law of the United States, so as to prevent the discovery and arrest of Omar Serrano, after notice and knowledge of the fact that a warrant and process had been issued for the apprehension of Omar Serrano, and which warrant had been issued on a felony charge.
>
> As a result of the violations set forth above, employee's conduct rises to the level of Conduct Unbecoming a Public Employee and therefore the employee's continued suspension and ultimate removal are necessary to maintain the safety, health, order and/or effective operation of the Department of Corrections.
>
> [R-2].

Following a Departmental hearing conducted on November 20, 2017, the County served Rivera with a Final Notice of Disciplinary Action (FNDA) dated December 4, 2017, sustaining charges of conduct unbecoming a public employee, and other sufficient cause, and removing Rivera from her position of employment effective January 4, 2016.[1]

Rivera filed an appeal with the Office of Administrative Law (OAL) on December 26, 2017. At a prehearing conference conducted via telephone on January 22, 2018, counsel for the County asked that the matter not be scheduled until May 2018, to accommodate the schedule of the assigned attorney who was on a leave of absence. Counsel for Rivera consented to May 9, 2018, as a hearing date, and moreover agreed to toll the 180-day requirements of N.J.S.A. 40A:14-201(a). See also: N.J.S.A. 40A: 14-201b.

The hearing was conducted on May 8, 2018. At the request of counsel, post-hearing written submissions were filed on May 9 and 22, and 23, 2018, at which time the record closed. As this decision was issued on May 24, 2018, and in light of appellant's waiver, forty-four days have elapsed from filing to decision.

FINDINGS OF FACT

Rivera had been employed by the County since 2006 when, on September 24, 2015, a criminal complaint was filed against her. The complaint alleged that she knowingly and intentionally harbored and concealed Omar Serrano, a person for whose arrest a warrant and process had been issued. At the time, Serrano was Rivera's husband. A narrative that accompanies the criminal complaint states that, on the morning in question, Federal Bureau of Investigation (FBI) agents arrived at a two-family home in Newark, New Jersey to execute an arrest warrant for Serrano. The author of the narrative, Paulo Oliveria, indicates that law enforcement knocked on the front door for some fifteen minutes; and during that time, and after peering out the window, Rivera advised her husband to go to a separate upstairs apartment, and only

[1] The removal was retroactive to the date of the suspension without pay.

then opened the door to her residence. The FBI agents duly identified themselves, but Rivera advised that she did not know where to locate Serrano, and that she had not seen him for several days. After conducting a search of her apartment, and concluding that Serrano was not there, the officers proceeded to the upstairs apartment. They ultimately entered the apartment forcibly, and found Serrano there with an elderly female. According to Oliveria, Rivera subsequently supplied a video-recorded statement admitting that Serrano had been at her apartment that morning and that she had assisted Serrano in attempting to elude arrest by hiding him upstairs.

Oliveria's statement was accepted into evidence, because hearsay is admissible in administrative proceedings. However, in accordance with the "residuum rule," a factual finding cannot be based on hearsay alone. Weston v. State, 60 N.J. 36 (1972). As the Weston court stated:

> Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.
>
> [Id. at 51]

The Uniform Administrative Procedure Rules are in accord, and require that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). Hearsay evidence must be accorded the weight deemed appropriate when the nature, scope and character of the evidence, together with the circumstances of its creation and production, are taken into account. N.J.A.C. 1:1-15.5(a).

No competent evidence was offered to corroborate Oliveria's version of the events; nor was the recorded statement to which he refers offered into evidence. A representative of the County, Sergeant Joseph Regateiro, readily admitted that he had

no personal knowledge regarding the events that led to Rivera's arrest. He based his recommendation for removal exclusively on the paperwork available, to include the criminal complaint and the Pretrial Diversion Agreement. The only witness with first-hand knowledge of the events of September 2015 was Rivera herself. And she told a very different story.

Rivera's testimony was entirely uncontroverted. I thus **FIND** that on September 24, 2015, at about 7:00 a.m., Rivera was at home in the master bedroom of her apartment, which was in the rear of the unit, and the furthest point from the front door. To access the apartment, which was part of a two-family house, a visitor would enter an outside front door, and then climb a few steps to the door to Rivera's residence. Another flight of stairs led to an upstairs apartment. Rivera was nursing her newborn baby, having given birth via cesarean section on September 4, 2015, a mere twenty days earlier. She has two small dogs. Although they are prone to barking, that morning their barking became incessant, and Rivera became concerned.

She got up, but moved slowly, because she was still recovering from surgery. Rivera dressed herself, gathered her baby, and proceeded to the front of the house. She saw people outside, but they were in plainclothes, and not readily identifiable as police officers. Rivera then heard the outer front door bell, and heard yelling; only when she opened her apartment's door did she realize that the people outside were shouting "FBI". She went to the outside front door, which was then opened by the officers with such force that she and her newborn were crushed between it and the wall. Her incision was reopened, and the baby was bruised. The officers asked for Serrano. Rivera indicated that he did not reside with her; that he lived upstairs with his mother.

Although the FBI agents presented no paperwork or warrants, she allowed them to search her apartment, and she told them her husband was upstairs. As the officers watched, Rivera texted Serrano, and advised that the police were looking for him. The FBI agents proceeded upstairs and apprehended Serrano. Rivera was not arrested or charged, but was asked to accompany the officers back to their office to supply a statement. She rode in the front of the car, and was not handcuffed. She was not told she was suspected of having committed a crime; the officers did not Mirandize her.

After giving a statement, and answering the questions asked of her, she thought the matter was over. Rivera was waiting for a ride home when the officers informed her that they would have to charge her with a crime.

Rivera adamantly denied that she harbored her husband in violation of law. She urged with credibility that she entered the Pretrial Diversion Program not because she admitted guilt, but because she wanted a speedy dismissal of the charges against her so she could return to work. Although the program can include a probationary period of as long as eighteen months, Rivera was required to participate for only six months, at which point the charges against her were dismissed. She has formally filed for divorce against Serrano.

The Pretrial Diversion Agreement confirmed that it was entered into by the parties after consideration of the nature of the offense and Rivera's background, and based on a determination that doing so would serve "the interests of the United States, [Rivera's] own interest and the interests of justice..." Moreover, and critically, the agreement expressly confirms that entry into Pretrial Diversion does not constitute an admission of guilt, as it states, "[a]ny statements made by [Rivera] in this Agreement will not be admissible on the issue of guilt in any subsequent proceeding."

CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is designed to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965).

A Civil Service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be removed or subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing before an administrative law judge are whether the

appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, to be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. N.Y. v. Bock, 38 N.J. 500 (1962). The appointing authority bears the burden of proving its charges by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that here, the County has failed to meet its burden of demonstrating that Rivera is guilty of conduct unbecoming a Corrections Officer. The specifications allege only that Rivera was arrested; a criminal complaint was filed against her; and the charges were dismissed after successful completion of a Pretrial Diversion Program. And these are the only facts that were presented by the County at the OAL hearing. The argument that an arrest alone, without more, rises to unbecoming conduct violates every notion of fundamental fairness, especially where the underlying conduct has been denied in unrebutted testimony. Indeed, Rivera herself offered the only legally competent evidence of what happened on September 24, 2015; she steadfastly maintained her innocence. [2] See: In re Rosado, CSR 16402-14, Initial Decision (July 19, 2016), deemed adopted, (September 19, 2016), <http://njlaw.rutgers.edu/collections/oal/>.

[2] As we know, criminal charges must be proven beyond a reasonable doubt, and a lesser standard governs this proceeding before me. The County thus could have proven by a preponderance of the credible evidence that Rivera illegally harbored her husband, even if the charges were dismissed at the criminal proceeding, and even if the criminal proceeding resulted in an acquittal at trial. But, it did not do so; indeed, its proofs did not even address Rivera's underlying conduct.

The fact that the criminal matter was dismissed after Rivera participated in a Pretrial Diversion Program does not alter my conclusion. The agreement Rivera executed makes it plain that there was no determination as to guilt made or implied by that agreement. She credibly explained her reasoning for choosing diversion over a trial. I **CONCLUDE** that Rivera must be reinstated to her position of employment as a Corrections Officer.

The post-hearing submissions of the parties address the issue of Rivera's entitlement to back pay. Rivera's period of unpaid suspension has been a lengthy one, dating back to January 2016.[3] She was initially placed on an indeterminate period of suspension, pending the disposition of the criminal charges against her, in accordance with N.J.A.C. 4A:2-2.7. That regulation permits a suspension to continue, if the employee enters a diversionary program, until completion of the probationary period stipulated by the diversionary program agreement. And the regulatory scheme moreover makes it clear that if the criminal charges are dismissed via a diversionary program, there is no back pay awarded. N.J.A.C. 4A:2-2.10(c)(1).[4] DelRossi v Department of Human Services, 256 N.J. Super. 286 (App. Div. 1992).

The County asserts that even if she is reinstated, Rivera is entitled to no back pay whatsoever. It overstates the limitations on Rivera's entitlement to relief. But, the County is correct, and I **CONCLUDE** that, for the period from January 2016, through the discharge of the criminal charges in December 2017, it is not obligated to make Rivera whole. N.J.A.C. 4A:2-2.10(c)(1). As for the period from December 18, 2017, to date, I **CONCLUDE** that Rivera is entitled to back pay. In re Gauthier, Rockaway Twp., 2018 CSC LEXIS 125, is instructive. There, a police officer was suspended without pay pending successful completion of PTI. He thereafter received back pay, covering the period between his completion of the intervention program and his reinstatement. But,

[3] In her post hearing submission, Rivera asks for back pay during the period from October 25, 2015, through January 4, 2016. But, that suspension came in the aftermath of an earlier disciplinary action, which was amicably resolved with an agreement to reinstate Rivera as of October 25, 2015. But, that earlier Civil Service appeal and any issues pertaining to it, are not before me.

[4] The regulation references Pre-Trial Intervention (PTI), the New Jersey equivalent of the Federal Pre-Trial Diversion Program that Rivera successfully completed here.

a claim for additional back pay for the period from his indictment to his completion of PTI was denied by the Civil Service Commission. So too here, Rivera is entitled only to be made whole for any compensation lost after the dismissal of her criminal complaint. See also: Walcott v. City of Plainfield, 282 N.J. Super. 121, 125 (App. Div. 1995).

ORDER

Based on the foregoing, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Essex County Department of Corrections against Rivera is hereby **REVERSED**.

It is **ORDERED** that no penalty be imposed in this matter.

I further **ORDER** that Rivera be awarded back pay, benefits, and seniority in accordance with N.J.A.C. 4A:2-2.10 and reasonable counsel fees in accordance with N.J.A.C. 4A:2-2.12. The period for which Rivera is entitled to back pay shall commence on December 18, 2017, and shall continue to date.

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

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

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

May 24, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: May 24, 2018

Date Mailed to Parties: MAY 29 2018 May 24, 2018

sej

APPENDIX

WITNESSES

For Appellant:

Mariela Rivera

For Respondent:

Joseph Regateiro

EXHIBITS

For Appellant:

A-1 Not admitted

A-2 Not admitted

A-3 Civil Service Decision issued November 5, 2015

A-4 Appeal documents

A-5 Not admitted

A-6 Divorce Complaint

A-7 Certificate of Recognition

For Respondent:

R-1 FNDA, dated December 4, 2017

R-2 PNDA with specifications, dated September 12, 2017

R-3 Criminal complaint

R-4 Pretrial Diversion Agreement

R-5 PNDA with specifications, dated July 31, 2013

R-6 FNDA, dated July 6, 2014

R-7 Not admitted

6-20-18

A-1

STATE OF NEW JERSEY

In the Matter of Olumide Sanyaolu, Ancora Psychiatric Hospital, Department of Health

CSC DKT. NO. 2018-808
OAL DKT. NO. 14876-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 20, 2018 BW

The Civil Service Commission, at its meeting of June 20, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 14876-17

AGENCY DKT. NO. 2018-808

IN THE MATTER OF OLUMIDE SANYAOLU,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Mario A. Iavicoli, Esq., for appellant

Francis A. Raso, Deputy Attorney General for respondent, (Gurbir S. Grewal, Acting Attorney General of New Jersey, attorney)

Record Closed: May 23, 2018 Decided: May 23, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter involves the appeal of Olumide Sanyaolu (Sanyaolu) of the decision of respondent Department of Human Services, Ancora Psychiatric Hospital (Ancora) to remove him from employment, effective June 2, 2017, on charges of (1) conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); (2) other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12); and (3) violation of a rule, regulation, policy, procedure, order, or administrative decision, specifically, Administrative Order 4:08 E-1.1.

The Civil Service Commission notified Sanyaolu of the above charges by a Final Notice of Disciplinary Action dated September 5, 2017. Upon receipt of Sanyaolu's hearing request, the matter was transmitted on October 4, 2017, to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following an unsuccessful settlement conference on March 19, 2018, a hearing was scheduled for March 28, 2018. Prior to the hearing, the parties met and reached a settlement, the terms of which were placed on the record. On May 23, 2018, the parties submitted the original, fully-executed Settlement Agreement, which is attached and fully incorporated herein, and the record closed.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their representations made on the record in this matter and their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five

days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 23, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 5/25/18

Date Mailed to Parties: 5/25/18

TMC/nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

RECEIVED
2018 MAY 23 A 10:56
STATE OF NEW JERSEY
OF ADMIN LAW

OAL DKT. NO. CSV 14876-2017 S
AGENCY DKT. NO. 2018-808

SETTLEMENT AGREEMENT

IN THE MATTER OF

Olumide Sanyaolu

v.

Department of Human Services,
Ancora Psychiatric Hospital

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action (FNDA), dated September 5, 2017, contains the following charges:

1. Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6);
2. Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12); and
3. Violation of a rule, regulation, policy, procedure, order, or administrative decision, Administrative Order 4:08 E-1.1.

The FNDA proposes removal, effective June 2, 2016, as discipline for the above charges.

B. In lieu of removal, the parties have agreed to the following terms:

1. The petitioner will obtain an updated doctor's note advising the appointing authority, within a reasonable degree of medical certainty, whether it would be difficult for him to produce the 45 mL of urine required to perform a urinalysis drug screen. In the event that the petitioner is unable to produce 45 mL of urine, the doctor's note will further advise the appointing authority as to whether it would be medically inadvisable for the petitioner to drink up to 40 oz. of fluid within a three-hour period.

2. After the petitioner obtains the doctor's note described above and submits it to the appointing authority, Ancora Psychiatric Hospital's Human Resources Department will promptly instruct the petitioner to report to WorkNet Occupational Medicine in Stratford, New Jersey, where he will submit to a physical exam and a tuberculosis test. The appointing authority will then refer the petitioner to an alternative form of a drug test that is consistent with his medical restrictions. The petitioner will comply accordingly.

3. If the appointing authority is able to schedule the petitioner's alternative drug test promptly, the petitioner's return to work will be conditioned upon a negative drug test result. If the appointing authority is not able to schedule the test promptly, the petitioner shall return to work before completing the test, but his continued employment will be conditioned upon compliance with the procedure outlined above and a negative test result at a later time.

4. Upon returning to work, the petitioner will comply with any future drug tests as may be required and will follow the procedure outlined above, as well as all directions of the drug testing facility. The petitioner shall notify the appointing authority immediately of any changes in his medical condition that enable him to perform a urinalysis drug screen.

5. The appointing authority will provide the petitioner with mitigated back pay from June 2, 2016 through December 31, 2017, less all customary payroll deductions for federal taxes, state taxes, Medicare, Unemployment Insurance, Temporary Disability Insurance, Family Leave Insurance, FICA, pension contributions, and any other deductions required by law or contractual agreement.

6. The back pay to which the petitioner is entitled under this agreement will be calculated using the following figure as the petitioner's base salary: $35,123.40. The petitioner will receive all benefits as provided by N.J.A.C. 4A:2-2.10.

C. The petitioner withdraws his request for a hearing before the Office of Administrative Law, and the appointing authority agrees that the charges outlined in the FNDA will be dismissed with prejudice.

D. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the appointing authority.

E. The appointing authority shall amend the petitioner's personnel records to conform to the terms of this settlement agreement. All internal records will be kept intact. Nothing herein shall preclude the State from releasing information on this matter to anyone who has a release executed by the petitioner or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. The petitioner waives all other claims against the Department of Human Services, Ancora Psychiatric Hospital, with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of the petitioner's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. The petitioner waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, Department of Human Services, its employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to

the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

4/11/18 DATE	[signature] ON BEHALF OF OLUMIDE SANYAOLU
4/11/18 DATE	[signature] ON BEHALF OF OLUMIDE SANYAOLU
5/10/18 DATE	[signature] ON BEHALF OF D.H.S.
5-17-18 DATE	[signature] ON BEHALF OF APH
5/22/18 DATE	[signature] ON BEHALF OF DOH

CERTIFICATION

I, OLUNIDE SANNI-AOLU being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Sanyaolu _____ 4/11/18 _____

DATE

Messina, JoAnn

From: Francis Raso <Francis.Raso@law.njoag.gov>
Sent: Thursday, June 14, 2018 5:15 PM
To: Angiulo, Nicholas; miavicoli
Cc: Messina, JoAnn
Subject: RE: In the Matter of Olumide Sanyaolu, Department of Human Services (Health), Ancora Psychiatric Hospital - OAL Docket No. CSV 14876-17 and CSC Docket No. 2018-808 - SETTLEMENT

Hi Mr. Angiulo,

I have received confirmation from my client that the period of time from January 1, 2018 until the petitioner's reinstatement on April 25, 2018 should be treated as an approved leave of absence without pay.

Thank you very much for your time, and have a great weekend

Sincerely,

Frank Raso

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Friday, June 08, 2018 11:52 AM
To: miavicoli; Francis Raso; Francis Raso
Cc: Messina, JoAnn
Subject: In the Matter of Olumide Sanyaolu, Department of Human Services (Health), Ancora Psychiatric Hospital - OAL Docket No. CSV 14876-17 and CSC Docket No. 2018-808 - SETTLEMENT
Importance: High

RE: In the Matter of Olumide Sanyaolu, Department of Human Services (Health), Ancora Psychiatric Hospital - OAL Docket No. CSV 14876-17 and CSC Docket No. 2018-808 - SETTLEMENT

Mr. Iavicoli and DAG Raso:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Olumide Sanyaolu from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Mr. Sanyaolu's removal effective June 2, 2016 is being settled to reinstatement (along with a drug test) with back pay through December 31, 2017, it does not indicate how to record the time from January 1, 2018 until his actual reinstatement. Before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be specifically accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties. Please make sure you "reply to all."

Sincerely,

Nicholas F. Angiulo
Deputy Director

Division of Appeals & Regulatory Affairs
New Jersey Civil Service

CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.

6-20-18

A-1

STATE OF NEW JERSEY

In the Matter of Beata Wolska
Hunterdon Developmental Center
Department of Human Services

CSC DKT. NO. 2018-2709
OAL DKT. NO. CSV 04416-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 20, 2018 BW

The Civil Service Commission, at its meeting of June 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04416-18

AGENCY DKT. NO. 2018-2709

IN THE MATTER OF
BEATA WOLSKA, DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: May 24, 2018 Decided: May 29, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Beata Wolska from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 27, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 29, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 6/1/18

Date Mailed to Parties: 6/1/18

cmo

OAL DKT. NO. CSV 4416-2018

AGENCY DKT. NO. 20 – 2018-2709

SETTLEMENT AGREEMENT

IN THE MATTER OF

Beata Wolska

AND

Hunterdon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 3/5/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.O. 4:08, A.3/E.1.		
2.	NJAC 4A:2-6.2(c), (a)6,(a)12	RNIGS	10/12/2017
3.			
4.			
5.			

B. The Appellant Beata Wolska withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	SAME AS ABOVE	Withdrawn	
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following: N/A

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 10/12/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

✓ resignation in good standing

____ general resignation

which shall be effective 10/12/2017 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Beata Wolska 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall not seek or accept reemployment with the Department of Human Services in the future.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

05/24/2018
DATE

B. Wolska
Appellant

5-24-18
DATE

Respondent ~~Respondent~~ Appellant's Rep.

5/24/18
DATE

ON BEHALF OF

5/24/18
DATE

ON BEHALF OF Respondent DEPARTMENT OF HUMAN SERVICES

CERTIFICATION

I, Beata Wolska, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

05/24/2018
DATE

BWolska
NAME

STATE OF NEW JERSEY

In the Matter of Lydia Akpor-Mensah
Hunterdon Developmental Center
Department of Human Services

CSC DKT. NO. 2018-2259
OAL DKT. NO. CSV 02455-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 02455-18
AGENCY DKT. NO. 2018-2259

IN THE MATTER OF LYDIA AKPOR-MENSAH, DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER.

John F. McDonnell, Esq., for petitioner, Lydia Akpor-Mensah (McDonnell Artigliere, P.C.)

Shareef Omar, Deputy Attorney General, for respondent, Department of Human Services, Hunterdon Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 22, 2018 Decided: June 26, 2018

BEFORE **JOHN R. FUTEY**, ALJ (Ret., on recall):

This matter was filed with the Office of Administrative Law (OAL) on February 14, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A settlement conference was conducted on June 22, 2018. At that time, the parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on .

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 26, 2018
DATE

JOHN R. FUTEY, ALJ (Ret., on recall)

Date Received at Agency: 6-26-18

Date Mailed to Parties: 6-27-18

JRF/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on June 22, 2018

OAL DKT. NO. CSV 02455-2018 S
CSC DKT. NO. 2018-2259

SETTLEMENT AGREEMENT

LYDIA AKPOR-MENSAH
v.
DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final Notice of Disciplinary Action** dated January 12, 2018 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. C3.1 - Physical or mental abuse of a client, removal effective 10/14/17.
2. C5.1 - Inappropriate physical contact or mistreatment of a client - removal effective 10/14/17.
3. C11.1 - Any improper conduct with violates common decency - removal effective 10/14/17.
4. N.J.A.C. 4A:2-2.3(a)(6) - Conduct unbecoming a state employee – removal effective 10/14/17.
5. N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause – removal effective 10/14/17.

B. The parties have agreed to the following:

1. The Appellant withdraws her appeal and request for a hearing with OAL Docket No: CSV 02455-2018 S.

2. The Appellant has agreed to return to work in his former position. LM JFM
3. The **Final Notices of Disciplinary Action** dated January 12, 2018 will be modified as follows:
    a. Elimination of the C3.1 charge;
    b. All other charges shall remain;
    c. Addition of an E1.1 charge, that is, violation of a rule, regulation, policy, procedure, order or administrative decision, for not properly following the Patient's Behavioral Support Plan (BSP), when Appellant told the Patient that she would place a helmet on her head, and proceeded to show the patient the helmet, thereby using an unauthorized means of redirection, violating the BSP.
    d. The Penalty of Removal shall be modified to a **four (4) months' suspension** - having already been served. The remaining time between Appellant's suspension and reinstatement shall be marked as an approved leave of absence.
4. Appellant understands that termination will be sought if a similar incident occurs.
5. The Appellant will not receive any back pay or attorney's fees from the appointing authority.
6. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. Department of Human Services shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

E. Except for the assessment of Lydia Akpor-Mensah's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

G. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

H. The parties waive the right to file exceptions and cross exceptions.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6/22/2018
DATE

Lydia Akpor-Mensah

6/22/18
DATE

John F. McDonnell, Esq.
ON BEHALF OF Appellant

6/22/18
DATE

Kim M. Heft
ON BEHALF OF Respondent

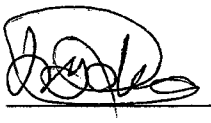
CERTIFICATION

I, Lydia Akpor-Mensah, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/22-2018
DATE



Lydia Akpor-Mensah

7-18-18

A-2

STATE OF NEW JERSEY

In the Matter of Matthew Bulzak
Camden County, Department of Corrections

CSC DKT. NO. 2016-1696
OAL DKT. NO. CSV 4001-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Matthew Bulzak, County Correction Officer, Camden County, Department of Corrections, 30 calendar day suspension, on charges, was heard by Administrative Law Judge Jeffery N. Rabin, who rendered his initial decision on June 8, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 4001-17
AGENCY DKT. NO. 2016-1696

IN THE MATTER OF MATTHEW BULZAK, CAMDEN COUNTY DEPARTMENT OF CORRECTIONS.

Christopher A. Gray, Esq., appearing for appellant, Matthew Bulzak (Sciarra & Catrambone, LLC, attorneys)

Antonietta P. Rinaldi, Assistant County Counsel, appearing for respondent, Camden County Department of Corrections (Christopher A. Orlando, County Counsel)

Record closed: April 27, 2018 Decided: June 8, 2018

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, Matthew Bulzak, a former corrections officer for respondent, Camden County Department of Corrections (DOC), appeals a thirty calendar day disciplinary action for conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7); other sufficient causes, in violation of N.J.A.C. 4A:2-2.3(a)(12), those being violations of Camden County

Correctional Facility Rules of Conduct 1.1 Violations; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 4.1 Courtesy; 4.5 Public Statement and Appearances, and General Orders #073, #074 and #203.

At issue is whether respondent DOC acted properly in suspending appellant for thirty calendar days.

PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action dated April 13, 2015, suspending him without pay for thirty calendar days.[1] A departmental hearing was held on October 16, 2015, and on October 28, 2015, a Final Notice of Disciplinary Action was served on appellant, suspending him without pay for a thirty-calendar day period of November 8, 2015, through December 7, 2015.

Appellant filed an appeal, failed to appear at a settlement conference scheduled for February 2, 2016, and his appeal was dismissed. Appellant's appeal was reinstated by Administrative Appeal issued on January 18, 2017, and the Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on March 22, 2017. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

After two adjournments for health-related reasons, the Hearing was held on April 24, 2018.[2] The record remained open until April 27, 2018, for post-hearing documentation, and the record closed on that date.

[1] Rather than a thirty-calendar day suspension for eight hours per day (240 hours), respondent treated this as a fifteen-working day suspension of twelve hours per day (180 hours).

[2] Appellant Bulzak failed to appear on April 24, 2018, but authorized his counsel by text message to proceed with the Hearing, which was acceptable to respondent-counsel.

FACTUAL DISCUSSION

Undisputed Facts from the within Hearing:

1. On March 25, 2015, appellant was employed as a Corrections Officer by respondent DOC, and had been so employed since 2009. (Exhibit R-2.)

2. On or about March 25, 2015, DOC Internal Affairs Investigator Sgt. Joseph Coleman used his personal Facebook account and discovered that appellant had posted on the Matthew Bulzak Facebook page that he worked as a "Zookeeper at Camden County Wildlife Refuge" (the "Facebook Post"). (Exhibits R-1 and R-2.) Appellant made this post while he was employed by DOC, and at a time when there was no Camden County Wildlife Refuge.

3. By March 26, 2015, appellant had removed the Facebook Post. (Exhibit R-4.)

4. Appellant offered two alternative explanations for why he wrote the Facebook Post; it was either a joke, or he wrote it to keep the public from knowing where he was employed. (Exhibit R-2.)

5. Appellant has stated that it was unprofessional for him to have referred to inmates as animals, and that such a reference was inappropriate. Appellant was familiar with the policies and procedures applicable to his position. (Exhibits R-2 and R-6 through 9.)

6. Appellant had one prior major disciplinary action on his record, a ten-day suspension from January 2015 for having posed with other officers for a cellphone photograph in the Camden County jail, shot from a contraband cellphone (employees were not permitted to bring cellphones into the jail). (Exhibit R-10.) Appellant was charged with a security violation, conduct unbecoming a public employee, neglect of duty, and inattentiveness to duty.

Testimony:

For respondent:

Sgt. **Joseph Coleman** had been with DOC for twenty-one years, twelve years as an Investigator for DOC's Internal Affairs department. He was responsible for monitoring social media accounts of DOC employees. It was irrelevant if a complaint had been filed, or whether social media violations happened while the officer was on-duty or off-duty. Because appellant's Facebook Post was on a public page, it could be viewed by members of the public. This could create problems at the county jail, because members of minority groups, such as African-Americans and Hispanics, could take appellant's post to mean that the jail is a zoo and the inmates are animals.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After having the opportunity to review the evidence and observe his testimony, I accept Sgt. Coleman's testimony as credible and truthful. Accordingly, I **FIND** as fact that: Appellant's Facebook page was accessible to the general public. Appellant's Facebook Post could create safety problems at the county jail, because inmates could take appellant's post to mean that employees consider the jail to be a zoo and the inmates to be animals.

LEGAL ARGUMENT AND CONCLUSION

At issue is whether respondent DOC acted properly in suspending appellant for thirty calendar days.

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV)(1996). Progressive discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV)(1994).

Respondent charged appellant with conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). In the DOC "Rules of Conduct", Topic 1.2, DOC personnel were required to conduct themselves in such a manner as to reflect positively on DOC, both on- and off-duty. It defined "Conduct unbecoming an employee" to include an action which "brings the department into disrepute, reflect discredit upon the employee as a member of the department, or which impairs the operation or efficiency of the department or the employee."

If appellant's sole interest was to protect his identity by not revealing where he was employed, he could have either denied the public access to his Facebook page, or chosen a fake job title unrelated to Camden County. By posting that he served as a "zookeeper" at a "wildlife refuge" in a county that does not operate a wildlife refuge, appellant left himself open to an interpretation that he worked at a zoo, filled with unruly animals and wildlife that needed a zookeeper to keep them under control. This might not only insult inmates by referring to them as animals and not humans, but might also insult the jail and jail employees themselves. Referring to a county facility as a "zoo" suggests that those responsible for the safe operation of the jail are not competent to perform their job functions, discrediting the men and women who work the difficult positions associated with working in a jail. Inmates' families, or inmates themselves, might be able to look up Bulzak's name on Facebook and see that he considers them to be wild animals. This could lead to safety issues brought by inmates against jail personnel.

Appellant himself stated that he was familiar with the policies and procedures applicable to his position, and admitted that it was not professional for him to have referred to inmates as animals, and that such a reference was inappropriate.

Accordingly, I **CONCLUDE** that appellant's Facebook Post evidenced conduct unbecoming a public employee.

As to the charge of neglect of duty, pursuant to N.J.A.C. 4A:2-2.3(a)(7), such neglect is defined in DOC's Rules of Conduct. (Exhibit R-6, Topic 1.3.) Any failure to comply with any departmental rule which causes a detriment to DOC or its personnel will be considered a neglect of duty.

Appellant failed to comply with several DOC rules: Appellant violated the "Personal Conduct of Employees" policy (General Order #73) by showing disrespect and lack of courtesy to inmates and jail employees, and exhibiting behavior which could demonstrate prejudice, contempt or ridicule towards inmates. (Exhibit R-7.) Appellant violated the "Professional Code of Conduct" by failing to demonstrate respect towards

fellow jail employees. (Exhibit R-8.) Appellant violated General Order #74 by publicly criticizing or ridiculing DOC and/or its employees. Appellant violated General Order #203 by posting onto social media a statement which might undermine the public trust and confidence in officers and employees of DOC, or which was a negative comment on the internal operation of DOC, by insinuating that the Camden County Jail was a zoo. (Exhibit R-9.)

Accordingly, I **CONCLUDE** that appellant's Facebook Post evidenced neglect of duty.

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). Appellant had a prior major disciplinary action on his record, having been charged in January 2015 with a security violation, conduct unbecoming a public employee, neglect of duty, and inattentiveness to duty. He was given a ten-day suspension. In both disciplinary actions the charges included conduct unbecoming a public employee and neglect of duty. It was therefore reasonable to issue a longer suspension for a second major disciplinary action. Because the second disciplinary action was discovered a mere two months after the first, a thirty-calendar day suspension (which in reality was only a fifteen-work day suspension) appeared reasonable.

I **CONCLUDE** that DOC acted properly in suspending appellant for a thirty-calendar day period.

ORDER

I **ORDER** that the disciplinary action of respondent Camden County Department of Corrections in suspending appellant Bulzak from his position as a Corrections Officer for thirty calendar days is **AFFIRMED**, and that the appeal is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** pursuant to N.J.A.C. 1:1-18.6., by which law it is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 8, 2018
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: June 8, 2018

Date Mailed to Parties: June 8, 2018

JNR/cb

APPENDIX

WITNESSES

For appellant:

None

For respondent:

Sgt. Joseph Coleman

Karen Taylor, Camden County Warden

EXHIBITS

For appellant:

None

For respondent:

R-1 Appellant's Facebook page

R-2 Internal Affairs Interview of appellant, dated March 25, 2015

R-3 Supervisor's Complaint Report, dated March 25, 2015

R-4 General Incident Report (Rebuttal), dated March 26, 2015

R-5 Preliminary Notice of Disciplinary Action served on petitioner, dated April 13, 2015; and Final Notice of Disciplinary Action served on petitioner, dated October 28, 2015

R-6 DOC Rules of Conduct

R-7 DOC General Order #073

R-8 DOC General Order #074

R-9 DOC General Order #203

R-10 Appellant Disciplinary History

7-18-18

A-3

STATE OF NEW JERSEY

In the Matter of Mark DiPasquale
Southern State Correctional Facility,
Department of Corrections

CSC DKT. NO. 2018-1839
OAL DKT. NO. CSR 00903-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Mark DiPasquale, Senior Correction Officer, Southern State Correctional Facility, Department of Corrections, removal effective December 21, 2017, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on June 8, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Mark DiPasquale.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 00903-18

AGENCY DKT. NO. N/A
2018-1839

IN THE MATTER OF MARK DIPASQUALE, SOUTHERN STATE CORRECTIONAL FACILITY.

Sean Sprich, PBA Local #105, for appellant, Mark DiPasquale, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jessica M. Saxon, Deputy Attorney General, for respondent, Southern State Correctional Facility (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: May 11, 2018 Decided: June 8, 2018

BEFORE **JOHN S. KENNEDY,** ALJ:

STATEMENT OF THE CASE

Appellant, Mark DiPasquale, a Corrections Officer at Southern State Correctional Facility (respondent) appeals his removal, effective December 21, 2017, after testing positive for tetrahydrocannabinol (THC) following a random drug urine screening on August 24, 2017. Appellant was charged with violations of N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12, Other sufficient cause; Human Resources Bulletin (HRB) 84-17, C-11, Conduct unbecoming a public

employee; HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance (custody); HRB 84-17, D7, Violation of administrative procedures and/or regulations involving safety and security; and HRB 84-17, E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. The appellant denies the allegations and states he was unaware he had ingested THC.

PROCEDURAL HISTORY

On October 25, 2017, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against the appellant. (J-1.) A departmental hearing was conducted on November 22, 2017. On December 21, 2017, the respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA and removing appellant from employment, effective December 21, 2017. (J-2.) Appellant filed an appeal directly with the Office of Administrative Law (OAL) challenging his removal. The appeal was filed and perfected at the OAL on January 16, 2018. The hearing was held on May 3, 2018. The record remained open to allow the parties to submit redacted exhibits and the record closed on May 11, 2018.

FACTUAL DISCUSSIONS AND FINDINGS

The parties made the following Joint Factual Stipulations and I therefore **FIND** the following as **FACT**:

1. Chain of custody is intact, complete and legally acceptable from the time the urine sample was taken from Mr. DiPasquale until the time it was tested at the State Toxicology Laboratory.
2. Mr. DiPasquale acknowledged receipt and signed for HRB 99-01, HRB 84-17, and the New Jersey Department of Corrections (NJDOC) Law Enforcement Personnel Rules and Regulations based on his new hire checklist.

Testimony

Duane Grade testified on behalf of the respondent. He has been employed by the NJDOC for twenty-two years and has been the Chief Investigator of the Special Investigations Unit (SIU) since July 2017. As Chief Investigator, he oversees the criminal and administrative investigations for the NJDOC. He is familiar with the drug screening process and he has undergone several random drug screenings throughout his career. There is a zero-tolerance policy for drug use in the NJDOC and all sworn law enforcement personnel are subject to random drug testing. The first workday of every month the SIU receives from Office of Information Technology (OIT) a computer printout list of those random individuals selected by a computer algorithm to be drug tested. All union representatives are made aware of the random urine selection process. Appellant was on the Master List for Donor Notifications for the period August 1, 2017, to August 31, 2017. (R-1.)

Law Enforcement Personnel Rules and Regulations, Article IV, Section 1 states:

> No officer shall
>
> a) Report to duty under the influence of alcohol.
> b) Use, possess or sell any illegal drug or controlled dangerous substance, whether on or off duty,
> c) Frequent any business, private house or establishment where illegal drugs or controlled dangerous substances may be used, purchased or sold with the exception of any appropriate medical establishment for the purpose of receiving appropriate medical care. (J-5, at 9-10.)
>
> Section 2 provides that an officer shall report the use, possession, or sale of any illegal drug or controlled dangerous substance by another officer, whether on or off duty. The report shall be made as soon as possible to the Institutional Administrator or his/her designee. (J-5, at 9.)

All new employees acknowledge that they receive the various policies. Appellant acknowledged that he received the Rules and Regulations when he was hired. (J-7.)

The NJDOC HRB 99-01, Amended November 6, 2009, sets forth the Drug Testing Policy. (J-3.)

Section IV, paragraph 3 provides that "Prior to the submission of a urine specimen, all individuals shall complete a medical questionnaire which clearly describes all medications, both prescription and over the counter (non-prescription), ingested in the past thirty days. (J-3, at 5.)

Section VIII entitled "Consequences of a Positive Result"

> A. Any covered person who tests positive for illegal drug use shall be:
>
> 1. Suspended immediately from all duties and subjected to Loudermill and Departmental disciplinary procedures;
> 2. Processed for termination from service;
> 3. Reported by Internal Affairs to the Central Drug Registry maintained by the Division of State Police, and
> 4. Barred permanently from future law enforcement in New Jersey. (J-3, at 8.)

Chief Grade is familiar with HRB 84-17 as amended and the Table of Offenses and Penalties. (J-4.) C.11, Conduct unbecoming an employee, the first offense is a minimum of a three-day suspension to removal. C.30, Use, possession or sale of any controlled dangerous substance (custody), the first offense is removal. E.1, General Violation of a rule, regulation, policy, procedure, order or administrative decision, the first offense warrants anywhere from an official written reprimand to removal. Appellant acknowledged receipt of this policy. Chief Grade is familiar with appellant's work/disciplinary history (J-6) which was moved into evidence for purposes of progressive discipline only.

Dennis Gunn testified on behalf of the respondent. He is a twenty-year employee of the NJDOC and is currently employed as a Principal Investigator at Southern State. His responsibilities as an investigations officer is to conduct all administrative and criminal investigations for the department in the field unit that he is assigned. They maintain all the evidence at the facility and investigate all crimes that occur in the facility and monitor the staff drug testing. He has monitored hundreds if not a thousand of drug tests. When first hired as an investigator, they receive the policy as

to how the drug testing should be administered and then are assigned to a senior investigator to conduct the drug testing until they are ready to administer it on their own. He himself has undergone several random drug tests in the course of his career.

The first working day of the month, the central office draws a list of random names and social security numbers of those officers to be tested that month. The central office notifies the investigator who then goes to central office to pick up the list and then goes to the facility with the list of those to be drug tested. Appellant's name was on the Master List for Donor Notifications for August 2017. (R-1.) Investigator Gunn called the shift commander to have appellant report to SID and when appellant reported, he was advised that he had been selected to provide a random urine sample for that month. Investigator Gunn monitored appellant's drug test. There is a drug testing booklet that is filled out with the individuals' name and social security number. (R-2.) There are monitor instructions that are checked off outlining the procedures to be followed. Attachment A-1 is the Drug Testing Employee Notice and Acknowledgement form signed by appellant and witnessed by Investigator Gunn, dated August 24, 2017. It provides as follows:

> "I understand that if I produce a positive test result for illegal drug use, I will be dismissed from the New Jersey Department of Corrections and from my position as a "Covered Person"".
> "I understand that if I produce a positive test result for illegal drug use, that information will be forwarded to the Central Drug Registry maintained by the Division of State Police. Information from the registry can be made available by court order as part of a confidential investigation relating to law enforcement employment."
> "I understand that if I produce a positive test result for illegal drug use, I will be permanently barred from serving as a law enforcement officer in New Jersey." (R-3.)

The Continuity of Evidence – Urine Specimen Form (R-5) summarizes the procedure for the drug testing. It indicates that a random drug screening occurred on August 24, 2017, of appellant that was ordered at 6:00 a.m. Appellant gave the urine sample at 7:12 a.m. on August 23, 2017. Investigator Gunn placed the specimen in the evidence refrigerator at 7:14 a.m.

Appellant provided two samples simultaneously at 7:12 a.m. The second sample was frozen in case of a positive result to allow the employee to have an independent test done on the urine. The second sample is maintained in their freezer until such time as they are notified the test was negative or the employee directs that the sample be released to another lab for testing as was done in this case. Appellant did not ask to have the second sample tested.

Investigator Gunn was notified of the results that there was a positive of one of the samples. The toxicology report for appellant's social security number came back positive for cannabinoids. (R-9.) Investigator Gúnn prepared and signed an administrative investigation report summarizing this incident and consistent with his testimony. (R-11.)

Robert Havier testified on behalf of the respondent. Dr. Havier is the Acting Director of the State Toxicology Laboratory in Newark, New Jersey. He has been employed by the State for thirty-nine years as a forensic toxicologist. As the Acting Director, he sets the goals for the laboratory and specifies the methods for analysis, certifies data and finalizes reports for law enforcement drug testing. He has a Bachelor of Science Degree (B.S.) in Chemistry from Long Island University, an Master of Science (M.S.) from Adelphi University in Organic Chemistry and Biochemistry, and a Doctor of Philosophy (Ph.D.) from the State University of New York at Buffalo in Biochemistry with a Minor in Organic and Medicinal Chemistry. (R-12.) Forensic toxicology is an interdisciplinary field of science, that involves analytical chemistry, pharmacology and toxicology towards the analysis and interpretation of drugs in a legal setting. He has been conducting drug tests for thirty-nine years. There are two sections in the lab, the post-mortem section and law enforcement drug testing section. Seventeen thousand tests are done a year for law enforcement drug testing, approximately fourteen hundred a month just from the urine drug testing. Of those seventeen thousand tests, only about two percent or less are positive for drugs. He was qualified as an expert witness in approximately thirty cases. Dr. Havier was qualified as an expert witness in the field of drug testing and toxicology.

Dr. Havier is familiar with the NJDOC's drug testing policy. The state toxicology lab is the only lab authorized to conduct the drug testing for law enforcement drug testing. When he finalizes a report for a case, he reviews all the data submitted from the screening and confirmation testing as well as the certification from the medical review officer. A receptionist in the laboratory receives all drug testing specimens. In this case, Jean Smith, received the specimens and accepted each specimen for testing as indicated by her initials after each specimen and her name at the bottom of the submission form. (R-8.) The criteria she follows for accepting the sample is to check that the container has not been opened once it was sealed or tampered with in any way. She also checks the volume and appearance of the sample. The social security on the label inside of the container is checked and compared to the submission form and put into the computer which generates a toxicology number. The case is then referred to by the toxicology number. Appellant's sample was given Toxicology Number 17L012142.

After the samples are received and accepted for testing they are stored in the refrigerator and collected by an analyst from the law enforcement drug testing section and placed in a secured refrigerator in that unit. The sample will be subjected to a first screening procedure, an immunoassay procedure, using antibodies to identify drugs or classes of drugs that may be present in the sample. If the sample is screened positive, that is, it contains one or more of the drugs they are looking for, the original specimen will be tested by a confirmation method completely different from the screening method. The equipment used for the screening procedure is the Architect which is manufactured by Abbot Laboratories.

The drugs tested for are amphetamines, barbiturates, benzodiazepines, cocaine, creatinine for validity (to make sure the urine is human), methadone, opiates, oxycodone, phencyclidine (PCP) and tetrahydrocannabinol (THC) the major metabolite of tetrahydrocannabinol, the active ingredient in marijuana. The results of the immunoassay drug screening test in this matter were positive for cannabinoids. (R-9.) The creatinine level was dilute which indicates that the appellant had consumed a large amount of water. The test identifies whether a certain level of drug is present or not. Once a sample screens positive for a drug another aliquot of the original sample will be confirmation tested by a procedure called gas chromatography/mass spectrometry

(GCMS) which is the benchmark for the whole industry as far as confirming the identity and the amount of any particular drug. An aliquot is a small portion of the original sample for testing. An aliquot of the original sample is taken and is subjected to an extraction procedure to obtain a metabolite of marijuana, tetrahydrocannabinol. The criteria for identifying a particular compound includes the retention time, the weight of the fragments that it produces and the ratio of the fragments to one another. The GCMS drug confirmation report identified the drug as a metabolite of THC 11th carboxy THC and the amount of that metabolite was twenty-three nanograms per milliliter (ng/ml). (R-9.) This information was sent to the medical review officer to review whether anything listed on the medication sheet would account for this positive result. In this case, there was not.

Dr. Havier reviewed all the screening and confirmation data and the report from the medical review officer. (R-9.) He concluded all the testing was properly conducted and he generated a final report for this case. The medical review officer certification indicated that the screening results were positive for cannabinoids and the GCMS results were positive for 11 carboxy THC. All of the instruments that are used for the screening and confirmation testing are tested and checked in advance to make sure they are functioning properly and calibrated properly before the tests are run that day.

A sample is deemed to be positive if it contains more than fifteen (15.0) ng/ml of THC. The cutoff level of fifteen (15.0) ng/ml is used because that is the industry accepted level for the drug based on possible passive inhalation or casual exposure that cannot produce a reading over fifteen (15.0) ng/ml. The toxicology report for appellant's urine sample indicated carboxy levels of sixty-six (66.0) ng/ml. (R-9, p. 101.)

Dr. Havier's opinion concluded that the urine specimen contained the metabolite of THC at the level of sixty-six (66.0) ng/ml which is above the generally accepted cutoff value of fifteen (15.0) ng/ml.

Appellant testified on his own behalf. He was employed with the NJDOC at Southern State Prison from September 2008 until he was terminated in December 2017. He had been required to take four or five random drug cases during his

employment and has never tested positive in the past. He had no idea he was going to test positive in October 2017, and asserts that he does not do drugs. At some point prior to the October drug test, appellant alleges that he went to a party in Washington DC. He did not know at the time but there was food laced with marijuana (edibles) being served at the party. He never felt the effects of the drug. At some point after he was notified that he tested positive, but before his Departmental Hearing on November 22, 2017, appellant discovered, for the first time, from a friend that there were edibles at the party and presumes that he must had eaten one. He did not disclose this presumption at the Departmental Hearing and never disclosed it to anyone prior to his testimony at this hearing because he did not think it would matter and did not know that he needed to report it.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958).

Appellant was a Corrections Officer for nine years prior to his removal. He was familiar with the NJDOC drug testing protocol and has submitted to approximately four or five random drug screenings as a condition of his employment. Appellant asserts that he consumed an edible at a party prior to the drug test. He also asserts that he does not know what he ate that was laced with marijuana and only discovered that he consumed the edible after he received the PNDA. Appellant's testimony in this regard is not believable. He asserts that he discovered that he had consumed the edible prior to the Departmental Hearing and certainly before he received the FNDA yet he never

revealed this information to anyone prior to his testimony before this tribunal. Furthermore, his testimony derives from information he received from a friend. Out-of-court statements, if offered to prove the truth of the matters stated, are hearsay. While the rules of evidence applicable to proceedings in the judicial branch permit certain hearsay to be accepted as competent evidence under recognized exceptions to the general rule excluding hearsay, in administrative hearings the rule governing the admissibility of hearsay evidence is different. That rule is codified at N.J.A.C. 1:1-15.5:

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5 (b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

> It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) . . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision,

> which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. . . .

In light of the foregoing I **FIND** that no legally competent evidence has been presented to support the allegations contained in appellant's hearsay testimony. Therefore, I deem that appellant's testimony in this regard is not credible.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

On August 24, 2017, appellant was randomly selected for a urine drug screening pursuant to the NJDOC drug testing policy set forth in HRB 99-01. The immunoassay drug screening test was positive for cannabinoids. A further confirmation drug test was performed using GCMS which indicated that 11 – Carboxy-THC was detected in the amount of sixty-six (66.0) ng/ml with a confirmation cutoff concentration of fifteen (15.0) ng/ml.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling

Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained - of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atlantic City, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellants status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304. N.J. Super. 191, 199 (App. Div. 1997).

The NJDOC has a zero tolerance for drug use policy and requires that as a condition of employment officers submit to random urine drug testing. The NJDOC policy requires that a negative result is required to maintain employment and a positive

result will result in termination. Appellant failed his random drug test on August 24, 2017, by testing positive for the metabolite of THC. The NJDOC Rules and Regulations for Law Enforcement Personnel prohibit an officer from using any illegal drug or controlled dangerous substance, whether on or off duty. As a Corrections Officer, appellant represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is certainly conduct that adversely affects the morale or efficiency of a governmental unit and has a tendency to destroy public respect in the delivery of governmental services. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing conduct unbecoming.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant tested positive for the THC metabolite following his random drug test on August 24, 2017. Law enforcement personnel are prohibited from using illegal drugs or controlled dangerous substances. Appellant's conduct violates the implicit standard of good behavior one would expect from a corrections officer. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause.

Appellant has also been charged with various offenses set forth in HRB 84-17, including C-11, Conduct unbecoming a public employee; HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance (custody); HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. As stated above, the same reasons for finding that the respondent has met its burden of proof for the conduct unbecoming violations set forth in N.J.A.C. 4A:2.3(a)6 apply to the C-11 conduct unbecoming charge. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17, C-11.

As far as the violation of HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance, on August 24, 2017, appellant was subjected to a random drug test and tested positive for the THC metabolite. Therefore, I **CONCLUDE**

that appellant was in possession and used a controlled dangerous substance and respondent has met its burden of proof in establishing a violation of HRB 84-17, C-30.

Appellant has also been charged with a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. On August 24, 2017, appellant submitted to a random drug screening as a condition of his continued employment with the NJDOC. Appellant tested positive for the metabolite of THC. Appellant's conduct is in violation of the Law Enforcement Personnel Rules and Regulations prohibiting an officer from possessing or using any illegal drug or dangerous substance whether on or off duty. Appellant's conduct is also in violation of the NJDOC's drug testing policy set forth in HRB 99-01, Amended November 6, 2009. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly

proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Pursuant to the NJDOC HRB 99-01, Amended November 6, 2009, any covered person who tests positive for illegal drug use shall be suspended immediately from all duties and processed for termination from service. (J-3.) The NJDOC drug policy does not call for a range of discipline and removal is the only option for a violation of the drug testing policy. Appellant knew that as a condition of his continued employment he had to pass the random drug urine screens. Appellant acknowledged that he understood that if he produced a positive result for illegal drug use, he would be dismissed from his position with the NJDOC. Therefore, the only appropriate penalty in this case is removal. I **CONCLUDE** that the removal of the appellant was appropriate.

ORDER

Accordingly, I **ORDER** that the action of the respondent is **AFFIRMED**, as set forth above. Appellant's appeal is **DISMISSED**.

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

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

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

6/8/18
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: June 8, 2018

Date Mailed to Parties: June 8, 2018

/dm

APPENDIX

WITNESSES

For Appellant:

Mark DiPasquale, appellant

For Respondent:

Duane Grade
Dennis Gunn
Robert Havier, Ph.D.,

EXHIBITS

Joint

J-1 Preliminary Notice of Discipline, dated October 25, 2017
J-2 Final Notice of Discipline (31-C), dated December 19, 2017
J-3 HRB 99-01, Amended November 6, 2009, Subject: Drug Testing Policy
J-4 HRB 84-17 Table of Offenses and Penalties
J-5 Law Enforcement Personnel Rules and Regulations
J-6 Disciplinary History of Appellant
J-7 New Hire Checklist for Appellant

For Appellant:

None

For Respondent:

R-1 Master List for Donor Notification
R-2 Drug Screening Program Monitor booklet

R-3 Drug Testing Employee Notice and Acknowledgement of appellant, dated August 24, 2017

R-4 Drug Testing Medication Information

R-5 Continuity of Evidence - Urine Specimen Form Attachment E2

R-6 Continuity of Evidence - Urine Specimen Form Frozen Specimen Attachment EA2

R-7 Frozen Specimen Receipt

R-8 Lab LEDT chain of custody

R-9 Toxicology Report/LEDT

R-10 Random Urine Log

R-11 Administrative Investigation Report of Bryan Gunn

R-12 Curriculum Vitae of Robert Havier, Ph, D.

R-13 LEDT Litigation Packet

STATE OF NEW JERSEY

In the Matter of Vanessa Escourse
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NOS. 2018-2565 & 2018-2642
OAL DKT. NOS. CSV 04327-18 & 04328-18
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOs. CSV 04327-18
and CSV 04328-18
AGENCY DKT. NOs. 2018-2565
and 2018-2642

IN THE MATTER OF
VANESSA ESCOURSE,
DEPARTMENT OF HUMAN
SERVICES, HUNTERDON
DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: May 24, 2018 Decided: June 11, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

These matters concern the appeal of Vanessa Escourse from the actions of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matters were transmitted to the Office of Administrative Law for determination as

contested cases on March 23, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that these matters are no longer contested cases before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 11, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 6-18-18

Date Mailed to Parties: 6-19-18

cmo

OAL DKT. NO. CSV 4327-2018 & 4328-2018

AGENCY DKT. NO. 20 – 2018-2565 & 2018-2642

SETTLEMENT AGREEMENT

IN THE MATTER OF

VANESSA ESCOURSE

AND

Hunterdon Developmental Center
DEPARTMENT OF Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Action dated 2/23/2018 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.4.5, NJAC 4A:2-2.3(a) 4, 6, 12.	Removal	2/23/2018
2.			
3.	A.4.6, NJAC 4A:2-2.3(a) 4, 6, 12	Removal	2/23/2018
4.			
5.			

B. The Appellant Vanessa Escourse withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	The parties have agreed to a general		
3.	resignation as a resolution to the disciplinary appeal.		

OAL DKT. NO. CSV 4327-2018 + 4328-2018

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 2/23/2018 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

___ resignation in good standing

_✓_ general resignation

which shall be effective 2/23/2018 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Vanessa Escourse 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall not seek or accept reemployment with the Department of Human Services at any time in the future.

OAL DKT. NO. CSV 4328-2018

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5-24-18
DATE

Appellant

5/24/18
DATE

Respondent - DHS

5-24-18
DATE

ON BEHALF OF APPELLANT

DATE

ON BEHALF OF

OAL DKT. NO. CSV 4327-2018 a 4328-2018

CERTIFICATION

I, Vanessa Escorse, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-24-18
DATE

NAME

7-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Brian Friedman
Ann Klein Forensic Center
Department of Health

CSC DKT. NO. 2016-4027
OAL DKT. NO. CSV 07712-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 07712-16
AGENCY DKT. NO. 2016-4027

IN THE MATTER OF BRIAN FRIEDMAN,
DEPARTMENT OF HUMAN SERVICES,
ANN KLEIN FORENSIC CENTER.

Frank M. Crivelli, Esq., for appellant (Crivelli & Barbati, LLC, attorneys)

Adam K. Phelps, Deputy Attorney General, for respondent (Gurbir S. Gewal, Attorney General of New Jersey, attorney)

Record Closed: March 5, 2018 Decided: June 14, 2018

BEFORE **ELIA A. PELIOS,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 23, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 14, 2018
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 6-18-18

Date Mailed to Parties: 6-19-18

nd

APPENDIX

EXHIBITS

Jointly:

J-1 Settlement Agreement

J-1

RECEIVED

2018 MAY 29 A 11:45

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF BRIAN FRIEDMAN AND STATE OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES ANN KLEIN FORENSIC CENTER	OAL DOCKET NO. CSV 07712-2016 S SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated May 5, 2016, contains the following charges and proposed discipline of Brian Friedman:

1. N.J.A.C. 4A:2-1.3(a)6 conduct unbecoming a public employee- Removal effective August 26, 2014.
2. N.J.A.C. 4A:2-2.3(a) 12 Other sufficient cause- Removal effective August 26, 2014.
3. DHS Disciplinary Action Program C8 Falsification C16 Notoriously Disgraceful Conduct - Removal effective August 26, 2014.

B. The parties have agreed to the following resolution of the charges listed in Paragraph A above:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows:
N/A (Withdrawn)

2. The total number of days of back-pay, if any, to be paid by the appointing authority to the Appellant is as follows:
N/A (Withdrawn).

3. Any other days from the date of last suspension day until reinstatement shall be treated as follows:
N/A (Withdrawn).

C. Upon Friedman executing this agreement the parties shall immediately notify the Administrative Law Judge assigned to this matter of the settlement.

D. Respondents Department of Human Services ("DHS") and Department of Health ("DOH"), of which Ann Klein Forensic Center is now a subsidiary, agree to accept a General Resignation from Appellant Brian Friedman ("Friedman") effective August 26, 2014.

E. Appellant Friedman agrees not to seek or accept employment with Ann Klein Forensic Center, DHS, DOH, the State of New Jersey, and/or any subsidiaries of the aforementioned entities, at any time in the future.

F. Pursuant to N.J.A.C. 4A:2-6.3, this settlement was agreed to as resolution to the disciplinary appeal for the charges set forth in Paragraph A.

G. In exchange for Friedman's General Resignation on August 26, 2014 as established in Paragraph D above, DHS and/or DOH agree(s) to pay Friedman a one-time pre-tax lump sum of two hundred seven thousand five hundred dollars ($207,500), with appropriate taxes to be withheld by the paying agency at the time of payment, to the extent practicable. Payment of all settlement proceeds shall be due and owing within thirty (30) days of the date The Civil Service Commission approves this settlement. Should DHS and/or DOH not make payment to Friedman of the amount described herein

within thirty (30) days of approval by the Civil Service Commission, their failure to do so may be deemed an express breach of this agreement by Friedman, entitling Friedman to vacate the terms of settlement as outlined in Paragraphs C, D, E and F above.

H. Friedman is responsible for any and all Federal, State and Local tax obligations incurred as a result of the aforesaid payment. Friedman recognizes any disagreement between the parties regarding DHS, DOH or the State's calculation or withholding of taxes arising from the payment set forth in Paragraph are to be corrected by Friedman through his subsequent tax filings. The parties acknowledge that this payment is not salary, and that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer. Friedman acknowledges that none of the money paid to him under this settlement is currently subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

I DHS and/or DOH shall amend Friedman's personnel records to conform to the terms of the settlement. All internal records of DHS and/or DOH will be kept intact. Pursuant to state policy, any inquiries regarding Friedman's employment will result in DHS and/or DOH and/or the State of New Jersey providing only Friedman's name, date of hire, date of resignation, and job title at separation of service. Nothing herein shall preclude the DHS/DOH from releasing information on this matter to anyone who has a release executed by appellant or as consistent and/or required by law, including, but not limited to, the Open Public Records Act. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

J. Appellant Friedman waives all other claims against Respondents DHS and/or Ann Klein Forensic Center/DOH with regard to this matter, including but not

limited to any claims for theft of personal property, lost, damaged, or stolen personal property, awards of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

K. Except for the assessment of Friedman's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

L. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, the Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any

past action or practice in any subsequent claims, except pending workers compensation claims.

M. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

N. This agreement will become effective only if approved by the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of any party to this settlement to pursue this matter further.

5-7-18
DATE

Brian Friedman, Psy.D.

5/7/18
DATE

Crivelli & Barbati, L.L.C.
Frank M. Crivelli, Esq.
Counsel for Brian Friedman

5/8/18
DATE

ON BEHALF OF Respondent
Department of Human Services

5/22/18
DATE

ON BEHALF OF Respondent
Department of Health

05/22/18
DATE

Adam K. Phelps, DAG

CERTIFICATION

I, Brian Friedman, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that as a result of this Settlement Agreement, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-7-18
DATE

Brian Friedman

7-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Bernard Gunderman
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2482
OAL DKT. NO. CSV 2555-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 2555-17
AGENCY DKT. NO. 2017-2482

IN THE MATTER OF BERNARD GUNDERMAN, DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER.

William A. Nash, Esq., appearing for appellant (Nash Law Firm, LLC, attorneys)

Andy Jong, Deputy Attorney General, appearing for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 11, 2018 Decided: June 14, 2018

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 22, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 14, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 6-18-18

Date Mailed to Parties: 6-19-18

/cb

OAL DKT. NO. CSV 02555-2017 S
AGENCY DKT. NO. 2017-2482

SETTLEMENT AGREEMENT

IN THE MATTER OF
BERNARD GUNDERMAN
AND
DEPT. OF HUMAN SERVICES,
HUNTERDON DEV. CTR.

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated January 11, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Inability to discharge one's duty due to mental or physical incapacity (B10.1)	Removal (for all charges)	8/30/16
2. N.J.A.C. 4A:2-2.3(a)3 Inability to perform duties		
3. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. Respondent Department of Human Services will accept a Resignation in Good Standing from Appellant Bernard Gunderman, effective August 30, 2016. Appellant Bernard Gunderman agrees not to seek or accept employment with the Department of Human Services or the Department of Health or any of their subsidiaries at any time in the future.

C. The Appellant Bernard Gunderman withdraws his appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. Inability to discharge one's duty due to mental or physical incapacity (B10.1)	Withdrawn
2. N.J.A.C. 4A:2-2.3(a)3 Inability to perform duties	Withdrawn
3. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause	Withdrawn

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement agreement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department of Human Services from releasing information on this matter to anyone who has a release executed by appellant, or as otherwise consistent with the

law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department of Human Services with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Bernard Gunderman's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past

action or practice in any subsequent claims, except pending worker's compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6-11-18
DATE

Bernard Gunderman, Appellant

6-1-18
DATE

ON BEHALF OF Appellant

May 30, 2018
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Bernard Gunderman, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6-11-18
DATE

Bernard Gunderman

7-25-18

A-1

STATE OF NEW JERSEY

In the Matter of Mathew Hahn, Middlesex County, Department of Adult Corrections

CSC DKT. NO. 2017-1588
OAL DKT. NO. CSV 18089-16
OAL DKT. NO. PTC 14419-16
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

RECEIVED
MAY 21 2018
NJ DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

MATHEW HAHN,
Petitioner,
v.
MONMOUTH COUNTY POLICE ACADEMY,
Respondent,
and
IN THE MATTER OF MATHEW HAHN, MIDDLESEX COUNTY DEPARTMENT OF ADULT CORRECTIONS.

OAL DKT. NO. PTC 14419-16
AGENCY DKT. NO. N/A

OAL DKT. NO. CSV 18089-16
AGENCY DKT. NO. 2017-1588
(CONSOLIDATED)

Peter B. Paris, Esq., for appellant/petitioner (Mets, Schiro, McGovern & Paris LLP, attorneys)

Benjamin D. Leibowitz, Esq., for respondent Middlesex County Department of Adult Corrections (Thomas F. Kelso, County Counsel, attorney)

Steven W. Kleinman, Esq., Special County Counsel, for respondent Monmouth County Police Academy (Andrea I. Bazer, County Counsel, attorney)

Record Closed: April 20, 2018 Decided: April 23, 2018

BEFORE **DEAN J. BUONO**, ALJ:

This consolidated matter was filed with the Office of Administrative Law (OAL) on September 27, 2016, and December 1, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On October 18, 2017, in accordance with N.J.A.C. 1:4A-17.1 and N.J.A.C. 1:4A-17.2, these matters were consolidated. The Police Training Commission was deemed to have the predominant interest with regard to the charges based upon the appellant's termination from an approved school or program for failure to meet the standards of N.J.S.A. 52:17B-71.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement and Complete Release (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this Initial Decision with **POLICE TRAINING COMMISSION.**

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **POLICE TRAINING COMMISSION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **POLICE TRAINING COMMISSION** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

April 23, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 4/27/18

Date Mailed to Parties: 4/27/18

/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement and Complete Release

J-1

SETTLEMENT AGREEMENT AND COMPLETE RELEASE

This Settlement Agreement and Complete Release ("Agreement") is entered into this 3rd day of ~~March~~ April (sub), 2018 and is by and between the Monmouth County Sheriff's Office ("MCSO"), the County of Middlesex ("Middlesex County"), and Matthew Hahn ("Hahn").

RECITALS

WHEREAS, Hahn was employed by Middlesex County as a County Corrections Officer; and,

WHEREAS, Hahn was required to successfully complete the Basic Course for County Corrections Officers as a condition of his continued employment by Middlesex County as a County Corrections Officer; and,

WHEREAS, Middlesex County enrolled Hahn in the 33rd Basic Course for County Corrections Officers at the Monmouth County Police Academy ("MCPA"), which is a division of the MCSO, commencing on August 29, 2016; and,

WHEREAS, Hahn was dismissed from the MCPA on September 8, 2016 following an incident that occurred earlier that day; and,

WHEREAS, due to his dismissal from the MCPA, Middlesex County removed Hahn from his employment as a County Corrections Officer effective November 4, 2016; and,

WHEREAS, Hahn timely filed an appeal (the "Dismissal Appeal") of his dismissal from the MCPA to the Police Training Commission ("PTC"), which was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case under docket number PTC-14419-16; and,

WHEREAS, Hahn also timely filed an appeal (the "Removal Appeal") of his removal from employment at Middlesex County to the Civil Service Commission ("CSC"), which was

transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case under docket number CSV-18089-16; and,

WHEREAS, the Dismissal Appeal and the Removal Appeal were consolidated for a plenary hearing before Administrative Law Judge Dean Buono; and,

WHEREAS, prior to the conclusion of the hearing at the OAL, the parties engaged in settlement discussions; and,

WHEREAS, the MCSO, Middlesex County and Hahn now desire to resolve all outstanding issues with respect to the foregoing events via this Agreement and amicably resolve both the Dismissal Appeal and the Removal Appeal.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the MCSO, Middlesex County and Hahn hereby agree as follows:

1. **RESOLUTION OF THE DISMISSAL APPEAL AND REMOVAL APPEAL; TERMS AND CONDITIONS.**

The MCSO, Middlesex County and Hahn agree as follows:

a. In lieu of his dismissal from the MCPA's 33rd Basic Course for County Corrections Officers, Hahn shall be deemed to have voluntarily withdrawn from same.

b. In lieu of his removal from employment by Middlesex County, he shall be deemed to have resigned from his employment in good standing as a County Corrections Officer, effective and retroactive to November 4, 2016. The parties agree that to the extent that it is within their control, this retroactive resignation date should not have any impact on any unemployment benefits that may have been obtained by Hahn.

c. Hahn agrees not to seek future employment as a sworn law enforcement officer with Middlesex County. However, nothing in this Agreement shall be construed as

limiting Hahn from applying for future law enforcement positions with any other law enforcement agency, or seeking any other employment whatsoever, whether or not that employment is governed by the Civil Service Act. In the event that Hahn is hired by a law enforcement agency that utilizes the MCPA for training purposes, there shall be no bar on his ability to re-enroll in the MCPA.

d. Hahn waives any and all claims arising from or relating to his dismissal from the MCPA or his removal from Middlesex County, including but not limited to, back pay, benefits, attorneys' fees and/or costs.

e. The MCPA and Middlesex County will amend their records to conform to the terms of the Agreement and will do all that is reasonably necessary to cause any Civil Service records to reflect Hahn's resignation in good standing instead of removal. All internal records will remain intact. Internal records shall also include a copy of this settlement agreement and the transcript and exhibits from the first and only day of the OAL hearing on November 29, 2017.

2. **COMPLETE RELEASE AND RELINQUISHMENT OF CLAIMS.**

In consideration of the settlement hereinabove, and to the fullest extent permissible by law, Hahn, along with his successors, assigns, heirs, representatives and estates (collectively, "**Releasor**"), agrees to irrevocably and unconditionally relinquish any and all causes of Action, demands or claims, including claims for attorney's fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the MCSO (as well as its funding agent, the County of Monmouth) and Middlesex County, as well as all of their elected and appointed officials, officers, agents, employees, agencies and instrumentalities (collectively, "**Releasees**"),

regardless of whether such claims are presently known or unknown to Releasor. This full and unconditional relinquishment and release of claims includes, but is not limited to, any causes of action, demands or claims relating in any way to Hahn's enrollment at the MCPA or his removal from employment by Middlesex County, or any other events, information or disputes giving rise to this matter, the Dismissal Appeal, the Removal Appeal or the Agreement.

This full and unconditional Release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This full and unconditional Release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, including, but not limited to, the United States Constitution, the federal Fair Labor Standards Act, the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act, the federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, and the New Jersey Civil Rights Act.

This full and unconditional Release also specifically includes, but is not limited to, claims for reemployment by contract or recall rights, compensatory damages, punitive damages, reinstatement, back pay, overtime compensation, back benefits, back emoluments, attorneys' fees, equitable relief, or any other relief.

This full and unconditional Release does not prevent, and is not intended to prevent, Hahn from making an allegation of discrimination to the U.S. Equal Employment Opportunity Commission ("EEOC"), the New Jersey Division on Civil Rights ("NJDCR") or any other state or local civil rights agency. However, Releasor irrevocably waives any right to receive any monetary relief or any other compensation whatsoever in connection with the prosecution of a charge or suit brought on Hahn's behalf by the EEOC, NJDCR, or any other third party such as another federal, state or local governmental agency or entity.

Nothing in this release shall apply to any vested benefits or any claim to determine or enforce rights with respect to said benefits, nor with respect to any claim filed under the New Jersey Workers Compensation Act.

3. **ACKNOWLEDGEMENT.**

Hahn acknowledges that this Agreement shall resolve all issues related to the Dismissal Appeal and the Removal Appeal and that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel prior to entering into it and that he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

4. **SATISFACTORY REPRESENTATION.**

Hahn certifies that (1) he is satisfied with the representation his legal counsel has provided him in this matter, (2) his legal counsel has not made any representations concerning the terms or effects of this Agreement other than those contained herein; and (3) he has been advised by his legal counsel that by entering into the Agreement, he is irrevocably waiving any further due process to which he may be entitled in this matter. Hahn has advised his legal counsel that with these understandings, he agrees to the terms contained in this Agreement.

5. **GOVERNING LAW AND FORUM.**

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

6. **HEADINGS.**

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

7. **SEVERABILITY CLAUSE.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

8. **AMBIGUITIES.**

Each party and their counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

9. **MODIFICATIONS TO BE IN WRITING.**

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

10. **ENTIRE UNDERSTANDING.**

This Agreement and Release sets forth the entire understanding between the MCPA, Middlesex County and Hahn, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

11. **NON-ADMISSION.**

Nothing in this Agreement shall be construed as an admission by any party that any action it has taken was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

12. **AGREEMENT NON-PRECEDENTIAL.**

The parties agree that this Agreement shall be non-precedential, is limited to specific, unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other enrollee at the MCPA or any other employee

of Middlesex County. The parties shall not utilize this settlement in any way with respect to any other proceeding involving the MCPA or Middlesex County unless specifically provided for herein.

13. **CONFIDENTIALITY.**

The parties agree that this document constitutes a confidential personnel record under the Open Public Records Act and/or the common law governing public records, and will not be publicly disclosed, except as consistent with law. Hahn agrees that he will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery or offer evidence, unless required by law or court order (in which case he agrees to notify the MCPA and Middlesex County before doing so to provide for an opportunity to oppose such a request), relating to the terms or execution of this Agreement.

14. **APPROVALS.**

The parties acknowledge that this Agreement may be subject to approval by the PTC and the Civil Service Commission and shall be provided to the PTC, the Civil Service Commission and/or the assigned Administrative Law Judge for their respective approvals if so required. Any disapproval by the PTC or the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

15. **REPRESENTATIONS.**

Each person signing this Agreement represents and warrants that she or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each party represents and warrants to the other that the execution and delivery of the Agreement and

the performance of such party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

16. ACKNOWLEGEMENT.

By signing this Agreement and Release, Matthew Hahn acknowledges:

i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.

iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE MCSO AND MIDDLESEX COUNTY TO CONSULT WITH AN ATTORNEY OF MY CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND REPRESENT THAT I IN FACT HAVE CONSULTED WITH AN ATTORNEY.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.

vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

viii. I REPRESENT AND AGREE THAT I AM NOT UNDER THE INFLUENCE OF ANY ILLNESS, INCLUDING MENTAL OR EMOTIONAL ILLNESS, MEDICAL CONDITION, DISABILITY OR IMPAIRMENT, OR OF PRESCRIPTION OR OTHER MEDICATION THAT WOULD AFFECT MY ABILITY TO REVIEW THIS AGREEMENT IN ITS ENTIRETY, UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILY AGREE TO IT.

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE MCSO, MIDDLESEX COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Matthew Hahn executed the foregoing Agreement this 3 day of April 2018.

Sworn and subscribed to before me this 3rd day of April 2018

Notary Public of the State of New Jersey Attorney at Law

MATTHEW HAHN

The County of Middlesex

Date:_____

By:_____

Printed Name: _____

Monmouth County Sheriff's Office

Date: 4/3/18

By:_____

Printed Name: Steven Heinman
Special Cnty Counsel

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE MCSO, MIDDLESEX COUNTY OR BY ANY THIRD PARTY.

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Sworn and subscribed to before me
this 3rd **day of** April **2018**

~~Notary Public of the State of New Jersey~~ Attorney at Law

Date: 4/4/18

MATTHEW HAHN

The County of Middlesex

By: _____

Printed Name: Dennis Carroll

Monmouth County Sheriff's Office

Date: 4/3/18

By: _____

Printed Name: Steven Heinman
Special County Counsel

7-18-18

A-4

STATE OF NEW JERSEY

In the Matter of Louis Hightower
Hudson County Sheriff's Department

CSC DKT. NO. 2018-418
OAL DKT. NO. CSV 12874-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Louis Hightower, Sheriff's Officer, Hudson County Sheriff's Department, 10 working day suspension, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on May 30, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 12874-17
CSC DKT. #2018-418

LOUIS HIGHTOWER,
Appellant,
v.
HUDSON COUNTY SHERIFF'S DEPARTMENT,
Respondent.

Jeffrey D. Catrambone, Esq., Sciarra & Catrambone, for Appellant (Sciarra & Catrambone, attorneys)

John A. Smith, III, Esq., Assistant County Counsel, for Respondent

Record Closed: May 11, 2018 Decided: May 30, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Louis Hightower, appeals a Final Notice of Disciplinary Action, dated July 28, 2017, imposing a ten-day suspension without pay.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on September 5, 2017.

A prehearing conference was conducted on September 20, 2017, and a prehearing order of the same date was entered by the undersigned.

A hearing was held on February 15, 2018. The record remained open to permit the parties to file post-hearing submissions. The record closed on May 11, 2018.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action: Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Neglect of Duty, N.J.A.C. 4A:2.2-3(a)(7); and, Other Sufficient Cause N.J.A.C. 4A:2-2.3(a)(12); and, if sustained, whether a penalty of a ten-day suspension without pay is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Patrick Schifano, testified as follows:

He is a captain with the Hudson County Sheriff's Department. At the time of the incident of June 9, 2017, he was the commanding officer. After he works his normal shift of 8:00 a.m. to 4:00 p.m. a supervisory officer is named as the "night boss." On June 9, 2017, the night boss was Sergeant Ingrid Baird. A sergeant can give an order to an officer or detective. It does not matter if that sergeant is the particular officer's direct supervisor as a sergeant is a superior officer and may issue orders.

He is aware of an interaction between Sergeant Baird and Appellant that occurred on June 8, 2017. He had requested written reports from both of them. He also requested written reports from Lieutenant Toft, Sergeant Carrillo, and Appellant. Captain Schifano also spoke with these individuals, except for Appellant.

Captain Schifano recommended disciplinary action against appellant after he completed a review of the interaction between Sergeant Baird and Appellant. That resulted in the issuance of a Preliminary Notice of Disciplinary Action (PNDA). The charges set forth therein were sustained in a Final Notice of Disciplinary Action.

As Appellant had previously been the subject of a minor disciplinary action Captain Schifano recommended major disciplinary action.

Sergeant Baird had the authority to order Appellant to stay on the job. The Rules and Regulations of the Hudson County Sheriff's Department, Rule 1.4, requires an officer to promptly comply with a lawful order of a supervisor.

The situation on June 8, 2017, was an emergent circumstance as a medical run may have been needed to transport a prisoner. Two officers are required to perform a medical run.

Captain Schifano was not present on June 8, 2017.

Officers should be aware of who is the night boss.

Captain Schifano admitted that Appellant ultimately obeyed Sergeant Baird's order. He felt Appellant was disrespectful towards Sergeant Baird by not obeying the order and trying to leave the building. He also stated being given an order and then walking away is a bit insolent.

Captain Schifano does not know if Sergeant Baird made inquiry into her unit for available officers for the medical run. Appellant is not in her unit.

It does not matter if Sergeant Baird is the night boss or just a sergeant. She is a superior officer and Appellant did not promptly comply with her order.

Ingrid Baird testified as follows:

She is a sergeant with the Hudson County Sheriff's Department. On June 9, 2017, she was the night boss. She oversees the building at night. That night she received a telephone call from Investigator Trombetta that there was a potential need for a medical run. The medical run was for a person waiting to be picked up on a warrant issued out of Jersey City. She told Investigator Trombetta to advise Appellant he was needed for the medical run. No one from her unit was available to do the medical run. Two officers are needed for a medical run and she needed to be sure she had them available. She considered the matter emergent.

Thereafter she went to the lobby of the building. Investigator Conti and Officer Domingues were working at the time. Sergeant Baird told Investigator Conti he was required to do the medical run. Investigator Conti complied with Sergeant Baird's order.

Sergeant Baird had authority to issue an order to an officer. She did not need to be that particular officer's direct supervisor. She had the right to order Appellant to do mandatory overtime.

Sergeant Baird spoke directly with Appellant in the lobby. She saw him leaving the building. She apologized to Appellant, but said she needed him. He said he had signed out and was not staying. Sergeant Baird again stated the order. Appellant responded by stating he was going to speak with his direct supervisor, Sergeant Carrillo. The Appellant returned approximately fifteen minutes later. Ultimately Appellant complied with the order.

Sergeant Baird thought the situation with Appellant was inappropriate and his behavior unacceptable. Sergeant Baird stated that Appellant "supervisor shopped."

She never had a previous problem with Appellant. She is aware of his prior five-day suspension.

The medical run was not needed as Jersey City Police picked up the individual and transported him.

Michael Trombetta testified as follows:

He is an Investigator with the Hudson County Sherriff's Department. He was on duty on June 9, 2017. He noted a prisoner had a possible medical condition and called Sergeant Baird to advise her. Sergeant Baird asked if there were available officers. Investigator Trombetta replied that Appellant was available. Sergeant Baird asked Investigator Trombetta to tell Appellant he was needed for a possible medical run. When told he needed to stay Appellant replied "no" and left. Investigator Trombetta told Appellant a second time that Sergeant Baird required him to stay.

Carlos Carrillo testified as follows:

He is a sergeant with the Hudson County Sheriff's Department. He was on duty on June 9, 2017. He is Appellant's direct supervisor. He spoke with Appellant in the garage. Appellant asked him if he needed to stay to do a medical run. Appellant stated he was "mandated" by Sergeant Baird when he was leaving the building. Sergeant Carrillo advised Appellant it would be in his best interest to follow Sergeant Baird's order. Sergeant Carrillo could not overrule Sergeant Baird. The conversation with Appellant took approximately five minutes. He prepared a written report regarding his conversation with Appellant.

Generally, officers do not question an order from a superior officer.

Joseph Toth testified as follows:

He is a Lieutenant with the Hudson County Sherriff's Department. He was on duty on June 9, 2017. He spoke with Appellant and Sergeant Carrillo at approximately 5:00 p.m. He was leaving for the day and was stopped by both men. Appellant told him of the order by Sergeant Baird regarding a medical run and that he wanted to leave. Lieutenant Toth asked Appellant if he had an emergency. Appellant stated he did not. He just wanted to leave. Lieutenant Toth stated that Sergeant Baird's order was legitimate. He told Appellant it would be in his best interest to go back and find Sergeant Baird. He prepared a written report regarding the matter.

Andrew Conti testified as follows:

He is an officer in the Hudson County Sheriff's Department. He was on duty on June 9, 2017. He was doing security in the lobby. He could not remember the name of the other officer working with him. He spoke with Sergeant Baird who told him to stay past his shift for a medical run. His shift ended at 6:00 p.m. Two officers are needed to do a medical run. He saw Appellant in the lobby walking toward the front door. Officer Conti did not speak with Appellant. He heard Sergeant Baird tell Appellant to stay. Appellant responded that he was not staying. Sergeant Baird stated it was an order. Appellant responded by stating he would speak with his own supervisor. He estimated the distance between Appellant and Sergeant Baird to be thirty-five feet. Officer Conti complied with Sergeant Baird's order and reported to the holding cell at 5:50 p.m. He did not recall if Appellant was there. Officer Conti thought Appellant was disrespectful and should not speak to a supervisor the way he did. Officers are trained to follow orders of superiors, even if given by someone not a direct supervisor. The medical run was not necessary as Jersey City Police picked up the prisoner. He did not prepare a written report.

Andrea Domingues testified as follows:

She is an officer with the Hudson County Sheriff's Department. She was on duty on June 9, 2017. She was working security in the lobby with Officer Conti. Sergeant Baird was the night supervisor. She does not recall Sergeant Baird speaking with

Officer Conti. She did not know if Officer Conti was asked to do a medical run. She observed Sergeant Baird and Appellant speak. Appellant was leaving at the time and Sergeant Baird asked Appellant to stay. She recalls Appellant saying, "I refuse to stay." Appellant told Sergeant Baird he would speak with Sergeant Carrillo. Sergeant Baird responded that Sergeant Carrillo was not her supervisor. Sergeant Baird ordered Appellant to stay for mandatory overtime. She stated a sergeant has the right to give an order. She considered this a direct order. She did not think Appellant was disrespectful. She did not prepare a written report.

Appellant's Case

Louis Hightower, Appellant, testified as follows:

He is an officer with the Hudson County Sherriff's Department. He was on duty on June 9, 2017. His normal shift is 8:30 a.m. to 4:30 p.m. At approximately 5:05 p.m. he was leaving the court house. Investigator Trombetta asked him if he was interested in working overtime. He had no other conversation with Investigator Trombetta. He saw Investigator Trombetta on the telephone. He spoke with him in the hallway. When he went to leave, Investigator Trombetta told him that Sergeant Baird mandated him to stay. He replied that he had already signed out. Sergeant Baird is not his immediate supervisor. He was not aware she was the night boss that day. He went to leave the building and Sergeant Baird saw him and told him he had to say for overtime. That conversation lasted less than a minute. He told Sergeant Baird he was not the only one there and that he was going to talk with his supervisor, Sergeant Carrillo. He knew Sergeant Carrillo was downstairs. He told Sergeant Carrillo that Sergeant Baird had mandated him for overtime. Sergeant Carrillo told him to obey the order. Lieutenant Toft also told him to obey the order. He then went to the ground floor to tell Sergeant Baird he was going to get changed. His intention at this point was to do the medical run. Sergeant Baird told him not to question her order. They were arguing with each other. He stated he was not being insubordinate. He prepared a written report. He is familiar with the overtime procedures set out in the Collective Bargaining Agreement (CAB). Overtime is first assigned within a unit. Sergeant Baird's unit is the second

floor. He did not know if the second-floor unit was questioned for overtime. If the unit cannot do the overtime then it is assigned to the division. He is not a member of Sergeant Baird's unit. He was not intentionally insubordinate. He never said he would not stay. The medical run never took place. He left the building about 6:45 p.m. He understood the order relayed by Investigator Trombetta, but Investigator Trombetta cannot relay that order. His intention was to leave when Sergeant Baird told him to stay. He stated he could not be mandated to stay by another officer. He does not know how to obey an order relayed by another officer. He does not have to obey an order if relayed by an officer of same rank. He understands the rules of the department and that he must carry out an order. He felt he was targeted by this order.

FINDINGS OF FACT

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

1. Appellant is employed by the Hudson County Sheriff's Department.
2. He was on duty on June 9, 2017, and was about to leave at the end of his shift.
3. He was advised by Investigator Trombetta not to leave at the direction of Sergeant Baird.
4. Sergeant Baird was the "night boss" on June 9, 2017, and had the authority to order appellant to perform mandatory overtime.
5. Investigator Trombetta informed appellant a second time not to leave as he was being mandated by Sergeant Baird to stay for a possible medical run.
6. Appellant then attempted to leave the building and was confronted by Sergeant Baird who gave appellant the order directly.
7. Appellant responded by advising Sergeant Baird he was not the only officer available and that he would go speak with his supervisor, Sergeant Carillo.

8. Rather than immediately complying with the order appellant sought out his direct supervisor, Sergeant Carillo, to discuss whether he should comply with Sergeant Baird's order.
9. Appellant did speak with Sergeant Carillo and Lieutenant Toft, who happened to be with Sergeant Carillo at the time. Appellant was advised by Sergeant Carillo to obey Sergeant Baird's order.
10. Thereafter, Appellant did obey the order.
11. Appellant admits that the proper procedure regarding an order is to comply with said order and thereafter file a grievance should he think the order was inappropriate.
12. Appellant is required by Rules and Regulations of the Hudson County Sheriff's Office to comply with an order from a superior officer. (R-5.)
13. Sergeant Baird is Appellant's superior officer.
14. The collective bargaining agreement between Appellant's union and the Hudson County Sheriff's Department require Appellant to continue to observe all rules and regulations pending the outcome of a grievance. (R-7.)
15. Appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) dated June 21, 2017, charging him with insubordination, neglect of duty, and other sufficient cause. (R-1.)

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory

responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

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

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein, 26 N.J. at 275. The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, 218 N.J. Super. at 341. The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

There is no constitutional or statutory right to a government job. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, which should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the Hudson County Sheriff's Department bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See Polk, 90 N.J. 550; Atkinson, 37 N.J. 143.

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

An employee may be disciplined for insubordination, neglect of duty, and other sufficient cause, among other reasons. N.J.A.C. 4A:2-2.3. This matter involves a major disciplinary action, brought by the respondent appointing authority against appellant, seeking a ten-day suspension. Respondent has charged Appellant with insubordination, neglect of duty, and other sufficient cause.

The salient facts in this matter are basically undisputed. Appellant was first advised by Investigator Trombetta that he was to not leave per Sergeant Baird as he may be needed to do a medical run. Appellant's reply was that he had checked out and was leaving. Investigator Trombetta advised Appellant a second time that Sergeant Baird wad mandating he stay. Thereafter Appellant went to the lobby to leave the building. In the lobby Sergeant Baird gave Appellant the order directly. Appellant did not promptly obey the order. Instead he went to speak with his immediate supervisor, Sergeant Carrillo. Sergeant Carrillo, and Lieutenant Toft, who was there at the time, advised Appellant to obey the order.

Appellant argues that not much time transpired from the time he was given the order directly by Sergeant Baird and the time when he eventually complied with the order. This argument is a red herring. There is no dispute he did not promptly comply with the order as required by the Rules and Regulations of the Hudson County Sheriff's Department. Rather Appellant sought to not comply with the order by speaking with Sergeant Carrillo. He knew, or should have known, the rules. He admitted in his testimony that he is to obey superior officers' orders. He admitted in his testimony that the proper procedure is to file a grievance if he believed an order to be inappropriate. That he ultimately complied does not negate his initial non-compliance.

INSUBORDINATION N.J.A.C. 4A:2-2.3(a)(2)

Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person.

Further, Insubordination, though not defined in the New Jersey Administrative Code, has been given a more expansive definition, to include acts of disobedience, non-compliance and non-cooperation." In re Stanziale, CSV 4113-00, Final Decision (January 29, 2001), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-3492-00

(App. Div. April 11, 2002). It thus encompasses more than a simple refusal to obey an order. In re Chaparro, 2011 N.J. CSC LEXIS 102 (N.J. CSC 2011) (CSC decision citing In re Stanziale,No. A-3492-00T5 (App. Div. April 11, 2002) (employee's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, No. A-2488-07T2 (App. Div. April 26, 2010), <http://njlaw.rutgers.edu/collections/courts/>; In re Moreno, CSV 14037-09, Initial Decision (June 10, 2010), modified, CSC (August 9, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 24, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Pettiford, CSV 08801-07,Initial Decision (March 13, 2008), adopted, Merit System Board (June 13, 2008), <http://njlaw.rutgers.edu/collections/oal/> (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor).

The Civil Service Commission also has determined that an appellant is required to comply with an order of his or her superior, even if he or she believed the orders to be improper or contrary to established rules and regulations. See Palamara v. Twp. of Irvington, A-5408-05T3 (App. Div. February 28, 2005), <http://njlaw.rutgers.edu/collections/courts/>; compare, In re Allen, CSV 11160-04, Initial Decision (May 23, 2005), remanded, Merit System Board (July 14, 2005), CSV 09132-05 Initial Decision, (November 22, 2005), adopted, Merit System Board (January 26, 2006) <http://njlaw.rutgers.edu/collections/oal/> (in which the Board determined that the appellant's disobedience was justified by concerns for the safety of the clients on a bus and reversed his removal).

I **CONCLUDE** that appellant is guilty of Insubordination for not promptly following the direct order of Sergeant Baird. Insubordination is defined in the Rules and Regulations of the Hudson County Sheriff's Department, R. 1.4(a), as follows:

> Personnel shall promptly obey all lawful orders of any supervisor. Failure or deliberate refusal of any employee to obey a lawful order of a supervisor, ridiculing a supervisor or his order, in or out of his presence, or disrespectful, mutinous, insolent or abusive language directed toward a supervisor, shall constitute insubordinate or serious breach of discipline.

NEGLECT OF DUTY N.J.A.C. 4A:2-2.3(a)(7)

Neglect of duty is not defined under the New Jersey Administrative Code, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). It has been applied both to not fully carrying out duties and to acting incorrectly. See, e.g., In re Marucci, CSV 07241-09, Initial Decision (January 1, 2010), modified, CSC (March 6, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, A-3607-09T1 (App. Div. January 3, 2012), <http://njlaw.rutgers.edu/collections/courts/> (removal of a police officer with no disciplinary record where he failed to remove drugs from under a sewer grate and then lied about his actions); see also In re Dona, CSV 10782-08, Initial Decision (August 3, 2009), modified, CSC (August 8, 2009), <http://njlaw.rutgers.edu/collections/oal/> (affirming twenty-day suspension for failing to pat down inmate properly, missing a wooden shank).

I **CONCLUDE** that appellant is guilty of Neglect of Duty for not promptly complying with the direct order of Sergeant Baird. Neglect of Duty is defined in the Rules and Regulations of the Hudson County Sheriff's Department, R. 1.3, as follows:

> Personnel are required to give suitable attention to the performance of their duties. Any act or omission or commission indicating failure to perform or the negligent performance or compliance to any rule, regulation, directive, order or standard operative procedure as dictated by Sheriff's Office practice, or as published, which causes any detriment to the Sheriff's Office, its personnel, and any prisoner or to any member of the public, shall be considered neglect of duty.

OTHER SUFFICIENT CAUSE N.J.A.C. 4A:2-2.3(a)(12)

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against Appellant. The charge of other sufficient cause has been dismissed when "respondent has not

given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/. Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

I **CONCLUDE** that appellant is guilty of Other Sufficient Cause for violating this standard of good behavior.

The final issue to be addressed is the appropriate penalty warranted under these circumstances. Appellant's prior disciplinary record may be considered for guidance in determining the appropriate penalty, as the principle of progressive discipline is applied in this state. Bock, 38 N.J.at 523. Although an employee's past record may not be considered for purposes of proving the present charge, past misconduct can be a factor in determining the appropriate penalty for the current misconduct. In re Herrmann, 192 N.J. 19, 29 (2007); In re Carter, 191 N.J. 474, 484 (2007); Bock, 38 N.J. at 522-23. The underlying intendment of progressive discipline is to provide an employee with notice of his deficiencies and the opportunity to correct them.

Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950). Appellant's entire record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. See Bock, 38 N.J. 500.

Appellant has one prior disciplinary matter arising from an incident from October 30, 2015. Appellant refused to comply with an order to man a crosswalk post. Appellant's contention at the time was that he was protecting his contractual rights as assignment to this post was by seniority. A five-day suspension was imposed and upheld by an arbitrator.

I **CONCLUDE** that the respondent has carried its burden to prove by a preponderance of the credible evidence that appellant was guilty of the Charges sustained in the Final Notice of Disciplinary Action: Insubordination N.J.A.C. 4A;2-2.3(a)(2); Neglect of Duty N.J.A.C. 4A:2.2-3(a)(7); and, Other Sufficient Cause N.J.A.C. 4A:2-2.3(a)(12); and, that the penalty of a ten-day suspension without pay should be affirmed.

ORDER

Based upon the foregoing, I **ORDER** that the Final Notice of Disciplinary Action, and the imposition of a ten-day suspension without pay, is hereby **AFFIRMED**; and,

It is further **ORDERED** that Appellant's appeal is **DISMISSED**, with prejudice.

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

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

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

May 30, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: May 30, 2018

LISA JAMES-BEAVERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: May 31, 2018

db

APPENDIX

List of Witnesses

For Appellant:

Louis Hightower, Appellant

For Respondent:

Capt. Patrick Schifano

Sgt. Ingrid Baird

Off. Michael Trombetta

Sgt. Carlos Carrillo

Lt. Joseph Toft

Off. Andrew Conti

Off. Andrea Domingues

List of Exhibits

For Appellant:

None

For Respondent:

R-1 PNDA dated 6/21/17 and FNDA dated 7/25/17

R-2 Written reports of Sergeant Baird, Lieutenant Toft, Sergeant Carrillo, and Appellant

R-3 NO DOCUMENT MARKED

R-4 Notice of Minor Disciplinary Action dated 10/30/15

R-5 Hudson County Sheriff's Department Rules and Regulations

R-6 Arbitrator's decision dated 11/7/16

R-7 CBA dated 1/1/16

7-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Anthony Holley
City of Jersey City,
Department of Public Safety

CSC DKT. NO. 2018-1053
OAL DKT. NO. CSV 16601-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16601-17

AGENCY DKT. NO. 2018-1053

IN THE MATTER OF ANTHONY HOLLEY, CITY OF JERSEY CITY, DEPARTMENT OF PUBLIC SAFETY.

James M. Mets, Esq., for appellant (Mets, Schiro, McGovern & Paris, attorneys)

James Johnston, Assistant Corporation Counsel pursuant to N.J.A.C. 1:1-5.4(a)2 for respondent (Scott Carbone, Corporation Counsel, attorneys)

Record Closed: June 21, 2018 Decided: June 22, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 8, 2018, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a hearing on June 21, 2018 and during that time, the parties agreed to settle the matter. The signed Settlement Agreement indicating the terms of settlement is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 22, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Date Mailed to Parties:
sej

LOCAL

OAL DKT. NO. CSV 16601-2017 N
AGENCY DKT. NO. 2018-1053

SETTLEMENT AGREEMENT

IN THE MATTER OF

Holley, Anthony

AND

City of Jersey City P.D.

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 8/25/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	Rule 3:108	15 day susp	N/A
2.	Rule 3:122		
3.			
4.			
5.			

B. The Appellant Anthony Holley withdraws his/her appeal and request for a hearing, and the Respondent appointing authority City of Jersey City P.D. agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	3:108	G	10 days 6 T/E 4 opt.-B
2.			
3.			
4.			
5.			

OAL DKT. NO. CSV 16601-2017 N

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 0 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 0.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Holley will forfeit 6 T/E Days + 4 opt-B days.

For Removals, Complete the Following

1. To date, appellant has served a total of N/A days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. City of Jersey City P.D. (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority City of J.C. will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of 10 day 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, City of Jersey City, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 16601-2017 N

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

06/21/2018
DATE

Appellant

6/21/18
DATE

Respondent

6/21/2018
DATE

ON BEHALF OF Appellant

6/21/18
DATE

ON BEHALF OF Jersey City Police DEPT

OAL DKT. NO. CSV _____

CERTIFICATION

I, Lt. Robert Sjoswaard, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/21/18	Lt Robert Sjoswaard
DATE	NAME

7-18-18

A-5

STATE OF NEW JERSEY

In the Matter of Tamika Jones-Richardson
City of East Orange

CSC DKT. NO. 2017-3599
OAL DKT. NO. CSV 08152-17

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Tamika Jones-Richardson, Data Control Clerk, City of East Orange, Department of Property Maintenance Revitalization, removal effective April 12, 2017, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on May 4, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision as well as his recommendation to modify the removal to a 30 working day suspension. The Commission also upholds the recommendation that the appellant undergo a psychiatric examination prior to her reinstatement.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a 30 working day suspension. The Commission also orders that the appellant undergo a psychiatric examination prior to her reinstatement. If the appellant is found not able to perform her duties based on the results of that examination or fails to complete the evaluation, the appointing authority *may* initiate a *new* disciplinary charge for the appellant's removal based on her current unfitness or noncompliance, with a current date of removal. Regardless, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant would be entitled to receive mitigated back pay, benefits and seniority from the conclusion of the suspension until the actual date of

reinstatement or removal. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 08152-17
CSC DKT. NO. 2017-3599

TAMIKA JONES-RICHARDSON,
Appellant,
v.
CITY OF EAST ORANGE, DEPARTMENT OF PROPERTY MAINTENANCE REVITALIZATION,
Respondent.

Jennelle Blackmon, Union Representative, CWA, AFL-CIO for Appellant, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Mark A. DiPisa, Esq., for Respondent (Roth D'Aquanni, attorneys)

Record Closed: April 19, 2018 Decided: May 4, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Tamika Jones-Richardson, appeals a Final Notice of Disciplinary Action (FNDA), dated April 12, 2017, providing for a penalty of removal effective the same date.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on June 9, 2017.

A prehearing conference was held on June 23, 2017, and a prehearing order of the same date was entered by the undersigned.

A hearing was held on February 2, 2018, March 1, 2018, and March 8, 2018. The record remained open to April 19, 2018, to afford the parties the opportunity to submit written summations.

ISSUES

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

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Michele Ralph-Rawls testified as follows:

She is the Director of Human Resources for the City of East Orange. She knows the appellant as an employee of East Orange. She had input in drafting the Preliminary Notice of Disciplinary Action (PNDA) dated November 1, 2016, in conjunction with the department director. She stated appellant refused to submit for an examination with a forensic psychologist, which was insubordination; refused a fitness for duty examination at Concentra and created a situation there that was conduct unbecoming a public employee; and, was frequently tardy and absent from work.

Appellant was sent to Concentra after Ms. Ralph-Rawls had a conversation with appellant about her tardiness and absenteeism in October 20, 2016. The department director, Dwight Saunders, had complained about this after issuing a written warning. She noted that appellant had two prior disciplinary matters for tardiness and absenteeism: a verbal warning and a written warning. During the conversation appellant had stated to Ms. Ralph-Rawls that she was depressed. This was the reason for the referral to Concentra for a fitness for duty examination.

Appellant had changed departments. She left Senior Services as she had problems with the manager there. Appellant requested a transfer. Appellant was transferred to the Department of Property Maintenance.

During the conversation with appellant in October 2016 appellant requested a return to Senior Services as she liked working with the senior population. Appellant told Ms. Ralph-Rawls she would only go back if the manager was removed.

She felt the referral to Concentra was necessary as appellant had stated she was depressed and it was incumbent on her to do something about it. Concentra is the medical service where the city sends its employees for fitness for duty examinations. The only reason for the referral was appellant stating she was depressed.

At Concentra appellant refused to be examined over an objection to Concentra's privacy agreement and did not want to sign it. She thought it was too broad. Appellant called the witness to advise her of her objection. The assistant manager at Concentra also called to advise appellant would not be examined for this reason.

Sergeant Williams from the city police department was called by Concentra as there was an outburst by appellant at Concentra. Sergeant Williams is the city's medical liaison officer. Sergeant Williams called the witness and communicated to her what the director at Concentra had said.

Appellant left Concentra and was not seen this day. Concentra edited the privacy statement by letter and this was acceptable to appellant. Appellant went back to Concentra a second time and was not seen. Appellant left but Ms. Ralph-Rawls did not know the reason why. Appellant went back a third time and was examined. Concentra recommended that appellant undergo a psychiatric evaluation.

An appointment was made for appellant to go to the Institute for Forensic Psychology (IFP) for an examination. Appellant was asked to come in to pick up registration documents for IFP. The examination was scheduled for October 31, 2016. Appellant did arrive at Ms. Ralph-Rawls but did not pick up the documents. IFP called to advise that appellant did not keep her appointment. Appellant was called and told it would be re-scheduled. Appellant advised she did not go as she did not have the money to get to IFP. Appellant was told arrangements would be made to get her to IFP. Appellant was also told that her continued employment was contingent on the examination. This was now in November 2016. Appellant did not go to the second appointment at IFP. Ms. Ralph-Rawls advised the doctor at IFP of appellant's work history at the city and why she was being referred for an evaluation.

Director Dwight Saunders submitted a memorandum to the witness, dated October 31, 2016, regarding appellant's impact upon the department by her tardiness and absences.

A Preliminary Notice of Disciplinary Action (PNDA), dated November 1, 2016, was prepared and suspended appellant without pay effective immediately. An amended PNDA was prepared, dated November 18, 2016. A Notice of Disciplinary Action was prepared by Director Dwight Saunders dated October 31, 2016, outlining her continued absences on October 26 and 27, 2016, where appellant called out sick; and, on October 28, 2016, where appellant did not call and did not report to work; and October 31, 2016, did not report to work or go to her fitness for duty examination. This document aided in the preparation of the PNDA.

Ms. Ralph-Rawls stated that appellant was suspended for ninety days, later reduced to forty-five days, when working at Senior Services. When appellant transferred into Property Maintenance the city did not continue with progressive discipline and gave her a clean slate in her new position.

Appellant was not referred to the Employee Assistance Program (EAP). Ms. Ralph-Rawls oversees EAP. When employees have mental health issues she has referred them to EAP. It is not city policy to send employees for a fitness for duty examination for excessive tardiness or absenteeism. The only reason appellant was sent for a fitness for duty examination was she said she was depressed.

On or about October 20, 2016, she met with appellant regarding her tardiness and absenteeism. This is also the day appellant went to Concentra.

A call was received by Sergeant Williams this date. He is the medical officer for the East Orange Police Department. He was called by Concentra regarding an incident with appellant. She understood that appellant was cursing at a Concentra employee. Cursing is a significant fact. She was not at Concentra when the incident occurred. The PNDA does not mention cursing. Cursing is also not mentioned in a letter from the witness to appellant dated November 1, 2016, advising appellant she was suspended.

She spoke with appellant regarding Concentra's privacy policy which appellant felt was too broad. She spoke with the director at Concentra to get the privacy policy changed.

The witness prepared a memo to file regarding appellant dated November 15, 2016. She acknowledged the contact with the director at Concentra to get the policy changed so that appellant could be seen. Concentra did submit a letter modifying the privacy policy for appellant. Thereafter appellant was seen by Concentra on October 24, 2016. Appellant was not refusing to be seen at Concentra. She was refusing to sign the privacy policy.

The IFP examination was scheduled for the end of October 2016. The second date scheduled was maybe November 14, 2016. This was after the PNDA date of November 1, 2016. Appellant was suspended from work immediately after November 1, 2016, without pay. The PNDA was dated October 31, 2016.

Ms. Ralph-Rawls was not sure if appellant was sent Family Medical Leave Act (FMLA) documents due to absenteeism. She does not distribute this material. It is another employee.

Mark James Barner testified as follows:

He is the Director of the Division of Property and Maintenance for the City of East Orange. He started as director on January 1, 2018. Prior to this he was Assistant Director. Appellant was employed in his division. He spoke to appellant regarding her frequent tardiness and absenteeism. Appellant had started in Property Maintenance in April 2016. By that time she had used all her available sick time. By July she had used all her vacation time. Appellant continued to call in sick and arrive late. Initially he gave Appellant a verbal warning. He then gave her a written warning.

Petitioner would arrive late two or three times per week by fifteen to twenty minutes. Sometimes she would arrive at noon or one p.m. Sometimes she would leave early. When appellant did show up for work she performed her job. The policy for using sick time was to call. Appellant did not call every time she would be absent.

Mr. Barner stated appellant was given a verbal warning and then a written warning regarding her tardiness and absenteeism.

Mr. Barner reviewed appellant's time cards and time tabulation for appellant.

The policy is to call in when absent. Appellant did not do this every time. Appellant would come in late and leave early. One time appellant called in she was crying and stated she did not want to be at work. Appellant did not say why.

Prior to the Notice of Disciplinary Action dated September 1, 2016, appellant had no prior disciplinary matters at Property and Maintenance.

Michael Williams, Jr. testified as follows:

He is a sergeant with the East Orange Police Department. He is the medical officer. He tracks sick time, processes FMLA matters and line of duty cases. He knows appellant. He received a telephone call from Giovanni and Debbie from Concentra in the late afternoon. He does not recall the date. Giovanni is the manager at Concentra. Debbie works at Concentra also. Debbie told him an employee was being unruly and would not sign off on paperwork so the employee could be treated. He was called as he is one of the liaisons for the city with Concentra. He was called as Concentra could not locate Ms. Ralph-Rawls. He reached out for Director Saunders who told him that appellant did not work for him, but for Ms. Ralph-Rawls. Ms. Ralph-Rawls called him and he related the conversation he had with Debbie from Concentra. He has no idea of the time between the incident and the time he received the telephone call.

Deborah Beck testified as follows:

She is the Assistant Operations Manager for Concentra. Concentra does fitness for duty examinations for East Orange. She knows appellant from when she was at Concentra for a fitness for duty examination in October 2016. She recalls an incident with appellant. Appellant came in for a fitness for duty examination. Appellant did not feel comfortable with the forms and chose not to sign them. An evaluation could not be done without signed forms. Appellant still wanted the services provided but did not want to sign the forms. Appellant was aggravated. Appellant came in and out of Concentra. She was on her cell phone. Appellant became loud and disruptive and called her a "sarcastic bitch." Ms. Beck told appellant if the forms are not signed no service could be provided. Appellant left Concentra at this time. The date was October 20, 2016. Appellant did sign the forms on October 21, 2017.

Ms. Beck shared with Giovanni what happened and they felt the need to speak with someone at East Orange. They called Sergeant Williams as they deal with him a lot.

Petitioner was examined on October 24, 2016.

Giovanni Lepiani testified as follows:

He is the Operation Director for Concentra. He remembers appellant. He met her at Concentra, but does not remember the date. He did not witness the incident on October 21, 2016. Ms. Beck told him about it. He was told a patient was irate and used derogatory terms. He called Sergeant Williams. It is not normal to have disruption at the center. He told Sergeant Williams what happened. He spoke with Human Resources and later wrote the letter regarding Concentra's privacy policy. He spoke with appellant the next day and advised her she must sign the privacy policy to receive the examination. He had a good interaction with appellant.

Appellant signed the return to work evaluation after the doctor spoke with her.

Appellant asked him to write a letter stating that the police were not called to the center.

Appellant's Case

Tamika Jones-Richardson, Appellant, testified as follows:

On October 20, 2016, she was told she was being sent to Concentra for a fitness for duty exam. She was not told why. She did not refuse to go. She went to Concentra on October 20, 2016, signed in and waited. She read the literature at Concentra. She became concerned and asked to speak with someone regarding the policy of sharing private health information. She was concerned that her private health information could be shared. She wanted it limited to sharing with East Orange and her insurance

company. She asked to speak with the manager, who was not in. She spoke with Deborah Beck the assistant manager. She was told by Ms. Beck "nope, not gonna happen," "not going to do it." Ms. Beck smiled at her which appellant took as sarcastic and condescending. Appellant asked to speak with a supervisor and was told the supervisor was not there. Ms. Beck told appellant she would tell her employer that she refused to be seen. She did not curse at Ms. Beck.

Appellant went back to work and was called into a meeting with Ms. Ralph-Rawls and the director and assistant director of Property Maintenance. She was asked why she refused to be seen at Concentra. She stated her concerns with the privacy policy. Ms. Ralph-Rawls told her she would call Concentra. Ms. Ralph-Rawls already knew what transpired at Concentra. No mention was made at this time regarding Ms. Beck stating appellant cursed at her.

The secretary at Human Resources called her to advise Concentra would amend her privacy policy to accommodate her concerns. Appellant went back on October 21, 2016, and spoke with Mr. Lepiani and had a good conversation with him. She thanked him for accommodating her concerns. She spoke with him for about thirty minutes. Mr. Lepiani never mentioned her cursing at Ms. Beck. Mr. Lepiani told her the wait that day would be about three hours. Appellant could not wait as she is a single mother and had to pick up her daughter. She went back to Concentra on October 24, 2016, and was examined.

After the October 24, 2016, examination at Concentra she was asked to pick up paperwork to do a follow-up examination. This was at 4:00 p.m. The examination was for Monday morning, October 31, 2016. She could not pick up the paper work as she had to be in court on a traffic warrant. She advised the assistant director of this and showed him the court notice.

She did not make the October 31, 2016, appointment as she suffered an extreme panic attack that morning. She did call out. She also had a pre-scheduled therapist appointment. She did go to her therapist appointment. It was a therapeutic

appointment. She tried to give this to her employer. It was not accepted as they were already in a termination meeting. She was given FMLA paperwork by her therapist. She tried to give this to the benefits coordinator when at work on November 1, 2016. They were not accepted. She went back to her desk and was told to go to Human Resources. She was told she was being terminated. As of November 1, 2016, she assumed she was terminated.

She had already exhausted her sick time. She did provide documentation for her previous doctor appointment. She submitted a document from Care Station Medical Group that she would be out of work from October 5, 2016, to October 12, 2016. She still received a discipline write up.

She did not go to the appointment with IFP on November 14, 2016, as she was already terminated and did not have funds to travel to IFP. The city never offered assistance with transportation.

She has been undergoing therapy and has much improved. She is able to cope in the work place now.

She acknowledged that the PNDA proposes termination. She was never told she was terminated. She assumed she was being terminated. She was suspended without pay as of November 1, 2016.

She did not find out about the October 31, 2016, meeting until Friday, October 28, 2016. She told an employee, Tonya, at the city that she had a scheduled appointment with her doctor.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the

overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

Ms. Ralph-Rawls testified is a straightforward and truthful manner. She was professional in her demeanor and did not shy away from or avoid answering questions. I deem her credible. However, her testimony as to what transpired at Concentra on October 21, 2016, is given no weight. This testimony is based upon a conversation with Ms. Beck, Mr. Lepiani, and Sergeant Williams. She did not witness the event.

Mr. James Barner was also credible. His testimony was largely confined to appellant's time tabulation and time cards, and the times she would either be late or miss work.

Sergeant Williams was also credible. His testimony was of little help as he did not witness the incident at Concentra on October 21, 2016, and was only able to relate what was told to him.

Ms. Deborah Beck was also credible. She related her understanding of what transpired between her and appellant on October 21, 2016, in a straightforward and direct manner.

Ms. Tamika Jones-Richardson was also credible. She related her understanding of what transpired between her and Ms. Beck on October 21, 2016, in a straightforward and direct manner. The balance of her testimony was likewise credible.

It is not unusual for two witnesses to relate different versions of the same event and both be credible. It is ultimately up to the finder of fact to determine which version is more likely than not, or to determine that neither version carries the day in terms of preponderance.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Petitioner was employed by the City of East Orange in the Department of Property Maintenance. Prior to this position she was employed by the city in Senior Services.
2. During the course of her employment, and prior to the November 1, 2016, appellant had exhausted her personal, sick, and vacation time. (R-7, R-8, R-9 and R-10.)
3. Appellant continued to be absent and tardy from work even though she had no available personal, sick, or vacation time. (R-7, R-8, R-9 and R-10.)
4. Due to repeated tardiness and absenteeism, appellant received a Notice of Disciplinary Action (Verbal Warning) dated September 1, 2016. (R-9.)
5. Appellant was late eight times and absent eleven times after receipt of the verbal warning. Appellant received a Notice of Disciplinary Action (Written Warning) dated October 12, 2016, regarding this. (R-10.)

6. Appellant provided her employer with a note from Care Station Medical Group that appellant could return to work on October 12, 2016. (A-14.)

7. Appellant provided her employer with a Certification of Health Care Provider for Family Member's Serious Health Condition form under the FMLA, dated October 16, 2016. (A-13.)

8. Appellant was called into a meeting with Ms. Ralph-Rawls, director of Human Resources for the city, to discuss her continued tardiness and absenteeism. This meeting took place on October 20, 2016.

9. During the course of this meeting appellant advised Ms. Ralph-Rawls that she was feeling depressed. Ms. Ralph-Rawls then advised appellant that she was to undergo a fitness for duty examination at Concentra. The only reason for the request for the fitness for duty examination was appellant stating she was depressed. The fitness for duty examination was scheduled for October 20, 2016. (R-6.)

10. Appellant reported to Concentra to undergo the examination on October 20, 2016. While there she read the center's privacy policy and had issues with who could review appellant's medical information. She spoke with Ms. Beck, the assistant manager at Concentra, who advised appellant that the privacy form could not be changed and that without signing it the examination could not take place. Appellant asked to speak with Ms. Beck's supervisor and was advised that he was not present. Appellant left Concentra on October 20, 2016, without undergoing the examination.

11. After appellant left Concentra on October 20, 2016, upon Mr. Lepiani's return to the center, a call was placed to Sergeant Williams as he is the contact person for Concentra with the city. The call was made as Ms. Beck characterized appellant as unruly. Sergeant Williams contacted Ms. Ralph-Rawls to advise. Ms. Ralph-Rawls spoke with Ms. Beck and Mr. Lepiani.

12. Appellant called Ms. Ralph-Rawls to let her know about her concerns with the privacy policy. Ms. Ralph-Rawls, who had already spoken with Ms. Beck and Mr. Lepiani from Concentra, told appellant she would assist with getting the privacy statement modified. This was done by Mr. Lepiani by letter dated October 21, 2016, and was to appellant's satisfaction. (R-12.)

13. Appellant returned to Concentra on October 21, 2016, and spoke with Mr. Lepiani, the manager at Concentra, who advised her that the wait for an examination would be approximately three hours. Appellant, who is a single mother, could not wait that long as she had to pick up her daughter. Appellant left Concentra on October 21, 2016, without being examined.

14. On October 24, 2016, appellant returned to Concentra and was examined. The result of that examination was a recommendation for a psychiatric evaluation prior to appellant's return to work. (R-13.)

15. Mr. Lepiani wrote a letter, at the request of appellant, dated January 25, 2017, stating that Sergeant Williams was called as the public safety manager for the city was not available. Mr. Lepiani characterized the basis for the call was a "misunderstanding" that occurred.

16. An examination was scheduled at IFP for October 31, 2016. Appellant did not make this appointment for several reasons: she had no funds for transportation; she had a panic attack; and, she had a scheduled appointment with her therapist. (A-12.)

17. Prior to her appointment at IFP, which was on a Monday, appellant was asked to pick up paper work for IFP on Friday, October 28, 2016. Appellant did not pick up the paper work that day as she had to be in court regarding a traffic warrant. (A-11.)

18. The IFP examination was rescheduled for November 14, 2016. Appellant did not appear for the examination this date as she assumed she had already been terminated from employment.

19. Appellant, while not terminated, had been suspended without pay and served with a PNDA seeking termination on November 1, 2016. (R-1 and R-18.)

20. Ms. Ralph-Rawls authored a memorandum regarding appellant, dated November 15, 2016, which led to the issuance of an amended PNDA. (R-4 and R-19.)

21. A FNDA was issued on providing for termination from employment effective April 12, 2017. (R-5.)

22. While employed at Senior Services appellant was twice disciplined, resulting in a five-day suspension and a ninety-day suspension (reduced to forty-five days after a hearing at the OAL). (R-20 and R-21.)

23. Respondent waived, in terms of progressive discipline, the discipline imposed on appellant while at Senior Services. (CourtSmart audio 2/2/18, 10:26:37 a.m. to 10:27:19 a.m.)

24. While the emotional issues appellant suffers from were not defined during the course of the hearing, based upon the testimony of Ms. Ralph-Rawls regarding her conversation with appellant on October 20, 2016, and the testimony of appellant, it is clear that appellant does suffer from some emotional issues and is undergoing therapy. (A-13 and A-14.)

LEGAL ANALAYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory, and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-

1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein, 26 N.J. at 275. The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, 218 N.J. Super. at 341. The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board[1] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The sustained charges in the Final Notice of Disciplinary Action (R-5) are set forth as: insubordination; chronic or excessive absenteeism or lateness; and, conduct unbecoming a public employee. These charges are set forth in N.J.A.C. 4A:2.3(2), (4), and (6), respectively.

[1] Now the Civil Service Commission.

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

As to the charge of conduct unbecoming a public employee, at hand there are two different versions of what transpired at Concentra on October 21, 2016. One is given by Ms. Beck, the other by appellant. The versions of the incident set forth in the testimony of Ms. Ralph-Rawls, Sergeant Williams, and Mr. Lepiani are not given any weight. They are based entirely on their memory of what Ms. Beck told them. The two individuals actually involved in the matter testified. Only their respective testimony is considered herein in determining if respondent carried its burden by a preponderance of the credible evidence as to this charge. As there are two credible witnesses as to this event, each with their own version of what transpired I cannot determine that there is a preponderance of credible evidence either for or against sustaining this charge. The evidence is in equipoise.

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its

> presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

As to the question of insubordination, again I cannot determine that appellant was insubordinate. While Ms. Ralph-Rawls characterized appellant's behavior as a refusal to submit to a fitness for duty examination at Concentra, I cannot reach this conclusion. Appellant did go to Concentra on October 20, 2016, for purposes of submitting to an examination. She had an issue with the privacy policy and would not agree to it as written. She communicated this to Ms. Beck who advised her it could not be changed. This was incorrect as it could be changed and was by Mr. Lepiani. Further, appellant communicated her issue to Ms. Ralph-Rawls who then assisted with the change to the privacy policy. The second time appellant went to Concentra the wait, three hours, was too long as she had to attend to other business. Appellant did submit to the examination on October 24, 2016. This is hardly a refusal to submit for an examination.

The other examination, at IFP, was scheduled for October 31, 2016. Appellant did not make the appointment, advising Ms. Ralph-Rawls that she did not have funds to pay for transportation. Ms. Ralph-Rawls advised appellant that the city would arrange to get her to the appointment, which was re-scheduled for November 14, 2016. Appellant also had an appointment with her therapist the same day. Appellant was served with a PNDA, dated October 31, 2016, and a letter from Ms. Ralph-Rawls, dated

November 1, 2016, advising her she was suspended without pay and that respondent was seeking her termination. Appellant did not make the appointment on November 14, 2016, based upon her understanding that she was terminated and that it would be superfluous to attend. I cannot conclude, based upon these facts, that appellant was insubordinate for not undergoing the examination at IFP.

As to the charge of chronic or excessive absenteeism or lateness respondent has more than met their burden by a preponderance of the credible evidence. In fact, appellant does not dispute the number of days she was either late or absent. Nor does she dispute that at times she failed to comply with policy and call in.

I **CONCLUDE** that the respondent has carried its burden to prove by a preponderance of the credible evidence that that appellant was guilty of the charge of chronic or excessive absenteeism or lateness set forth in the Final Notice of Disciplinary Action.

I further **CONCLUDE** that the respondent has not carried its burden to prove by a preponderance of the credible evidence that that appellant was guilty of the charges of insubordination and conduct unbecoming a public employee set forth in the Final Notice of Disciplinary Action.

The question remains as to what the appropriate penalty should be. Here appellant has several prior disciplinary matters, as follows: appellant was suspended for five days by Notice of Minor Disciplinary Action dated May 19, 2014, for conduct unbecoming a public employee; appellant was suspended for ninety days by Final Notice of Disciplinary Action dated October 28, 2014, for conduct unbecoming a public employee[2]; appellant received a verbal warning by Notice of Disciplinary Action dated September 1, 2016, for tardiness and absenteeism; and, appellant received a written warning by Notice of Disciplinary Action dated October 12, 2016, for tardiness and absenteeism. The two suspensions occurred while appellant was working for Senior

[2] This suspension was later reduced to forty-five days by the Honorable Leland S. McGee, ALJ, after a hearing at the OAL. See CSV 00937-15, http://njlaw.rutgers.edu/collections/oal/.

Services. The verbal and written warnings occurred while appellant was working for Property Maintenance.

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

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

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

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . . .

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

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

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

1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979). The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter the penalty herein of termination seems disproportionate to the offense and mitigating circumstances as to be arbitrary and unreasonable. Respondent, pursuant to the testimony of Ms. Ralph-Rawls, gave appellant a clean slate when she was transferred from Senior Services to Property Maintenance. While appellant does have a disciplinary history which includes two prior suspensions for conduct unbecoming a public employee while at Senior Services, I cannot consider them in terms of progressive discipline as the city has, in effect, waived them in terms of progressive discipline.

Further, I have determined that respondent has not met its burden as to the charges of insubordination and conduct unbecoming a public employee. That leaves the only sustained charge of excessive absenteeism and tardiness. It is important to note that the tardiness and absenteeism was extensive. It is also important to note that appellant is addressing her emotional issues by seeking therapy. This willingness to address the issue that caused appellant to either be late or miss work is a mitigating factor.

It would be appropriate herein to impose a substantial suspension in lieu of termination. In light of the fact that appellant continued to be late and absent after receiving a verbal and then written warning for this, it is not disproportionate to the offense and mitigating circumstances to impose a penalty of suspension for thirty days. It is also appropriate for appellant to undergo a psychiatric evaluation as recommended by Concentra in their return to work evaluation dated October 24, 2016.

Based upon the foregoing, I **CONCLUDE** that the penalty of termination be reversed and that a penalty of a thirty-day suspension be imposed; and, that appellant undergo a psychiatric evaluation prior to her return to work.

ORDER

It is hereby **ORDERED** that charge contained in the Final Notice of Disciplinary Action dated April 12, 2017, of Chronic or Excessive Absenteeism or Lateness in violation of N.J.A.C. 4A:2.3(a)(4) is **SUSTAINED**; and,

It is further **ORDERED** that charges contained in the Final Notice of Disciplinary Action dated April 12, 2017, of Insubordination in violation of N.J.A.C. 4A:2.3(a)(2) and Conduct Unbecoming a Public Employee in violation of N.J.A.C. 4A:2.3(a)(6) are **NOT SUSTAINED**; and,

It is further **ORDERED** that the penalty of termination is **REVERSED**; and that the appropriate penalty shall be a suspension, without pay, of thirty days; and,

It is further **ORDERED** that appellant undergo a psychiatric evaluation prior to her return to work; and

It is further **ORDERED** that appellant be awarded appropriate back pay for the period of her separation from employment in excess of thirty days (subject to mitigation for income earned during this period), including benefits, and seniority subject to N.J.A.C. 4A:2-2.10.

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

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

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

May 4, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: May 4, 2018

Date Mailed to Parties: May 4, 2018
db

APPENDIX

List of Witnesses

For Appellant:

Tamika Jones-Richardson, Appellant

For Respondent:

Michele Ralph-Rawls, Director of Human Resources

Mark James Barner, Director Division of Property Maintenance

Michael Williams, Jr., Sergeant, East Orange Police Department

Deborah Beck, Asst. Director Concentra

Giovanni Lepiani, Operations Director Concentra

List of Exhibits

For Appellant:

A-1 2005-2006 CWA and City of East Orange Collective Bargaining Agreement

A-2 a. July 1, 2006 – June 30, 2010, CWA & East Orange MOA

b. July 1, 2010 – December 31, 2013, CWA & East Orange MOA

c. January 1, 2014 – December 31, 2018, CWA & East Orange MOA

A-3 November 1, 2016, PNDA

A-4 November 1, 2016, Michele Ralph-Rawls letter to Appellant

A-5 November 18, 2016, Amended PNDA

A-6 October 20, 2016, email to Dwight Saunders

A-7 Concentra Health Services Notice of Privacy Practices Policy

A-8 January 25, 2017, letter from Giovanni Lepiani

A-9 October 21, 2016, letter from Giovanni Lepiani

A-10 Concentra Employer Service Patient Agreement regarding Appellant

A-11 October 28, 2016, City of East Orange Municipal Court Notice

A-12 October 31, 2016, Palisade Behavioral case release notice

A-13 October 17, 2016, MLA certification form

A-14 Care Station return to work note

For Respondent:

R-1 PNDA dated November 1, 2016

R-2 Acknowledgment of Receipt of PNDA, unsigned

R-3 Acknowledgment of Receipt of PNDA, signed

R-4 Cover letter dated November 21, 2016, regarding Amended PNDA and amended PNDA

R-5 FNDA dated April 12, 2017

R-6 Receipt for disciplinary package

R-7 Time tabulation for Appellant from April 11, 2016, to August 12, 2016

R-8 Time sheets for Appellant from August 15, 2016, to November 4, 2016

R-9 Notice of Disciplinary Action (verbal warning) with time tabulation, time sheets, and written disagreement to same from appellant

R-10 Notice of Disciplinary Action (written warning) with time sheets and written disagreement to same from appellant

R-11 Concentra Employer Service Patient Information form completed by appellant

R-12 Correspondence from East Orange Human Resource Department to Concentra, dated October 21, 2016

R-13 Return to work evaluation form dated October 24, 2016

R-14 Fax cover sheet from IFP to East Orange and letter from IFP to East Orange

R-15 Letter from Michelle Ralph-Rawls to Dr. Lewis R. Schlosser dated October 28, 2016

R-16 Correspondence from Michelle Ralph-Rawls dated October 31, 2016

R-17 Notice of Disciplinary Action (suspension) dated October 31, 2016

R-18 Correspondence from Michelle Ralph-Rawls dated November 1, 2016

R-19 Memo from Michelle Ralph-Rawls dated November 15, 2016

R-20 Prior discipline documentation for five-day suspension, May 19, 2014f

R-21 Prior discipline documentation for forty-five-day suspension, October 26, 2014

7-18-18

A-6

STATE OF NEW JERSEY

In the Matter of Carla Lane
Middlesex Vicinage, Judiciary

CSC DKT. NO. 2017-4083
OAL DKT. NO. CSV 11294-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Carla Lane, Investigator, Middlesex Vicinage, Judiciary, 30 working day suspension, on charges, was heard by Administrative Law Judge Tricia M. Caliguire, who rendered her initial decision on June 18, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11294-17
AGENCY DKT. NO. 2017-4083

IN THE MATTER OF CARLA LANE,
SUPERIOR COURT OF NEW JERSEY,
MIDDLESEX VICINAGE.

Connor Meara, Organizer/Field Representative, AFSCME New Jersey, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Susanna J. Morris, Esq., for respondent (Counsel's Office, New Jersey Courts, attorneys)

Record Closed: May 28, 2018 Decided: June 18, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 28, 2017, respondent Superior Court of New Jersey, Middlesex Vicinage (Court) issued a Preliminary Notice of Disciplinary Action (PNDA) to appellant Carla Lane (Lane) charging her with incompetency, inefficiency, or failure to perform duties, pursuant to N.J.A.C. 4A:2-2.3(a)(1), conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and neglect of duty, pursuant to N.J.A.C. 4A:2-2.3(a)(7). On March 27, 2017,

respondent conducted a departmental hearing. A Final Notice of Disciplinary Action (FNDA) was issued to appellant on June 14, 2017, by which appellant was charged with incompetency, inefficiency, or failure to perform duties, pursuant to N.J.A.C. 4A:2-2.3(a)(1), and neglect of duty, pursuant to N.J.A.C. 4A:2-2.3(a)(7). In the FNDA, respondent notified appellant that she would be suspended from employment as an Investigator for thirty working days.

Appellant filed this appeal on June 20, 2017, which was transmitted by the Civil Service Commission to the Office of Administrative Law (OAL) on August 8, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties were scheduled to appear before the Honorable Gerald Foley, ALJ, on September 26, 2017, for a settlement conference, but before the conference began, appellant obtained the consent of respondent to an adjournment. On October 24, 2017, the parties met before Judge Foley for a settlement conference, but were unable to reach a resolution.

On November 22, 2017, this matter was reassigned to the undersigned. On January 3, 2018, I held a prehearing telephone conference with the parties and scheduled the hearing for February 23, 2018. At the request of appellant, this hearing date was adjourned to April 2, 2018. The hearing was conducted on April 2, 2018, and the record left open for the parties to submit post-hearing briefs and responses following their receipt of the transcripts of the proceedings. Briefs were submitted by both parties on May 18, 2018; neither party filed a response (nor notified the undersigned that they would not be doing so) and the record closed on May 28, 2018.

FACTUAL DISCUSSION AND FINDINGS

Lane faces a penalty of suspension for thirty working days on charges of incompetency, inefficiency, or failure to perform duties, and neglect of duty, as a result of incidents which took place on January 17, 2017, and February 6, 2017. Most of the material facts are not in dispute. The following is not a verbatim report of the hearing testimony but a summary of the relevant testimony of Lane and respondent's witnesses, Lori Grimaldi (Grimaldi) and Jennifer Sincox (Sincox).

Lane has worked for respondent for twenty-four years, and has held the title of Investigator for most of that time. As an investigator, Lane's duties now and during the period in question include handling inmate applications for public defenders, annotating bail motion lists, and preparing bail workups.[1] She works five days per week, from 8:30 a.m. to 4:30 p.m.

In June 2016, Grimaldi became a Team Leader in the Criminal Division, supervising eight employees, including Lane. On July 1, 2016, Grimaldi held a team meeting that was attended by Lane. (R-3; R-9.) Grimaldi testified that at this meeting, she discussed among other topics, the call-out policy by which employees are required to notify their supervisor of their same-day absence from work by 8:45 a.m.; time management and the need to "be mindful of due dates;" and that investigators must "ensure that all Bail Motions are done[.]" (R-3.) Grimaldi testified, and Lane acknowledged, that at the end of the July 1 meeting, Grimaldi gave her cell phone number to the team and told them to use it when they had questions or problems.

On August 2, 2016, and on September 8, 2016, Lane violated the call-out policy but was not disciplined. On September 9, 2016, Grimaldi met with Lane to discuss these infractions and Grimaldi warned Lane that future violations of the call-out policy could result in disciplinary action. (R-10.) At this meeting, Grimaldi also asked Lane to clean up her office, organize files, and consider time management training. Lane responded that her heavy workload made it difficult to find time to file, and requested extra help rather than training. (R-10.)

At the beginning of both 2016 and 2017, respondent issued Annual Performance Advisory forms to Lane, which Lane signed on January 25, 2016, and January 31, 2017, respectively. (R-1; R-2.) In both these documents, the "Supervisor's Expectation for [Lane's] Performance" for the calendar year include:

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[1] All persons who testified drew a distinction between annotating a bail motion list and preparing a bail workup, but in documents introduced at hearing, this distinction is not as clear. (R-1; R-2; R-6.) Respondent later clarified that the terms "bail workup" and "bail investigation" mean the same thing, and are completed before a defendant's initial bail is set. The investigation workup is updated and then attached to the bail motion list ("annotating" the bail motion list). (Letter Br. of Resp't., (May 18, 2018) at 7.)

- Reliable and Timely Attendance.

- All bail motion workups must be submitted to the judge's secretary by Noon the day before the scheduled bail motion date.[2]

- Inform immediate supervisor when work is not completed within stablished time frames.

[(R-1; R-2.)]

Incident of January 12, 2018

There is no dispute that, on January 12, 2018, Lane did not complete the task of annotating the bail reduction motion lists prior to leaving for the day. As Grimaldi explained in her testimony, every Friday, the judges in the Criminal Division hear bail reduction motions filed by individuals who have been arrested and charged, and are being held in the County jail due to their inability to post the required monetary bail.[3] Prior to the hearings, staff provides the judges with information that they may require to properly evaluate the motions.

The entire process of accumulating, storing and processing information related to bail is as follows:

1. When an individual is arrested, a bail investigation is conducted by an investigator and documented. This document—the bail investigation workup—is given to the judge, who then sets bail.

2. The workup is scanned into the court's computer system and a hard copy is filed (in the filing room, located one floor below Lane's office).

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[2] These documents, which bear Lane's signature, directly contradict her testimony on cross-examination that the deadlines that must be met for the benefit of the judges are not found in documents.

[3] Since bail reform was instituted in New Jersey in January 2017, the number of individuals held on monetary bail has been reduced significantly and, therefore, the number of bail reduction motions filed and heard in any given week has also been reduced. At the time of the incident involved in this matter, however, the full impact of bail reform was not yet felt and persons who had been incarcerated prior to January 1, 2017, were still assessed bail under the former system.

3. Individuals who cannot make bail are sent to the County jail and may move for a reduction in bail.

4. Each week by 9:30 a.m. on Wednesday, the investigator receives the bail reduction motion lists, one for each of the judges in the Criminal Division to whom that investigator is assigned.[4]

5. The investigator annotates the lists by adding information such as the amount of current bail, whether an interpreter is needed, an up-to-date criminal record, and information regarding the arrest and the incident which led to the arrest. He or she would obtain this information from the County computer system, the municipal court systems and the bail investigation workups. For each movant, the investigator includes the original bail workups conducted upon arrest and completed prior to when bail was initially set.

6. The entire packet is emailed by the investigator to each judge (and their staffs) by noon on Thursday.

On December 8, 2017, prior to the events involved in this matter, Lane told Grimaldi that she had trouble meeting the noon deadline for the bail motion workups on those Thursdays when Lane was required to attend Central Judicial Processing (CJP) Court. In response, Grimaldi and her immediate supervisor, Sincox, Assistant Criminal Division Manager, agreed to relax the above deadline from noon to 4:30 p.m., when Lane had CJP Court duties. (A-3.) On cross-examination, Lane stated that she actually wanted help with the work rather than more time to do the work, but admitted that she made no further attempts to ask for such help.

On January 12, 2017, Grimaldi left the office at approximately 1:00 p.m. She testified that prior to leaving, she walked around the office to let her staff know of her early departure and that Sincox would be covering for her. Sincox testified that she is responsible for

[4] In 2016, Lane was assigned to prepare all bail motion workups for all the judges in the Criminal Division. (A-2.)

oversight of ninety staff persons and all Criminal Division courtrooms. She confirmed that, on January 12, 2017, Grimaldi left early on preapproved leave and Sincox covered for her.

There is a dispute as to whether Grimaldi spoke with Lane prior to leaving, but this is immaterial, as Lane does not claim that Grimaldi's absence impacted whether she got her work done on time. Lane could not recall Grimaldi leaving early as she was in CJP Court until 12:45 p.m., and then took an hour lunch, returning to the office at 1:45 p.m., after Grimaldi left. Lane testified that when she returned at 1:45 p.m., she still had about one-quarter of the bail reduction motions yet to complete.

Between 2:00 p.m. and 3:00 p.m.,[5] on January 12, 2017, Sincox received a call from the Honorable Colleen M. Flynn, J.S.C., asking for her bail motion workups. Sincox then went to Lane's cubicle and asked about Judge Flynn's motion workups. Lane told her that the work for Judge Flynn was almost done; Lane sent the workups to Judge Flynn between 4:00 and 4:30 p.m.

At 4:30 p.m., the Honorable Benjamin S. Bucca, J.S.C., called Sincox, asking for his bail motion workups. Sincox went to Lane's cubicle; Lane told her that she was still working on Judge Bucca's list. Lane testified that at that point, she had completed all of Judge Bucca's workups except one, and for that one motion, she told Sincox she could not find the initial bail investigation workup in either the computer system or the file room. Sincox testified that she directed Lane to complete the work and that she did not speak to Lane again that day. When Sincox left the building at 5:30 p.m., she walked by Lane's cubicle, did not see Lane and so assumed that she had completed her work.

Lane testified that she continued to search for the paperwork for a single defendant until 6:00 p.m., and surmised that she was in the file room when Sincox stopped by her cubicle at 5:30 p.m. Since her search was unsuccessful, Lane emailed all but one of the bail motion workups to Judge Bucca and his secretary with an apology for the delay. Lane

[5] Sincox testified that this call came between 2:00 and 2:30 p.m., but in a document that Sincox wrote and filed with her supervisor on January 20, 2017, she stated that the call from Judge Flynn came at 3:00 p.m. (R-5.)

did not contact Grimaldi because she had already spoken to Sincox about the delay and Lane conceded that Sincox assumed Lane would complete the job.[6] Lane stated that she went to Sincox's office at 6:00 p.m., but that Sincox had already left.

When Sincox returned to work the morning of January 13, 2017, she saw e-mails from Judge Bucca's staff to Lane asking for the missing workup on one defendant. (R-5.) Sincox asked Lane, who responded that she did not finish the bail motion workup for that defendant. Lane testified that her intention was to complete this workup when she arrived on the morning of January 13, 2017. Of the nineteen bail motions on the list for January 12, 2017, Lane completed all but one. Judge Bucca heard one bail reduction motion without the proper paperwork.

Much testimony was given regarding the responsibility of Shirley Scott, Judiciary Clerk Level 2, for scanning the bail investigation workups into the shared drive.[7] Sincox and Grimaldi called the scanning "a courtesy;"[8] Lane call this a "necessary prerequisite to efficiently performing [her] duties." (Letter Br. of Appell't. (May 18, 2018) at 6.) While Grimaldi and Sincox agreed that it would be easier and faster for an investigator to complete the bail motion lists if all the workups were timely scanned to the shared drive, they also agreed that not all the workups are so uploaded.

Hard copies of all bail workups, including those uploaded to the shared drive, are kept in the file room. No one disputed appellant's testimony that the file room is not well organized, filing is not current, and hard files are often difficult to locate. Sincox testified that in the event that paperwork is missing, the back-up plan is for an investigator to do the bail investigation workup from scratch, since she would have access to all the necessary documents. Lane testified, however, that she did not have the security clearance to obtain information that would

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[6] Lane testified that at this point, she still did not realize that Grimaldi had left early.

[7] Lane testified that Scott took the files out of the building to scan, which is why the file Lane needed was not available. Sincox, however, stated that such files never leave the building and that Scott handled the scanning in the courthouse.

[8] This description is curious as a Court document titled "Scanning Procedure" states, "On a daily basis the bail workups need to be scanned to the shared drive." (A-9.)

be available using a defendant's fingerprints (e.g., prior criminal history). Even so, Lane testified that she did not attempt to do the bail investigation workup from scratch.

Respondent introduced ample evidence that as a member of Grimaldi's team, Lane knew to "inform [her] immediate supervisor" that the bail motion lists would not be completed by the close of business. (R-1; R-2.) Presumably, once the immediate supervisor has such notice, he or she will take appropriate action but Sincox conceded on cross-examination that she left for the day without checking with either Lane or Judge Bucca's office to ensure that his bail motion list was completed. Neither she nor Grimaldi explained what, if anything, Sincox should have done to assist Lane once she knew Lane was behind. Grimaldi did not testify as to what immediate assistance she routinely gives members of her team when they are struggling to meet a pressing deadline.[9] Once the judges started calling Sincox, she was certainly on notice that Lane needed help, if only for someone to pull the hard copies of files from the file room.

Incident of February 7, 2017

Prior to leaving work on February 6, 2017, Lane told Grimaldi that she would undergo a dental procedure later that same day. Grimaldi told Lane to call her on her cell phone after the procedure was completed if Lane needed to take sick time the following day, February 7, 2017. Lane responded that she did not want to make that decision until the morning after the procedure, depending on how she felt. Grimaldi then told Lane to be sure to call out, if necessary, by 8:45 a.m., pursuant to policy. (R-3.)

Lane called Grimaldi on February 7, 2017, at 9:21 a.m., and stated that she would be out sick that day. Lane blamed her delay in calling on the pain she was experiencing and the medicine she was taking. (A-6.)

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[9] This is not to disregard the testimony that on December 8, 2016, Grimaldi and Sincox extended the deadline for Lane to complete bail motion lists from noon to 4:30 p.m., on days she attended CJP court, but only to point out that no examples were given of supervisors assisting staff in meeting a pressing, same-day deadline.

Following a departmental hearing, respondent charged Lane with incompetency, inefficiency, or failure to perform duties, pursuant to N.J.A.C. 4A:2-2.3(a)(1), and neglect of duty, pursuant to N.J.A.C. 4A:2-2.3(a)(7), and determined that the proper penalty is suspension from employment for thirty working days. Lane has been disciplined a total of six times in the twenty-four years she worked for respondent, most recently in 2015, with a fifteen-day suspension from employment. (R-8.)

Findings

I **FIND** as **FACT** that the undisputed testimony shows that completing bail motion lists by the close of business on Thursday was one of Lane's duties and she failed to complete that task on January 12, 2017.

I **FIND** that the undisputed testimony also shows that Lane was well aware of the call-out policy and she failed to observe it on February 6, 2017, despite the reminder from Grimaldi the previous afternoon and having been warned in the prior six months that discipline would result from another such violation.

With respect to Lane's failure to inform Sincox that she would not complete Judge Bucca's bail motion list by the close of business, the line is not as clear. If, as respondent contends, the purpose of an employee providing such notice is to ensure that the supervisor is able to assist the employee in meeting a deadline, then once Judge Bucca called Sincox, additional notice was not necessary. It may be that Sincox did not hear a request for help in Lane's statement that she could not find the initial bail investigation workup online or in the file room. It may also be that, at 4:30 p.m., Lane still expected to finish the work before leaving for the day and so did not ask for help, or that Sincox did not simply ask, "what can I do to help?" Notwithstanding the above, there is no dispute that Lane did not notify her supervisors at any point during the day that she was at risk of missing a deadline and did not notify them of the missed deadline before she left for the

day.[10] Court policies place the responsibility to notify supervisors of missed deadlines on the employee, and I **FIND** that Lane failed to meet that responsibility.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Under N.J.A.C. 4A:2-2.3(a)(1), and -2.3(a)(7), an employee may be subjected to major discipline[11] for incompetency, inefficiency, or failure to perform duties and for neglect of duty. In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). To prove neglect of duty, the employer must prove the employee did not perform an act required by his or her job title or was negligent in the discharge of that duty. Avanti v. Dept. of Military & Veterans Affairs, 97 N.J.A.R. 2d 564 (1996).

Based on the above, I **CONCLUDE** that respondent has carried the burden of proving that appellant is guilty of incompetency, inefficiency, or failure to perform duties and of neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(1) and -2.3(a)(7).

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[10] Although on cross-examination Lane stated that she saw no point to sending Sincox an email prior to leaving as Sincox did not have remote access to email, Lane did send an email to Judge Bucca's staff after hours and did not use Grimaldi's cell phone number to notify her of the missed deadline.

[11] Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-(6)(a), - 20; N.J.A.C. 4A:2-2.2, -2.4.

PENALTY

The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). At hearing, and in her post-hearing brief, Lane argues that the penalty proposed by respondent is excessive, not justified, ignores extenuating circumstances, and was delivered prior to any attempt to resolve the problems which led to the discipline. (Br. of Appell't. at 9.) Respondent counters that Lane inexplicably chose not to follow well-established policies and, as a consequence, a thirty-day suspension is both a warranted and reasonable penalty for Lane's failure to complete the bail reduction motion list on January 12, 2017, failure to notify her supervisors in a timely manner that she would not complete her work on January 12, 2017, and failure to call-out sick as required on February 7, 2017. (Br. of Resp't. at 15.)

The offense that is the most serious is that Lane left for the day on January 12, 2017, without completing Judge Bucca's bail reduction motion list. It is particularly troubling that, at the same time the New Jersey courts were instituting significant reforms to the monetary bail system, the person who may have been harmed the most by Lane's failure to complete her work on January 12, was the defendant who was incarcerated and unable to make bail under the old system. A close second was Judge Bucca, who had to choose either to leave the defendant who could not make bail in prison for at least another week or to reduce the defendant's bail despite an incomplete record.[12] It is not lost on me that Lane

[12] The record is bereft of the details as to this defendant or Judge Bucca's ultimate decision.

finished eighteen of the nineteen bail motions on the list, but this is one of those times when close is not good enough.

With respect to Lane's failure to notify Sincox that she would not finish her work on January 12, 2017, in a timely manner, respondent claims that Lane knew that the reason to provide this notice was "so that alternate arrangements could be made to complete the task," and that her failure to so notify her supervisors removed "any chance they may have had to resolve whatever issues Ms. Lane claimed to be having in completing the lists." (Resp't. Br. at 14-15.) Here, neither the testimony nor documentary evidence support respondent's claims. While Lane's supervisors were responsive to her general request for a more relaxed deadline on days she had CJP Court duties, there was no evidence that raising a specific, time-sensitive problem would garner an immediate "all-hands" response. In fact, the evidence is just the opposite. By 4:30 p.m., the end of the work day, Sincox had been called by two judges about documents they needed the next day. When Lane told Sincox that Judge Bucca's list was not complete due to the absence of materials in the shared drive, Sincox did not offer a solution or offer to help locate the files. Instead, Sincox told Lane to get the work done and left the office without confirming with anyone that the work was in fact completed.[13]

Appellant argues that she was required to alone do the work previously shared with other investigators, that the files were a mess, and her supervisors did not respond to her prior complaints about difficulty finding necessary files. While all that may be true, and as discussed above, Sincox offered no assistance once she was alerted to the problem, what also comes through—from Lane's testimony—is that on this day, despite knowing that she had CJP Court duties, and that she still had to finish approximately four or five of the bail reduction motion lists by 4:30 p.m., Lane did not contact Grimaldi before she left for CJP

[13] In her post-hearing brief, appellant noted that one charge in the PNDA was dropped following the departmental hearing, the charge of "conduct unbecoming a public employee." Appellant argues that Sincox bore some of the responsibility for ensuring that Judge Bucca's bail motion lists were complete and instead of pitching in, Sincox used the opportunity "to exert disciplinary authority over an employee who she felt had disrespected her." (Br. of Appell't. at 3.) As appellant's union representative knows, only the charges in the FNDA are considered in this forum, and at hearing, appellant did not question Sincox about the verbal exchange that led to the since-dropped charge.

Court to request extra help. Lane's testimony regarding her earlier complaints about the filing system are a strong indication that she should not have been surprised to find that at least some of the files she needed that afternoon were hard to locate. Then Lane left for the day without notifying either Sincox or Grimaldi that a deadline had in fact been missed.

Under the specific circumstances, Lane's failure to call-out on February 7, 2017, by 8:45 a.m., does not on its own merit major discipline. Grimaldi knew that Lane was having a dental procedure and knew that Lane would be making a decision in the morning whether to come into work. Yes, Lane should have called earlier, but Grimaldi probably knew by 8:45 a.m., at which time Lane was already fifteen minutes late, that Lane would not be coming to work that day. Respondent argues with justification however, that this offense is exacerbated by the fact that Lane was late in calling out twice in the prior year, and had been counseled and warned.

Lane's prior disciplinary record includes six separate charges over the course of her twenty-four years employment, none prior to 2007. All of the charges, however, are similar in nature to the charges in this matter, including that in March 2011, she was charged with neglect of duty and was suspended for seven days, and that in April 2015, she was charged with incompetency, inefficiency or failure to perform duties and was suspended for fifteen days. (R-8.) Based upon the concept of progressive discipline, I **CONCLUDE** that the penalty of suspension for thirty working days was appropriate, and should be **SUSTAINED.**

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against Lane, specifically violations of N.J.A.C. 4A:2-2.3(a)(1) and -2.3(a)(7), for incompetency, inefficiency, or failure to perform duties and neglect of duty. I **ORDER** that these charges be and are hereby **SUSTAINED.** Furthermore, I **ORDER** that the penalty of a thirty-day suspension is hereby **AFFIRMED.**

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

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

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

June 18, 2018
DATE

Tricia M Caliguire
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: June 18, 2018

Date Mailed to Parties: June 18, 2018
nd

APPENDIX

WITNESSES

For Appellant:

Carla Lane

For Respondent:

Lori Grimaldi

Jennifer Sincox

EXHIBITS

For Appellant:

A-1 Not introduced

A-2 Annual Performance Advisory, dated January 31, 2017

A-3 Email from Appellant Carla Lane to Lori Grimaldi, Subject CJP and Bail Motions, dated December 8, 2016

A-4 Email from Appellant Carla Lane to Jennifer Sincox, Copied to Donna Roche, Lori Grimaldi, Subject Follow-Up from Our Meeting Today/This Weeks' Bail Motions, dated January 17, 2017; Appellant's Statement to Management

A-5 Not introduced

A-6 Letter from Mahn K. Kaga, DMD, Concerning Dental Work Office Visit, dated February 1, 2017

A-7 Interoffice Memorandum to Appellant Carla Lane, Investigator, from Vicki Dzingleski DiCaro, Criminal Division Manager, Subject Settlement Agreements, dated April 22, 2015

A-8 Not introduced

A-9 Scanning Procedure

For Respondent:

R-1 Annual Performance Advisory, Advisory Period Covered: Calendar Year 2016, dated January 25, 2016

R-2 Annual Performance Advisory, Advisory Period Covered: Calendar Year 2016, dated January 31, 2017

R-3 P.O./Inv. Team Grimaldi Meeting, July 1, 2016

R-4 Memo from Lori Grimaldi, CSSII, to Jennifer Sincox, ACDM, Subject Carla Lane Late Call out on February 7, 2017

R-5 Memo from Jennifer Sincox, ACDM, to Laura Schweltzer, CDM, Subject Carla Lane, dated January 20, 2017 (Amended on February 2, 2017)

R-6 Preliminary Notice of Disciplinary Action, Department of Personnel, State of New Jersey, dated February 28, 2017

R-7 Final Notice of Disciplinary Action, Civil Service Commission, State of New Jersey, dated June 14, 2017

R-8 Disciplinary History of Carla Lane, dates from January 17, 2007 through April 21, 2015

R-9 Email from Lori Grimaldi to Lionel Neals,Vanessa Amaxopoulos, Carla Lane, Marianne Foster, Anna Cotton, Subject Team Meeting Minutes July 1, 2016

R-10 Email from Carla Lane to Lori Grimaldi, Subject meeting on September 9, 2016, dated September 9, 2016

STATE OF NEW JERSEY

In the Matter of Denise Lynn
Plainfield Housing Authority

CSC DKT. NO. 2018-729
OAL DKT. NO. CSV 15794-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15794-17

AGENCY REF. NO. 2018-729

IN THE MATTER OF DENISE LYNN, CITY OF PLAINFIELD HOUSING AUTHORITY,

---

Arnold S. Cohen, Esq., for appellant (Oxfeld Cohen, P.C.)

Vernita E. Sias-Hill, Esq., for respondent

Record Closed: May 9, 2018 Decided: May 14, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on October 24, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was conducted on November 14, 2017 wherein the parties agreed on a hearing date of April 2, 2018. During the pendency of the hearing the parties reached a tentative settlement agreement. On May 1, 2018, the parties submitted a fully executed settlement agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

5-14-18
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: MAY 16 2018
ljb

Ann James Bevacqua
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LAW OFFICES

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SAMUEL B. WENOCUR **
SHERRI L. GOLDMAN *
BARRY FRANK **
OF COUNSEL

* MEMBER OF NJ BAR
** MEMBER OF NJ & NY BAR
*** MEMBER OF NJ & PA BAR

May 1, 2018

2018 MAY -9 A 8:5

VIA EMAIL AND REGULAR MAIL
Hon. Kimberly Moss, ALJ
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102

Re: Lynn, Denise v City of Plainfield Housing Authority
OAL Docket. No.: CSV 15794-2017 N
Agency Ref. No.: CSC Dkt# 2018-729

Dear Judge Moss:

Enclosed with this letter please find the executed Settlement Agreement and General Release in the above matter for your approval.

Thank you for your attention to the above.

Very truly yours,

ARNOLD SHEP COHEN

ASC/elj
Cc: Vernita Sias-Hill, Esq.
Larry Howell
Denise Lynn

LAW OFFICE OF VERNITA SIAS-HILL

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VIA FACSIMILE (973)802-1055 & REGULAR MAIL

2018 MAY -9 A 10:51

April 26, 2018

Oxfeld Cohen
Arnold S. Cohen, Esq.
60 Park Place, 6th Floor
Newark, New Jersey 07102

Re: Lynn, Denise v. Plainfield Housing Authority
OAL Docket No.: CSV 15794-2017 N
Settlement Agreement and General Release

Dear Mr. Cohen:

Attached herewith is the fully executed Settlement Agreement and General Release to be filed with the court. With respect to the Fit For Duty Examination, Ms. Lynn has received all documents and information related to the upcoming appointment scheduled for April 30, 2018.

Sincerely,

Vernita E. Sias-Hill, Esq.

C: file
Attachment

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement"), dated this 23rd day of April 2018, is made by and between DENISE LYNN (herein referred to as "Employee"), the HOUSING AUTHORITY OF PLAINFIELD and its affiliates, members, subsidiaries, insurers, attorneys, and current and former employees, officers, manager, boards, trustees, directors, pension plans, employee benefit plans, health plans, severance plans, insurers, agents, representatives, and successors and assigns (hereinafter collectively referred to as "Employer", on the other hand (collectively, the "Parties").

WHEREAS, Employee, has filed an action before the OAL challenging the Employer's termination of her dated July 10, 2017 in the matter captioned, "In the Matter of Denise Lynn, City of Plainfield Housing Authority, OAL Dkt. No. CSV 15794-17, Agency Dkt. No. 2018-729) and;

WHEREAS, the parties have reached an agreement to settle, compromise and resolve all claims Employee has, had or may have against Employer up to the date this Agreement is signed; and

WHEREAS, the terms of this Agreement are the products of mutual negotiation and compromise between Employee and Employer; and

WHEREAS, the meaning, effect and terms of this Agreement have been fully explained to Employee who has had the advice of counsel of her own choosing and who understands this Agreement; and

WHEREAS, Employee knowingly, freely and voluntarily enters into this Agreement.

NOW, THEREFORE, Employee and Employer, for the full and sufficient consideration set forth below, and for other good and valuable consideration and the mutual promises and covenants contained herein, the receipt and sufficiency of which the parties acknowledge, the parties do hereby agree as follows:

1. **Consideration**: Upon the return of an executed original copy of this Agreement signed by Employee and Employer, the Employee agrees to withdraw the matter before OAL

captioned "In the Matter of Denise Lynn, City of Plainfield Housing Authority, OAL Dkt. No. CSV 15794-17, Agency Dkt. No. 2018-729) and the Employer agrees to convert the termination of July 10, 2017 to a Leave of Absence without pay.

2. The Employee expressly and specifically understands and agrees that she will not receive any back pay related to this Agreement.

3. The Employee's reinstatement is subject to the successful completion of a comprehensive physical and psychological "Fit for Duty examination" by the Employer's doctor at the Employer's expense. The Employer will make the medical appointment, the Employee will provide to the Employer her current address for which the Employer will notify the Employee in writing of the date, time and location of the appointment.

4. The Employee agrees to provide the required Release of Medical records to the Employer's designated doctor(s).

5. If the Employer's doctor determines that the Employee is Fit for Duty, the Employer shall restore all eligible medical benefits to the Employee as of the effective return to work date.

6. **Time to Sign and Return Agreement**. Employee understands and agrees that she has been given at least twenty-one (21) calendar days from the date she first received this Agreement and has an attorney of record in this matter to decide whether to sign it and further agrees that immaterial changes to the terms or form of this Agreement do not restart the running of this twenty-one (21) day period. Employee understands and agrees that in the event of a material change to the terms or form of this Agreement, the twenty-one (21) day period will start over. She understands that she may sign the Agreement at any time on or before the expiration of this 21 – day period. She also understands that for seven (7) calendar days after she signs this Agreement she has the right to revoke it, and that this Agreement will not become effective and enforceable until after the expiration of this seven (7) day period. However, she specifically understands and agrees that any attempt by her to revoke this Agreement ***after*** the seven (7) day revocation period has expired is, or will be, ineffective. She also understands and agrees that to receive the consideration provided for under this Agreement, she must properly complete, sign and return this Agreement to Employer.

7. **Release of Claims by Employee**. In exchange for the consideration which Employee will receive pursuant to this Agreement and to the fullest extent permitted by law, Employee and her successors, assigns, heirs, personal representatives, executors, administrators, agents, attorneys, and representatives hereby knowingly and voluntarily

release and discharge Employer and any predecessors, successors, assigns, heirs, representatives, executors, administrators, officers, managers, directors, employees, agents, attorneys, subsidiaries, affiliates and insurers (hereinafter collectively referred to as "Released Parties") from all actions, causes of action, suits, debts, dues, sums of money, accounts, contracts, controversies agreements, promises, damages, judgments, claims and demands whatsoever in law or equity, whether now known or unknown, vested or contingent, accrued or yet to accrue, against the Released Parties which Employee hereafter can, shall or may, have for, upon , or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date upon which this Agreement has been executed by Employee, whether now known or unknown, including, but not limited to all claims relating to or arising out of any aspect of Employee's employment relationship with Employer. Employee specifically releases all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), the Older Workers' Benefits Protection Act ("OWBPA"), Sections 503 and 504 of the Rehabilitation Act of 1973, the Worker Adjustment and Retraining Notification Act ("WARN"), 42 U.S.C. Sections 1981 through 1988, the Equal Pay Act, the Occupational Safety and Health Act ("OSHA"), the Americans with Disabilities Act of 1990 ("ADA"), the New Jersey Law Against Discrimination ("NJLAD"), the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), the Employee Retirement Income Security Act ("ERISA), the Immigration Reform and Control Act ("IRCA"), the Fair Labor Standards Act ("FLSA"), the Family and Medical Leave Act ("FMLA"), the New Jersey Family Leave Act ("NJFLA"), and the New Jersey Conscientious Employee Protection Act ("CEPA").

8. **Covenant Not to Sue by Employee and Employee's Attorneys**. Employee and Employee's Attorneys covenant and promise that they will not hereafter file or cause to be filed on her behalf any charge, claims, legal or administrative action of any nature before any court or administrative agency to assert any claim against the Released Parties arising on or before the date of this Agreement except as may be necessary to enforce this Agreement. Further, Employee and Employee's attorneys specifically agree that, by this Agreement, they waive any right to recover any relief or recovery from such proceedings, including but not limited to costs and attorney's fees.

9. **Claims Not Waived**. Notwithstanding the preceding provision or any other provision of the Agreement, this Agreement is not intended to interfere with Employee's right to file a charge with an administrative agency in connection with any claim Employee may have against any of the Released Parties. However, by executing this Agreement Employee hereby waives the right to recover, and agrees not to seek any damages, remedies or other relief for herself personally in any proceeding Employee may bring before such agency or in any proceeding brought by such agency on Employee's behalf.

10. **No Claims Exist**. Employee confirms that no claim, charge, complaint or action of any type by her against the Released Parties exists in any forum or form with respect to any matters covered by this Agreement. In the event that any such claim, charge, complaint or action exists or is filed, Employee agrees that she shall not be entitled to recover any relief or recovery there from, including, but not limited to costs and attorney's fees, and that the Released Parties may be entitled to restitution, set-off or recoupment of all of the payments made pursuant to this Agreement.

11. Except to the extent such agreement is prohibited by applicable law or regulation, in the event that Employee brings a lawsuit for any claims released by this Agreement or if either party is found to have violated any material term of this Agreement, the breaching party shall be required to pay all reasonable costs and attorneys' fees incurred by the non-breaching party in defending any such action, including, but not limited to, all reasonable costs and attorneys' fees in pursuing and recovering any award of damages or attorneys' fees and costs entered in favor of any non-breaching party in such an action.

12. **Indemnification.** Employee agrees to hold harmless and to indemnify the Released Parties from any claims that may be asserted by third parties, including but not limited to Employee's attorneys, against the Released Parties arising out of Employee's claims. Employee further agrees to satisfy any liens, claims, or encumbrances asserted by and third party based on such facts and circumstances and will hold the Released Parties harmless and indemnify them from any claims or rights asserted against them by any third party asserting such lien, claim, or encumbrance.

13. **Non-disparagement by Employee.** Response to Employment Referrals by Employer. The parties agree and promise that they will not make, publish or cause to be made or published, any statement in writing or orally (which shall include all electronic communications including, without limitation, texting, communications on social media sites such as Facebook, Instagram and Twitter), which reasonably could be construed as injurious to or disparaging of the reputation or standing of the other party. Employer, if contacted by any current or prospective employer of Employee, will only provide Employee's dates of employment and last job title. Nothing in this section shall prohibit Employee from testifying truthfully in any court proceeding or under any order issued by a court of law. Employee further agrees that Employee will notify Employer if Employee receives a subpoena to testify or give information of any type in an administrative or court proceeding brought against Employer.

14. **No admission of Liability**. Employee specifically understand and agrees that by entering into this Agreement, Employer does not admit any liability whatsoever to her or to any other person arising out of the claims heretofore or hereafter asserted by her, and Employer expressly deny any and all such liability.

15. ***Governing Law and Interpretation***. This Agreement shall be governed by and construed under the laws of the State of New Jersey.

16. **Choice of Forum**. Any action relating to the enforcement or interpretation of this Agreement shall be commenced in the courts in the State of New Jersey.

17. **Severability**. In the event that a court determines that any provision of this Agreement is illegal or unenforceable, said provision shall be deemed null and void.

18. **Attorneys' Fees and Costs**. Employee and Employer agree that each party is responsible for their own attorneys' fees and costs incurred in connection with the preparation, negotiation and//or execution of this Agreement.

19. **Voluntary and Knowing Execution**. Employee hereby expressly states that she has read this Agreement and discussed the terms and conditions of this Agreement with her attorney. Employee further affirms that she fully understands all aspects of this Agreement and that she has entered into this Agreement voluntary and that this Agreement is the complete and final compromise, release and settlement, as permitted by law, of all claims, demands, injuries, damages, actions or causes of action, known or unknown, suspected or unsuspected, relating to the Employee's employment relationship with the Employer and/or any other matter or claim occurring prior to her execution of this Agreement, including those she has or may have pursuant to the federal, state and local law prohibiting discrimination in employment. She further affirms that other than as specifically provided herein, or as required by law, she is not entitled to any payment, compensation or benefit relating to or as a result of her employment relationship with Employer.

20. **Amendment**. This Agreement may not be modified, altered or changed except upon express written consent of bother parties.

21. **Entire Agreement**. This Agreement consists of the entire Agreement between the parties, and fully supersedes any prior agreements or understandings between the parties. Employee acknowledges that she has not relied on any representations, promises, or agreements of any kind made to him in connection with his decision to accept this Agreement, except for those set forth in this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the date indicated below their respective signatures.

BY SIGNING THIS AGREEMENT, THE UNDERSIGNED ACKNOWLEDGES THE FOLLOWING:

1. **I HAVE CONSULTED WITH MY ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT TO ENSURE THAT I FULLY AND THOROUGHLY UNDERSTAND ITS LEGAL SIGNIFICANCE;**

2. **I HAVE TAKEN THE TIME NECESSARY TO REVIEW COMPLETELY AND FULLY UNDERSTAND THIS AGREEMENT;**

3. **I HAVE BEEN GIVEN 21 DAYS TO CONSIDER THIS AGREEMENT AND EVEN IF I HAVE NOT USED THE FULL 21-DAY PERIOD, THE DECISION HAS BEEN MADE KNOWINGLY AND VOLUNTARILY;**

4. **I FULLY UNDERSTAND THIS AGREEMENT, ACCEPT IT, AND AGREE TO IT, AND AGREE THAT IT IS FULLY BINDING UPON ME FOR ALL PURPOSES; AND**

5. **I HAVE ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES SET FORTH HEREIN, AND TO HAVE EMPLOYER TO CONVERT THE TERMINATION TO A LEAVE OF ABSENCE WITHOUT PAY REFERRED TO IN THE AGREEMENT. I FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTER INTO THIS AGREEMENT INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS I HAVE OR MAY HAVE AGAINST THE EMPLOYER UP TO THE PRESENT.**

By: Denise Lynn
Denise Lynn

Date: 4/23/18

Housing Authority of Plainfield

By: _____
Randall Wood, Executive Director

Date: 4/25/18

With a copy to:

Arnold S. Cohen, Esq.
Oxfeld Cohen, P.C.
60 Park Place, 6th Floor
Newark, New Jersey 07102
Attorney for Employee

Vernita E. Sias-Hill, Esq.
Law Office of Vernita Sias-Hill
1812 Front Street
Scotch Plains, New Jersey 07076
Attorney for Employer

Angiulo, Nicholas

From: Vernita sias-hill <vsiashill@yahoo.com>
Sent: Monday, July 2, 2018 9:24 PM
To: Angiulo, Nicholas
Cc: Jacqueline Miller
Subject: Denise Lynn - Return to Work
Attachments: PHA Lynn Ret to Work Ltr to Cohen 6 28 18.pdf

Dear Mr. Angiulo:

As per our conversation, a determination was made that Ms. Lynn was fit for duty to return to work. Attached is a copy of the communication sent to Ms. Lynn and the correspondence sent to her attorney advising of the return to work date of July 2, 2018. If you should require any additional information, please advise.

Sincerely,

Vernita E. Sias-Hill, Esq.

LAW OFFICE OF VERNITA SIAS-HILL
1812 Front Street
Scotch Plains, New Jersey 07076
(908)688-2200 cell (908)577-7855
Fax (908)322-8961

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LAW OFFICE OF VERNITA SIAS-HILL

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SENT VIA FACIMILE ONLY: (973)802-1055 **2 pages**

June 28, 2018

Oxfeld Cohen, P.C.
Arnold S. Cohen, Esq.
60 Park Place, Suite 600
Newark, New Jersey 07102

Re: Lynn, Denise v. Plainfield Housing Authority
OAL Docket. No.: CSV 15794-2017 N
Agency Ref. No.: CSV Dkt# 2018-729

Dear Mr. Cohen

This office is in receipt of your letter inquiring as to the status of Ms. Lynn's return to work. Attached herewith is a copy of the letter sent to Ms. Lynn advising her of the determination that she is fit for duty and that she is to return to work on Monday, July 2, 2018. My client has also communicated with Ms. Lynn via phone regarding the return to work date.

With respect to the gap in time from the date of the evaluation, we were advised by The Institute for Forensic Psychology that there was a delay in receiving some medical reports from Ms. Lynn's providers.

Sincerely,

Vernita E. Sias-Hill, Esq.

C: R. Wood
Attachment

d/PHA Ltr to Cohen re D Lynn return to work

HOUSING AUTHORITY OF PLAINFIELD

510 East Front Street
Plainfield, New Jersey 07060
Telephone No. (908) 769-6335
Fax (908) 941-1227
www.hap-nj.org

COMMISSIONERS:
Pamela G. Dunn-Hale (Chairwoman)
Joseph M. Ruffin (Vice Chairman)
Dollie S. Hamlin
Louise A. Colodne
Jeanette M. Edghill
Viola Barco

Randall M. Wood
Executive Director

Dan S. Smith, Esq.
Counsel

June 28, 2018

Ms. Denise Lynn
825 Second Place, Apt. 1
Plainfield, NJ 07060

Re: Fit for Duty/Return to work

Dear Ms. Lynn,

Please be advised that based upon the assessment of your fitness for duty conducted by The Institute for Forensic Psychology, they have concluded that you are fit for duty. As it has been determined that you are fit for duty to return to work, your employment with the Authority is hereby reinstated in accordance with the terms of the Settlement Agreement.

You are to report to my office on Monday, July 2, 2018. All personnel matters regarding your reinstatement will be completed at that time.

Sincerely,

Randall M. Wood

Randall M. Wood
Executive Director

RW/jm

Cc: L. Howell, Union Representative Local 617
File

7-18-18

A-7

STATE OF NEW JERSEY

In the Matter of Gary Mason
Ann Klein Forensic Center,
Department of Human Services

CSC DKT. NO. 2018-1498
OAL DKT. NO. CSV 18078-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Gary Mason, Senior Medical Security Officer, Ann Klein Forensic Center, Department of Human Services, removal effective November 7, 2016, on charges, was heard by Administrative Law Judge Catherine A. Tuohy, who rendered her initial decision on May 1, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Gary Mason.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 18078-16
AGENCY DKT. NO. 2018-1498

IN THE MATTER OF GARY MASON,
DEPARTMENT OF HUMAN SERVICES,
ANN KLEIN FORENSIC CENTER.

Rashidah Hasan, Esq., for appellant, Gary Marson

Marolhin D. Mendez, Deputy Attorney General, for respondent Department of Human Services (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 2, 2018 Decided: May 1, 2018

BEFORE **CATHERINE A. TUOHY,** ALJ:

STATEMENT OF THE CASE

Appellant, Gary Mason, a Senior Medical Security Officer at respondent, Ann Klein Forensic Center, Department of Human Services appeals his removal effective November 7, 2016 for violations of N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee; N.J.A.C 4A:2-2.3(a)11 Other sufficient cause; and Administrative Order 4:08 E1 Violation of a rule, regulation, policy or administrative decision as a result of his failure to pass a drug screening test upon his return to service following a first positive drug test.

PROCEDURAL HISTORY

On November 3, 2016, respondent issued a Preliminary Notice of Disciplinary Action (R-1) setting forth the charges and specifications made against the appellant. Appellant did not request a departmental hearing and the respondent issued a Final Notice of Disciplinary Action (R-2) on November 7, 2016 sustaining the charges in the Preliminary Notice and removing appellant from employment effective November 7, 2016. Appellant appealed on November 10, 2016 and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on December 1, 2016, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearing was held on February 14, 2018. The record remained open to allow the parties to submit post-hearing submissions and the record closed on April 2, 2018.

FACTUAL DISCUSSIONS AND FINDINGS

Charles Moore testified on behalf of the respondent. He has been the employee Relations Coordinator for respondent since April 2008 and is responsible for the administration of the employee disciplinary program; handling grievances; and acting as a conduit between the union and the administration at the Ann Klein Forensic Center. He had previously been a state corrections officer since 1976 and retired from that position. Mr. Mason was employed as a Senior Medical Security Officer and was responsible for the daily care of the clients such as making sure they were fed, cleaned and took their medications. The medical security officer has client contact on a twenty-four-hour basis. Ann Klein is the only forensic hospital in the state of New Jersey. They house patients who have been civilly committed, transferred from county jails and those awaiting competency hearings. Ann Klein houses the most complex clients with the most severe behavioral problems.

Mr. Moore co-facilitates the random drug screening program at Ann Klein together with Anne Kenyon and is familiar with the facts of this case. Mr. Mason violated the drug policy set forth in Administrative Order 4:23 that was implemented on September 7, 2010 (R-3). The purpose of the policy was to develop a drug testing policy because it was

necessary to have a drug free environment to ensure the patients safety. All employees are given this policy and Mr. Mason received this policy. Once an employee tests positive on a random screening, the employee is referred to EAS (Employee Advisory Services) for a consultation and the counsellor will recommend a course of treatment for the employee. The employer does not know what the course of treatment is, only that the employee went to EAS and that they were referred to a program that might require them to miss work for a period of time. EAS will usually advise the employer how long the employee will need to be out of work. EAS is not part of the Department Human Service or the Department of Health, they are a part of civil service. Mr. Moore explained that he would call and make an appointment for the employee to attend EAS for the first time while the employee is on duty and then the employee would follow-up on their own time. Employees are advised that if they refuse to submit to a random drug test they may be terminated. They are further advised that if they test positive for unlawful use of any controlled dangerous substance, they may be referred to EAS or terminated from employment with DHS (R-4).

Mr. Mason's name randomly came up on a list of employees to be tested and he was scheduled to be tested on November 5, 2015 (R-5). Employees are selected quarterly for random drug testing by a third-party company, Energetix TPA, Toxicology Services Group. Employees receive notice the same day they are to be tested to report for a random drug screen. Mr. Mason received notice of the random drug screen on November 5, 2015 and was directed to immediately report to Corporate Health for drug testing on that day (R-6). Mr. Mason acknowledged that he understood that a negative result was a condition of his continued employment with DHS (R-6). On November 5, 2015 Mr. Mason gave a urine sample for drug testing (R-7). Usually the results are provided within seventy-two hours and they are negative. If there is a positive reading for any of the twelve panels they test for, the medical review officer will contact the employee to review any prescription medications they may be taking that could have provided a positive result. In those cases, it may take about a week if the employee provides the prescription and the medical review officer will review same to see if that prescription would cause a positive drug test. If the medical review officer determines that the prescription the employee was taking produced the positive test, they will advise that the drug test is negative because the employee had a prescription. On November 13, 2015 the lab results of Mr. Mason's November 5, 2015

drug test came back positive for cocaine (R-8). Mr. Mason was referred to EAS and completed the return to work protocol. On May 24, 2016 Mr. Mason was notified to report to Capital Health for a follow up drug test (R-14). Capital Health by letter dated May 26, 2016 advised that Mr. Mason passed the drug test after his return to work (R-15). An additional notice for drug testing was served upon Mr. Mason to report for a drug test on October 6, 2016 (R-17). Mr. Mason provided an additional urine specimen on October 6, 2016 which tested positive for cocaine (R-18). This was the second follow-up after Mr. Mason's return to work. The medical clearance report dated October 14, 2016 which attached the Quest Diagnostic Lab Report indicated that Mr. Mason failed his follow-up urine drug test of October 6. 2016 by testing positive for cocaine metabolites (R-19).

On cross-examination Mr. Moore admitted that Mr. Mason was not a discipline problem. An employee is referred to EAS after they fail the drug test. The employer is not advised of what the treatment consists of before the employee is cleared to return to work. Departmental policy requires that an employee be terminated after the failure of the second drug test and they are not referred to EAS again by the employer. On October 7, 2016 David Botti, a Counselor with EAS wrote to Anne Kenyon, Director of Human Services for Ann Klein Forensic Center that Mr. Mason had been seen for an assessment on October 7, 2016 and an outside referral was recommended which would require him to be on medical leave for thirty to forty-five days, effective October 10, 2016 (R-20). Mr. Moore explained that this letter indicates that EAS made a referral to Mr. Mason and not that the employer referred Mr. Mason to EAS. Mr. Mason self-reported to EAS on October 7, 2016.

Anne Kenyon testified on behalf of the respondent. She is the Director of Human Resources at Ann Klein Forensic Center. She has worked for the State in human resources for thirty years and has been at Ann Klein since July 1993. Ms. Kenyon became Director of Human Resources in 2003 and oversees all human resource functions including hiring, promotions, timekeeping and payroll, training and staff development, finger printing and drug screening processes. She knows Mr. Mason as an employee and has never had any personal issues with him. Ms. Kenyon is familiar with the drug testing policy at Ann Klein. When an employee tests positive for drugs for the first time on a random drug screening, the test results are sent to her electronically from the medical

review officer and she prints out the document and gives it to the employee relations coordinator, Charles Moore, who will meet with the employee and refer them out to EAS and explain the procedures to them. The return to duty drug testing process begins at the EAS, the employee advisory service. They are required to clear the employee to return to duty by having a drug test screening that is in compliance with the policy and then notify the employer that this has been accomplished and the employee is returned to work. The employee is then subject to a minimum of three follow-up tests within the year. The consequences of a second positive on a follow up drug screen is a removal from employment.

An EAS counsellor evaluated Mr. Mason on November 18, 2015 and an outside referral was recommended. The Compliance Signature Sheet was signed by EAS counsellor, Mr. Botti and Mr. Mason on November 18, 2015 indicating the necessary steps Mr. Mason had to follow to be in compliance with the return to work policy (R-10).

By letter dated January 7, 2016, Mr. Mason was cleared to return to work after completing treatment and the return to work protocol which included a negative drug test result (R-13). There also was a letter submitted from Gen Psych, a behavioral health organization dated January 11, 2016 indicating Mr. Mason was able to return to work (R-13). Mr. Mason did return to work after January 11, 2016. After an employee returns to work, they are required to pass a minimum of three follow-up random drug tests within the year. If an employee tests positive on a follow-up, the employee is administratively removed (R-3). The October 7, 2016 letter from EAS was sent to the Ann Klein Forensic Center advising them that Mr. Mason was there, but it was not because he was referred to EAS by his employer (R-20).

On cross-examination, reference was made to paragraph "E" of the drug testing policy entitled "Voluntary Participation in Drug Treatment" which provides that:

> "Employees in direct care functions who have drug abuse problems are encouraged to voluntarily seek treatment. Treatment may be sought through the Employee Advisory Service (EAS) or independently by the employee without employer involvement.

> Nothing herein shall prevent the employer from taking appropriate disciplinary action for violations under this policy." (R-3)

Gary Mason testified on his own behalf. He was employed by respondent for over nine years as a medical security officer before his removal. As a medical security officer, he provided daily care for the mentally ill clients he serviced, including taking care of their hygiene needs and making sure they had clean clothes and ate properly.

In November 2015 after he received the first positive drug test, he was referred by his employer to the EAS. He went to the EAS and spoke with Mr. Botti who referred him to Gen Psych. Mr. Mason did not know what to expect since he had never been in treatment. It was two hours a day, three times a week for a thirty-day program. He had a cognitive/rational thinking class, and an art and music class. Looking back, it really was not a treatment program at all. Mr. Mason was not working during this time. He finished the program and returned to work. Prior to getting the test results back from the last test that he failed, he called Mr. Botti before he took the test. Mr. Botti advised him that he could not refuse it, so take the test and call him the next day and he would try and help him. Mr. Mason went to his office and Mr. Botti called around for various treatment programs and found one in West Palm Beach Florida. He went the next day to Florida. It was supposed to be a ninety-day program but on the twentieth day there was a problem with the insurance so they discharged him. Mr. Mason felt that this program focused more on inter-personal relationships and was not geared towards drug or alcohol abuse. Mr. Mason called Mr. Botti who advised him to come back and he would find Mr. Mason another program. Mr. Mason did not receive anything from his employer regarding his job status while he was in Florida. Mr. Mason came back to New Jersey and then returned to Florida three days later and attended the Recovery Institute of South Florida (RISA) for seventy-five days. He had his own therapist, medical doctor and psychiatrist. He was seen by a specialist to adjust his medication. Mr. Mason was required to go to outside meetings four days a week. The staff were professional and the recovery personnel educated him on the disease of addiction. They brought up issues he did not know he had. This facility dealt with his underlying psychological issues. Mr. Mason received the help he needed and is glad he went for treatment. Mr. Mason wishes he was sent there first. He has been clean and sober since his treatment at RISF.

On cross-examination, Mr. Mason was asked how he was able to pass the first drug test upon his return to work if the first EAS referral program did not help him. He returned to work and was clean for a while but was trying for three months but could not stop using drugs. If he had the proper treatment initially, he would have been able to remain clean. Mr. Mason was shown R-10, the Direct Care Employee Compliance Sheet which he signed acknowledging that he understood that a second positive drug test may result in termination.

The following facts having been stipulated to by counsel as not being in dispute (J-4) are **FOUND** as **FACTS**:

Mr. Mason acknowledged that he received and signed for the DHS Administrative Order 4:23 Policy regarding Drug Testing on October 8, 2010 (R-4). He was randomly selected to be drug tested on November 5, 2015 (R-5). Mr. Mason submitted his urine as part of the random drug testing procedure on November 5, 2015. He signed the drug testing custody and control form on November 5, 2015 (R-7). On November 13, 2015 the lab results indicated that Mr. Mason tested positive for cocaine metabolites (R-8). The veracity of the lab results from November 5, 2015 are not in question. Mr. Mason was referred to meet with an EAS counsellor on November 17, 2015 (R-9). On December 29, 2015 lab results came back negative for all illicit drugs. In January 2016 Mr. Mason successfully completed the return to work procedures and was recommended to return to work in January 2016. On May 24, 2016, Mr. Mason was notified of a subsequent drug test. Mr. Mason submitted his urine as part of the random drug testing procedure on May 25, 2016. On May 27, 2016 the lab results came back negative for all illicit drugs. The veracity of the lab results was not in question. On October 6, 2016 Mr. Mason was notified of a subsequent drug test (R-17). On October 6, 2016 Mr. Mason voluntarily reported to EAS. Mr. Mason submitted his urine as part of the random drug testing procedure on October 6, 2016 which was a follow-up. Mr. Mason signed the drug custody and control form on October 6, 2016 (R-18). On October 14, 2016 the lab report results came back indicating that Mr. Mason testified positive for cocaine metabolites (R-19). The veracity of the lab results was not in question. Mr. Mason subsequently entered the Recovery

Institute of South Florida. The treatment records from RISF were stipulated into evidence in their entirety as J-3.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In reZeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258

N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellant was a Medical Security Officer who had daily direct care contact with the clients at respondent's facility. Mr. Mason was responsible for taking care of the client's physical needs including ensuring their safety, good hygiene, nutrition, and clean clothing. The Ann Klein Forensic Center cares for the most complex clients with the most severe behavioral problems. To protect their clients and employees' safety, respondent has instituted a drug testing policy to ensure that their employees be free from the effects of controlled dangerous substances. Mr. Mason failed a random drug screening test by testing positive for cocaine metabolites on November 5, 2015. He returned to work after having completed the return to work policy, knowing that he was subject to three additional random urine drug screens for the next year and knowing that a second positive test would result in his termination. On October 14, 2016, Mr. Mason underwent another random urine drug test and again tested positive for cocaine metabolites and was terminated November 17, 2016. Mr. Mason's conduct in using illicit drugs, i.e. cocaine, adversely effects the morale and efficiency of the Department of Human Services and has a tendency to destroy public respect in the delivery of governmental services. His conduct in using cocaine endangers the safety of the clients he services as well as other employees. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of unbecoming conduct.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant's conduct in using cocaine violates the implicit standard of good behavior one would expect from a Medical Security Officer. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause.

The appellant was also charged with a violation of Administrative Order 4:08 E1, "Violation of a rule, regulation, policy, procedure or Administrative decision." On September 7, 2010 respondent implemented Department of Human Services

Administrative Order 4:23 which provided for mandatory drug testing for applicants for employment and direct care staff members employed in State psychiatric hospitals and developmental centers in order to promote the safety and welfare of its employees and clients (R-3). In order for the Department Human Services State psychiatric hospitals and developmental centers to meet their commitment to consumers and employees, it is essential that the Department Human Services operate in a drug free environment, and that its employees be free from the effects of controlled dangerous substances. It is the responsibility of each employee to ensure that he is drug free in compliance with the law and the requirements of this policy. As a condition of employment with the Department Human Services, employees are prohibited from being under the influence of illegal drugs.

The unlawful use, possession, solicitation for or sale of controlled dangerous substances including prescription drugs is strictly prohibited (R-3, page 1). The policy required that direct care staff members be subject to random drug testing for controlled dangerous substances (R-3, page 2). Employees who test positive for unlawful use of a controlled dangerous substance may be suspended from duty, referred to employee advisory service (EAS), or terminated from employment (R-3, page 5). Upon receipt of documentation which substantiates a positive drug test, the facility Office of Human Resources/Employee Relations will contact the employee to explain to the employee the procedures with regard to his mandated referral to the employee advisory service (EAS) and a return to work drug screen. The employee will not be allowed to return to work until the employee is cleared by EAS and has been authorized to return to work by the facility Office of Human Resources/Employee Relations (R-3, page 8). An employee who has been subject to random drug testing and has engaged in conduct prohibited by this policy shall, prior to his return to work, undergo a return-to-work drug test with a result indicating a verified negative result for controlled dangerous substance use (R-3, pages 11 & 12). When an employee is permitted to return to duty requiring the performance of direct care functions, the employee shall be subject to unannounced follow-up controlled dangerous substances tests at least three (3) times in the first 12 months following the return-to-duty (R-3, page 13).

Based upon the facts of this case as set forth above, I **CONCLUDE** respondent has met its burden of proof that appellant has violated Administrative Order 4:08 E1, "Violation

of a rule, regulation, policy, procedure or Administrative decision" by violating the drug testing policy of respondent contained in Department Human Services Administrative Order 4:23 by testing positive for cocaine metabolites a second time, after his return to work following his first random urine drug screen tested positive for cocaine.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe

misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Pursuant to the New Jersey Department of Human Services Administrative Order 4:23 does not call for a range of discipline and removal is the only option for a second violation of the drug testing policy. Appellant knew that as a condition of his continued employment he had to remain drug free after his first positive drug test for cocaine metabolites. Appellant does not dispute the fact that he failed his follow up drug test. What appellant argues is that his first treatment program failed and he should be given a third chance. Although it is commendable that Mr. Mason did eventually seek the further treatment he needed and received at the RISF, respondent's actions in terminating him after he tested positive the second time was appropriate and in the interest of public safety. As a medical security officer in a psychiatric facility providing direct care services for the most complex clients with the most severe behavioral issues, Mr. Mason was required to free from the effects of controlled dangerous substances. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein and in light of the seriousness of the offense, I **CONCLUDE** that the removal of the appellant was appropriate.

ORDER

Accordingly, I **ORDER** that the action of the respondent is **AFFIRMED**, as set forth above. Appellant's appeal is **DISMISSED**.

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

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

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

May 1, 2018
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: May 1, 2018 (emailed)

Date Mailed to Parties: May 1, 2018 (emailed)

/mel

APPENDIX

WITNESSES

For Petitioner:

Gary Mason

For Respondent:

Charles Moore

Anne Kenyon

EXHIBITS

Joint:

J-1 (R-1) Preliminary Notice of Disciplinary Action (31-A) 11/3/16)

J-2 (R-2) Final Notice of Disciplinary Action (31-B) 11/7/16

J-3 Appellants treatment records from RISF (119 pages)

J-4 Stipulation of Facts

For Petitioner:

None

For Respondent:

R-3 Administrative Order 4:23

R-4 Employee Acknowledgement of Drug Testing Policy

R-5 List of Employees Selected to be Randomly Tested

R-6 Employee Notice for Random Drug Testing dated 11/5/15

R-7 Custody and Control Form

R-8 November 2015 Positive Urine Test Results

R-9 Notice of Referral to EAS dated 11/17/15

R-10 EAS Compliance Signature Sheet 11/18/15

R-11 EAS Compliance Letter to HR 11/23/15

R-12 Medical Clearance Report 1/11/16 passed urine drug test

R-13 1/7/16 Return to Work Approval

R-14 Employee Notice for Testing 5/24/16

R-15 Medical Clearance Report dated May 2016 passed urine drug test

R-16 5/26/16 letter to HR from EAS with attachment

R-17 Employee Notice for Testing 10/6/16

R-18 Custody and Control Form 10/4/16

R-19 Medical Clearance Form dated October 2016 failed urine drug test

R-20 EAS letter to HR 10/7/16

R-21 10/26/16 letter from HARP facility

R-22 11/3/16 discharge letter from GenPsych

STATE OF NEW JERSEY

In the Matter of Kimberly McCall
Newark Public Schools

CSC DKT. NO. 2018-1401
OAL DKT. NO. CSV 18141-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 18141-17
AGENCY REF. NO. 2018-1401

IN THE MATTER OF KIMBERLY McCALL,
NEWARK PUBLIC SCHOOLS,

Samuel Wenocur, Esq., for appellant (Oxfeld Cohen, P.C.)

Bernard Mercado, Esq., for respondent (The Newark Public Schools, Office of the General Counsel)

Record Closed: June 6, 2018 Decided: June 6, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on December 12, 20117, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was conducted on January 9, 2018, wherein the parties agreed on a hearing date of June 8, 2018. Prior to the hearing date the parties prepared and submitted a fully executed settlement agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

6-6-18

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 8 2018
ljb

The Newark Public Schools
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102-3091
Phone: 973-733-7139/7054
Fax: 973-733-8771

A. Robert Gregory
Interim Superintendent

Arsen Zartarian, Esq.
Deputy General Counsel

Alexander L. D'Jamoos, Esq.
Associate Deputy General Counsel

Dr. Lamont Repollet
Commissioner of Education

Bernard Mercado, Esq.
Senior Associate Counsel

Sabrina Styza, Esq.
Associate Counsel

Eric Frazier, Esq.
Contract Counsel

June 5, 2018

VIA OVERNIGHT MAIL
Hon. Kimberly Moss, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102

2018 JUN -6 A 9:41

Re: McCall v. Newark Public School District
OAL Dkt. No.: CSV 18141-2017N
Agency Ref. No.: 2018-1401

This office represents the Board of Education of the City of Newark, County of Essex (the "Board") in the above-mentioned matter. Enclosed for filing, please find an original settlement agreement executed by both parties which serves to resolve this matter. As such, it would appear that the hearing scheduled for this Friday, June 8, 2018 is no longer necessary. Therefore, please also accept this letter as a formal request to adjourn the hearing in this matter. My adversary gives his consent for the adjournment given the executed settlement agreement.

Should Your Honor have any questions or need any further information, please do not hesitate to contact this office. I thank the Court in advance for its courtesies in helping to resolve this matter.

Respectfully submitted,
The Newark Public Schools

By: _____
Bernard Mercado, Esq.

Encl.
cc: Samuel Wenocur, Esq. (w/encl. via email only)

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent Board of
Education of the City of Newark

2018 JUN -5 A 9:12

KIMBERLY MCCALL,	:	OFFICE OF ADMINISTRATIVE LAW
Appellant,	:	
	:	OAL DKT. NO. CSV 18141-2017N
vs.	:	AGENCY REF. NO.: 2018-1401
NEWARK PUBLIC SCHOOL DISTRICT,	:	SETTLEMENT AND
Respondent.	:	LAST CHANCE AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Kimberly McCall ("Appellant" or "McCall") and Respondent Board of Education of the City of Newark, County of Essex ("Respondent" or the "Board"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, her appeal and request for a hearing filed under OAL Docket No. CSV 18141-2017N, Agency Ref. No.: 2018-1401 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other suits or claims that she may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. It is understood by the parties that this Settlement Agreement will serve as a formal letter of withdrawal for any other suits or claims, except for workers compensation claims, should Appellant fail to submit a formal letter of withdrawal for each suit or claim.

3. The parties agree that the charges set forth in the Final Notice of Disciplinary Action dated November 6, 2017 are sustained but that Petitioner's removal will be amended to a six (6) month suspension without pay commencing November 6, 2017. Appellant will be deemed to have served said suspension during the pendency of this current appeal.

4. Respondent agrees to reinstate Appellant within a reasonable time after the Civil Service Commission has approved this settlement. Appellant will be assigned to a location at the discretion of Respondent. For the balance of time from the end of her

6 month unpaid suspension to her reinstatement, Appellant will be deemed to be on administrative leave without pay. Respondent shall amend Appellant's personnel records to conform to the terms of this settlement.

5. Appellant shall not accumulate or receive any sick, vacation or personal days for any time between her six month suspension and the date of her reinstatement.

6. Appellant shall not receive any back pay, monies or any other emoluments as part of this settlement.

7. Appellant understands and agrees that this is a "Last Chance Agreement" constituting a probationary period and as such, she is subject to immediate termination by Respondent for incurring in excess of the following enumerated infractions over the next 12 months after execution of this Settlement Agreement: (a) no more than one (1) sick day per month which must be accompanied by appropriate notice beforehand to her supervisors along with competent medical documentation to be received by the Talent Department within 72 hours of the absence; (b) should Appellant be absent for more than one day each month due to her own hospitalization, Appellant will be required to produce to the Talent Department within 72 hours of her return, with due notice to her supervisors, hospital admittance and discharge papers evidencing her hospitalization and accounting for the entire time she was absent from duty, the failure to produce such documentation or account for all of her time absent due to her own hospitalization will be deemed to be a violation of the terms of this Agreement; (c) no more than one (1) instance of lateness/tardiness per month; (d) absolutely no unauthorized leaves or Absences Without Leave ("AWOLs") will be permitted; (e) Appellant understands that she has a responsibility to be at the work site during her entire work shift and that her failure to do so or respond to her supervisors when paged will result in being marked AWOL; (f) Appellant will perform her duties, complete all assignments and tasks assigned to her during the relevant time period to the satisfaction of her supervisors after they have had an opportunity to review said assignments; and (g) no instances of insubordination or neglect of duty will be permitted. After the initial 12-month period, Appellant understands that she will be subject to further major discipline, up to and including termination, for any infraction that she commits.

8. Appellant acknowledges that she has now been suspended or written up on several prior occasions for charges pertaining to chronic or excessive absenteeism or lateness, and is familiar with the "notice to employee" sections of prior recommended decisions. As such, Appellant acknowledges that any further violations will result in disciplinary action, up to, and including termination.

9. Except for the conduct committed by Appellant which resulted in the Final Notice of Disciplinary Action dated November 6, 2017, nothing in this Settlement Agreement serves as a waiver to the filing and pursuing of disciplinary action against Appellant for any other incidents that may have occurred during her employment up to this point in time and likewise, nothing prohibits the District from pursuing disciplinary action against Appellant related to any claims of

misconduct, inefficiency or incapacity that may have already accrued or occurred in the past or that may accrue or occur in the future.

10. Appellant understands and agrees that Respondent retains the managerial prerogative and sole discretion to assign Appellant to any school it deems fit.

11. The Parties agree that Appellant is not a prevailing party, and as such, Appellant expressly waives any claims for attorneys' fees incurred in connection with this action.

12. Appellant fully understands that this Agreement can be used by Respondent in future disciplinary proceedings.

13. In exchange for the consideration set forth in Paragraphs 3 and 4, the sufficiency of which is hereby acknowledged, Appellant hereby waives, releases and discharges any and all claims or rights that she has or may have against the Board, the Superintendent, Board of Education and Board members, and any and all other officers, employees, representatives, agents, successors and assigns of Respondent (collectively, the "Released Parties"), including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Appellant's employment, up until the time that this agreement is fully executed and approved by the necessary administrative agencies. It specifically includes, without limitation, all claims which Appellant may have regarding insurance, COBRA, tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the Civil Service Act, the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her

employment with the District, including but not limited to any claim for wrongful discharge, back pay, insurance, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Notwithstanding the foregoing, Appellant does not waive or release any workers' compensation claim.

14. Notwithstanding Paragraph 13 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving her rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 14, Appellant agrees not to seek or accept any resulting relief whatsoever.

15. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Appellant of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has 7 days from the date of the execution of this Agreement to revoke it. Appellant understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Respondent either by hand or by certified mail within the 7 day period.

16. This Agreement may not be modified, altered, changed, discharged, terminated or waived except upon express written consent of the Parties.

17. Appellant acknowledges that she has entered into this Agreement voluntarily and hereby signs it without duress or coercion, and with the opportunity to consult counsel.

18. Appellant understands, agrees to and acknowledges that she is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

19. This Agreement shall be governed by the laws of the State of New Jersey.

20. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.

21. The Parties agree to keep confidential and not share any information as to the terms of the settlement agreement and release, except as required by law.

22. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

23. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Agreement shall be fully enforceable.

24. This Settlement Agreement is subject to final approval by the undersigned representative of the Board who represents and warrants that she is authorized and empowered to sign this Agreement on behalf of the Board and is able to bind the Board to the terms of this Agreement. Any disapproval by the Board representative shall not interfere with the rights of either party to pursue this matter further.

25. This Settlement Agreement is subject to final approval by the Civil Service Commission and will only become final and binding on Appellant and Respondent upon the approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

Dated: 5/30/18

KIMBERLY MCCALL
Appellant

Dated: 5/30/18

SAMUEL WENOCUR, ESQ.
Attorney for Appellant

Dated: 6/5/18

YOLANDA MENDEZ
Assistant Superintendent, Talent

Dated: 6/5/18

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, KIMBERLY MCCALL, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney/representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily. I also understand that if this Settlement Agreement is approved by the Civil Service Commission, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 5/30/18

KIMBERLY MCCALL

7-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Lavonn Motley
Newark Public Schools

CSC DKT. NO. 2017-3888
OAL DKT. NO. CSV 03240-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03240-18

AGENCY REF. NO. 2017-3888

IN THE MATTER OF LAVONN MOTLEY,

NEWARK PUBLIC SCHOOL DISTRICT.

Colin M. Lynch, Esq., for appellant Lavonn Motley (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Bernard Mercado, Esq., for respondent Newark Public School District

Record Closed: June 6, 2018 Decided: June 7, 2018

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Civil Service Commission on February 28, 2018, for hearing as a contested case, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties reached an amicable resolution of the matter, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

June 7, 2018
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: JUN 11 2018

id

The Newark Public Schools
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102-3091
Phone: 973-733-7139/7054
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A. Robert Gregory
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Arsen Zartarian, Esq.
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Associate Deputy General Counsel

Dr. Lamont Repollet
Commissioner of Education

Bernard Mercado, Esq.
Senior Associate Counsel

Sabrina Styza, Esq.
Associate Counsel

Eric Frazier, Esq.
Contract Counsel

June 5, 2018

VIA OVERNIGHT MAIL
Hon. Ernest Bongiovanni, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102

RECEIVED
2018 JUN -6 A 9:00
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Re: Motley, Lavonne v. Newark Public School District
OAL Dkt. No.: CSV 03240-2018N
Agency Ref. No.: 2017-3888

Your Honor,

As you may recall, this office represents the Board of Education of the City of Newark (the "Board") in the above referenced matter. Pursuant to the last case status conference, enclosed for filing please find an original fully executed copy of the settlement agreement in the above-mentioned matter. Further, given the settlement agreement, it would appear that the case status telephone conference scheduled for Wednesday, June 6, 2018 at 3:00 pm is no longer necessary.

Should Your Honor have any questions or need any additional information, please do not hesitate to contact me. I thank the Court for its courtesies in helping to resolve this matter.

Respectfully submitted,
The Newark Public Schools

By: _____
Bernard Mercado, Esq.

Encl.
cc: Colin Lynch, Esq. (w/encl. via electronic mail only)

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
765 Broad Street
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Attorneys for Respondent Board of
Education of the City of Newark

RECEIVED
2018 JUN -6 A 9:00
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

LAVONN MOTLEY, Appellant, vs. NEWARK PUBLIC SCHOOL DISTRICT, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV 03240-2018N AGENCY REF. NO.: 2017-3888 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant LaVonn Motley ("Appellant" or "Motley") and Respondent Board of Education of the City of Newark, Essex County ("Respondent" or the "District"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, her appeal and request for a hearing filed under OAL Docket No. CSV 03240-2018N, Agency Ref. No.: 2017-3888 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other suits or claims that she may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all of Appellant's outstanding claims against the District related to her employment. It is understood by the parties that this Settlement Agreement will serve as a formal letter of withdrawal for any other suits or claims, except for workers compensation claims, should Appellant fail to submit a formal letter of withdrawal for each suit or claim.

3. The parties agree that Appellant will be deemed guilty of "Failure to Perform Duties" for the conduct that she committed on January 26, 2017.

4. In exchange, and for good consideration as hereby acknowledged by the parties, the District will convert Appellant's termination effective February 2, 2017 to an unpaid six (6) month suspension as discipline for the conduct committed on January 26, 2017. The unpaid suspension period shall be recorded as February 2, 2017 through August 2, 2017. Between August 3, 2017 and the actual date

Appellant is reinstated, Appellant will be deemed to have been placed on an unpaid leave of absence.

5. Except for the conduct committed by Appellant on January 26, 2017, nothing in this Settlement Agreement serves as a waiver to the filing and pursuing of disciplinary action against Motley for any other incidents that may have occurred during her employment up to this point in time, subject to applicable law, and likewise, nothing prohibits the District from pursuing disciplinary action against Motley related to any claims of misconduct, inefficiency or incapacity that may have already accrued or occurred in the past or that may accrue or occur in the future, subject to applicable law. Motley reserves and retains the right to assert all applicable and/or available defenses.

6. Appellant understands and agrees that Respondent retains the managerial prerogative and sole discretion to assign Appellant to any school it deems fit.

7. Appellant shall not receive any back pay or any other payment as part of this settlement.

8. Appellant shall not receive any sick, vacation or personal days for any time between February 2, 2017 and the date of her reinstatement.

9. The Parties agree that Appellant is not a prevailing party, and as such, Appellant expressly waives any claims for attorneys' fees incurred in connection with this action.

10. Appellant fully understands that this Agreement can be used by Respondent in future disciplinary proceedings.

11. In exchange for the consideration set forth in Paragraph 4, the sufficiency of which is hereby acknowledged, Appellant hereby waives, releases and discharges any and all claims or rights that she has or may have against Respondent, the Superintendent, Board of Education and Board members, and any and all other officers, employees, representatives, agents, successors and assigns of Respondent (collectively, the "Released Parties"), including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Appellant's employment, up until the time that this agreement is fully executed and approved by the necessary administrative agencies. It specifically includes, without limitation, all claims which Appellant may have regarding insurance, COBRA, tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker

Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the Civil Service Act, the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, insurance, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Notwithstanding the foregoing, Appellant does not waive or release any workers' compensation claim.

12. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Appellant of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has 7 days from the date of the execution of this Agreement to revoke it. Appellant understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Respondent either by hand or by certified mail within the 7 day period.

13. This Agreement may not be modified, altered, changed, discharged, terminated or waived except upon express written consent of the Parties.

14. Appellant acknowledges that she has entered into this Agreement voluntarily and hereby signs it without duress or coercion, and with the opportunity to consult counsel.

15. Appellant understands, agrees to and acknowledges that she is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

16. This Agreement shall be governed by the laws of the State of New Jersey.

17. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.

18. The Parties agree to keep confidential and not share any information as to the terms of the settlement agreement and release, except as required by law.

19. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

20. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Agreement shall be fully enforceable.

21. This Settlement Agreement is subject to final approval by the undersigned representative of the District who represents and warrants that she is authorized and empowered to sign this Agreement on behalf of the District and is able to bind the District to the terms of this Agreement. Any disapproval by the District representative shall not interfere with the rights of either party to pursue this matter further.

22. This Settlement Agreement is subject to final approval by the Civil Service Commission and will only become final and binding on Appellant and Respondent upon the approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

Dated: 5/16/18

LAVONN MOTLEY
Appellant

Dated: 5/16/18

COLIN LYNCH, ESQ.
Attorney for Appellant

Dated: 6/5/18

YOLANDA MENDEZ
Interim Chief Talent Officer

Dated: 6/5/18

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, LAVONN MOTLEY, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney/representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 5/16/18 LaVonn Motley
LAVONN MOTLEY

RECEIVED
2018 JUN -6 A 9:00
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

7-18-18

A-8

In the Matter of Betty Ramos Irvington Township, Department of Public Safety CSC DKT. NO. 2017-2816 OAL DKT. NO. CSV 04239-17	:	**STATE OF NEW JERSEY** **DECISION OF THE** **CIVIL SERVICE COMMISSION**

ISSUED: JULY 20, 2018 BW

The appeal of Betty Ramos, Police Officer, Irvington Township, Department of Public Safety, 40 working day suspension, on charges, was heard by Administrative Law Judge Jeffrey A. Gerson, who rendered his initial decision on June 7, 2018 reversing the 40 working day (20 days held in abeyance) suspension. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to back pay, benefits, and seniority, for the actual number of days she was suspended pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, she is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Betty Ramos. The Commission further orders that appellant be granted back pay, benefits, and seniority for the actual number of days she was suspended. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, Northern Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 04239-17
AGENCY DKT NO. 2017-2816

IN THE MATTER OF BETTY RAMOS, IRVINGTON TOWNSHIP, DEPARTMENT OF PUBLIC SAFETY.

Peter B. Paris, Esq., for petitioner Betty Ramos (Law Office of David Beckett, attorney)

Lindal Scott-Foster, Esq, for respondent, Township of Irvington, attorney)

Record Closed: November 13, 2017 Decided: June 7, 2018

BEFORE: **JEFFREY A. GERSON**, ALJ t/a:

STATEMENT OF THE CASE

Betty Ramos, a Police Officer in Irvington Township was suspended for 40 working days, 20 of which were held in abeyance, on February 21, 2017.

On February 24, 2017, Officer Ramos filed her Major Disciplinary Appeal form on August 8 and on August 24, 2017 the matter was heard at the Office of Administrative Law.

The record was closed on November 13, 2017 after receipt of the final submission of a letter brief.

FACTS

Despite some minor differences between the parties, the facts in this matter are not in significant dispute.

On March 22, 2016, Officer Betty Ramos was assigned to the "Call Taker" position in the Irvington Police Department Communication Center. As Call Taker, Ramos was responsible to receive 911 calls and relay the information to the dispatcher.

On the date in question, Ramos received a call from a civilian at approximately 10:40 p.m. reporting a motor vehicle accident involving damage to parked vehicles with the offending vehicle leaving the scene and, according to the citizen, endangering two pedestrians.

The citizen was in the process of following the offending vehicle and reported the location and provided Ramos with a license plate number. Ramos maintained communication with the citizen who remained at the scene where the offending vehicle was subsequently parked.

While in contact with the civilian, Ramos searched the license plate number of the vehicle which produced the name of the owner. Ramos recognized the name of the owner as an Irvington Police Officer.

At the time of the call, Ramos was already entering information in the CADE report (computer system) and notified the dispatcher, not only of the incident, but told her of the involvement of an Irvington Police Officer.

The first witness to testify on behalf of the Township was Detective Sergeant Gerard Malek. Malek conducted the investigation that subsequently led to the charges against Ramos among several others.

Malek testified that Ramos was required to notify the desk supervisor of an unusual incident after determining that the offending vehicle was registered to an Irvington Police Officer. Malek went on to indicate that R 3.1.7 "performance of duty" requires the officer to perform all the duties designated to them. From this general description, Malek determined that Ramos had violated this provision, though the basis of that violation was never clarified in his testimony. He went on to indicate that Ramos also violated R 3.1.26 which indicates that when an officer becomes aware that another officer is involved in a violation of law or ordinance or rule, they are required to report that in writing to their supervisor. The third charge filed by Malek against Ramos was that she violated a General Order which required all reports to be "concise and documented".

Malek confirmed that as a result of the original citizen call, a notification from Ramos to the Dispatcher occurred which resulted in the appearance at the scene of several officers. The officers at the scene interviewed the Irvington Police Officer who they subsequently determined was not only the owner but also the operator of the offending vehicle. It was the conduct of these officers at the scene which led to the notification to the Essex County Prosecutor's office reporting what was perceived to be the shortcomings of their conduct.

The next witness to testify on behalf of Irvington Township was Joseph J. Santiago, who formally was the Police Director for the Township of Irvington from 2008 to 2014. He presently does some consulting work for the Township of Irvington in addition to his employment privately with Santiago Associates.

Santiago's testimony was apparently offered to clarify some of the Orders and operating procedures governing the Irvington Township Police.

The last witness to testify on behalf of the Township was Lieutenant Clinton Franks, who on the date of the incident was working as a desk Lieutenant.

According to Lieutenant Franks, it was not until the following day when he reviewed the reports and upon that initial review did not see anything that would have triggered an unusual incident report, but subsequently learned that omissions by both the Dispatcher and the on scene officers distorted the actual facts surrounding the incident.

Officer Ramos testified that she received the call from a citizen complainant, took all of the information offered, prepared a CAD report and advised the Dispatcher verbally that the registered owner of the offending vehicle was "one of us" or actually relayed the name of the offending officer.

Officer Ramos testified that she did not believe that the incident could be categorized as an "unusual incident" and that the information that the incident involved an Irvington Police Officer was not only verbally given to the dispatcher, but also subsequently attached to the CAD report. She contended that her actions on the night in question were in complete comportment with all rules, regulations and orders governing the conduct of a "Call Taker".

DISCUSSION

Charge I against Officer Ramos was as follows:

> R 3.1.7 Performance of Duties states:
>
> All members and employees shall perform their duties as required or directed by law, police department rule, policy or Order, or by order of a superior officer. All lawful duties are required by competent authority shall be performed promptly

> as directed, notwithstanding the general assignment of duties and responsibilities.

No testimony offered by Irvington Township indicated with any specificity what conduct of Officer Ramos would lead to the conclusion that she did not do perform her duties as required. A review of Exhibit A-10, the duties of a Call Taker specifies nine procedures to be followed, none of which any of the witnesses pointed to as being violated by Ramos.

The second Charge is that Ramos failed to perform her duty when she did not notify the desk supervisor of an "unusual incident" when she became aware that the owner of the vehicle was an Irvington Police Officer.

General Order 2008-01 discusses "unusual incident" that require notifications to various officials. A review of what is categorized as unusual incidents reveals that most are serious crimes or citizen complaints against police officers. The incident of March 22, 2016 involving Officer Ramos as a Call Taker does not fall into any of the listed items in the Order and requires an extraordinary stretch of everyday language to consider this event as an extraordinary occurrence and thereby an "unusual incident.

The last charge against Officer Ramos was that she failed to immediately report in writing that an Irvington Police Officer was the owner of a motor vehicle which was reported to be driving erratically and involved in an accident.

Though there is simply no basis for this charge since it is quite clear that a CAD report was filed immediately and attached to the CAD report was the details of who the operator and registered owner was of the vehicle.

Over simplified, Officer Ramos took a call from a concerned citizen which eventually was determined to involve an Irvington Police Officer. Ramos documented the details and notified the Dispatcher, not only of the nature of the call, but of the

potential involvement of a fellow police officer. The subsequent involvement of several on duty police officer officers which may have involved some overprotective aspects of a fellow officer, create ripple effects which extended out to Ramos though her performance did not warrant the subsequent discipline. If Irvington would like to have the Call Taker notify superiors of any call that comes in involving a police officer, a General Order so requiring such notification would not be hard to author. The Rules, Regulations and Orders as presently constituted require notification under specific circumstances, most of which are serious offenses and none of which will require Officer Ramos to be disciplined.

ORDER

It is **ORDERED** that the disciplinary charges filed against Officer Betty Ramos are hereby dismissed and any loss of salary and/or seniority resulting in the already served suspension be reinstated immediately.

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

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

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

June 7, 2018

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 6/7/18

Date Mailed to Parties: 6/7/18

sej

APPENDIX

WITNESSES:

For Appellant

Betty Ramos, appellant
Ms. Scott-Foster
Clinton Franks

For Respondent

Detective Sergeant Gerard Malik
Joseph J. Santiago

EXHIBITS:

For Appellant

A-1 Irvington Police Department Incident Summary (2 pgs)
A-2 DVD
A-3 Irvington Police Department Internal Affairs Bureau Summary Report dated 3/23/16 (9 pgs)
A-4 Irvington Police Department Internal Affairs Bureau Investigation Report dated 10/31/16 (33 pgs)
A-5 Chapter III General Rules and Regulations 3.1 through 3.1.7
A-6 Chapter III General Rules and Regulations 3.1.25 through 3.1.27
A-7 Irvington Police Department General Order 2010-10 dated 12/1/10
A-8 Irvington Police Department General Order 2008-01 dated 5/1/14
A-9 Irvington Police Department Highlight Report
A-10 Irvington Police Department Standard Operating Procedures dated 11/15/96
A-11 New Jersey Police Crash Investigation Report dated 3/22/16

For Respondent

R-1 Letter dated 8/23/16
R-2A Irvington Police Department General Order (Responsibilities of Command and Supervisory Personnel, 1:15 dated 10/20/98)
R-2B General Order 2:00

7-18-18

A-9

STATE OF NEW JERSEY

In the Matter of Christopher Reece
City of Passaic, Department of Public Safety

CSC DKT. NO. 2016-3477
OAL DKT. NO. CSV 11753-16
OAL DKT. NO. PTC 02976-16
(Consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Christopher Reece, Police Officer, City of Passaic, Department of Public Safety, removal effective February 22, 2016, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on April 4, 2018. No exceptions were file regarding the matter before the Civil Service Commission (Commission).

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Commission, at its meeting of July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Christopher Reece.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED

CHRISTOPHER REECE,
Petitioner,
v.
PASSAIC COUNTY POLICE ACADEMY,
Respondent.

OAL DKT. NO. PTC 02976-16
AGENCY DKT. NO. N/A

IN THE MATTER OF
CHRISTOPHER REECE,
CITY OF PASSAIC DEPARTMENT
OF PUBLIC SAFETY.

OAL DKT. NO. CSV 11753-16
AGENCY DKT. NO. 2016-3477

Michael L. Prigoff, Esq., for petitioner/appellant Christopher Reece (Lebson & Prigoff, attorneys)

Jose R. Santiago, Assistant County Counsel, for respondent Passaic County Police Academy (William J. Pascrell III, Passaic County Counsel)

Philip G. George, Esq., for respondent City of Passaic Department of Public Safety (Eric M. Bernstein & Associates, attorneys)

Record Closed: April 2, 2018 Decided: April 5, 2018

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioner/appellant Christopher Reece appeals his dismissal by the Passaic County Police Academy for failure to fully participate in 80 percent of the total physical training as per the Police Training Commission (PTC) standards. Petitioner/appellant further appeals his termination by the City of Passaic Department of Public Safety for failure to complete the police training.

PROCEDURAL HISTORY

In Christopher Reece v. Passaic County Police Academy, OAL Docket No. PTC 02976-16, Reece requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on February 23, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, for a hearing as a contested case. In In the Matter of Christopher Reece, City of Passaic Department of Public Safety, OAL Docket No. CSV 11753-16, Reece requested a hearing and the matter was transmitted to the OAL on August 4, 2016, for a hearing as a contested case. Pursuant to N.J.A.C. 1:4A-17.1, an Order was issued on September 23, 2016, consolidating the matters and deeming the PTC to have the predominant interest.

The hearing was held on November 9, 2017, and November 16, 2017, and the record remained open for post-hearing submissions. The record closed on April 2, 2018, upon receipt of the final submission.

FACTUAL DISCUSSION

Background

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** the following **FACTS** in this case:

Dennis Schlosser retired as a captain from the Passaic County Sheriff's Department in September 2009 after twenty-five years. He has been employed full-time by the Passaic County Police Academy (PCPA) as a physical training (PT) instructor since November 2009. He has been the assistant director of the PCPA for approximately fourteen months, and prior thereto he was a senior PT instructor for four years. He had previously been a PT instructor, on and off, since approximately 1988.

Mohamed Lostan retired as a captain and has been a PT instructor for twenty-eight years.

The PCPA runs basic police, basic corrections, special one and special two, juvenile detention officer, and park ranger classes, as well as general in-service classes for prior graduates. To maintain its certification, the PCPA must conduct a minimum of two classes per year. Instructors take a forty-hour in-service class to be certified by the PTC. Schlosser took the certification class in November 2009. The class covers the PTC Physical Conditioning Training Manual. When Schlosser started at the PCPA, the PCPA was on basic class police officer (BCPO or class) number 33, and it is now on class number 50.

Christopher Reece was sent to the PCPA by the Passaic Police Department (Passaic PD). He started the BCPO at the PCPA on November 5, 2015. Reece was one of 141 trainees in class 15-46BCPO, so each trainee was also given a number for more specific identification. Reece's identification number was 95. The BCPO averages twenty-four weeks. Class 15-46BCPO concluded in March 2016, and 113 of the 141 trainees graduated.

Reece is six feet tall. At his medical examination several weeks prior to starting at the PCPA Reece weighed approximately 255 pounds. (J-11.) A trainee's physical condition is assessed three times during the class. Trainees are assigned numerically to exercise group 1 (entry), group 2 (intermediate), and group 3 (advanced). For the first assessment, a trainee's physical condition is assessed on the fourth day of the class, after three easy days of PT, to determine which exercise group the trainee should be in. On November 9, 2015, the first physical condition assessment was conducted.

On that date, Reece weighed 248 pounds and his 1.5-mile-run time was 16.36. (J-12.) The run assessment was based on the trainee's own pace, six times around the track. Reece was assigned to group 1.

On November 5, 2015, Reece signed a confirmation that he read, understood and agreed to comply with the PCPA Rules and Regulations. (J-8.) Chapter 6-1 of the PCPA Rules and Regulations addresses physical-fitness training as follows:

> a. Proper physical fitness and posture are necessary attributes for a Law Enforcement Officer. Total fitness for Law Enforcement duties include[s]: technical fitness, mental and emotional fitness, and physical fitness. If any of these attributes are lacking, the Officer's effectiveness suffers proportionately.
>
> b. Scheduled physical exercise as prescribed by the Police Training Commission's Physical Conditioning Program Manual will be conducted so that each "Trainee" can maintain a high level of physical fitness.
>
> c. Each Trainee will undergo prescribed physical fitness tests. Strengths and weaknesses shall be identified for the Trainee. Alternative training may be required as necessary. All Trainees are to participate fully in physical training sessions. Police Training Commission's rules shall be adhered to at all times.
>
> d. The New Jersey State Police Training Commission has set minimum standards for participation as per Directive #6-98. The minimum sessions will be forwarded to you during Orientation Day.
>
> e. It is the responsibility of all persons involved in the training process, to pay close attention to the personal safety of everyone involved in the training course. While attending the Passaic County Police Academy, Instructors and Trainees alike will not jeopardize the health or safety of themselves or others for the sake of the training mission.
>
> [J-8.]

Per PTC Directive #6-98, an individual enrolled in the BCPO "must participate in a minimum of 80 percent of the physical conditioning sessions scheduled by a school with an individual participating in no less than 40 physical conditioning sessions as described in the [C]ommission's Physical Conditioning Training Program Manual." (J-54.)

The PCPA provides each trainee with the PCPA's definition of "participation" (Participation Notice). On November 5, 2015, Reece signed the Participation Notice, which states in part:

> Participation in the Physical Training Program consists of sharing with, or keeping up with your assigned group. Your assigned group consists of recruits with a similar level of physical fitness as determined by your initial physical training assessments. If you refuse to share or keep up with your assigned group you are not participating in the program. If you do not participate in the program you will not be given credit for that particular training session.
>
> . .
>
> If you fail to participate you fail to be part of the team. If you fail to be part of the team your time at the academy and in this program may be limited.
>
> [J-10.]

The PT program includes cardiovascular endurance, muscular strength, and endurance and flexibility. There are exercise programs for a five-day week and for a three-day week, all of which generally include a warm-up, flexibility exercises, aerobic activities, transition cool-down, calisthenics/strength exercises, speed and agility exercises, and cool-down. One of the aerobic activities at the PCPA is running. Reece did not receive credit for the PT runs on November 18, 2015, November 19, 2015, November 20, 2015, November 23, 2015, November 24, 2015, November 25, 2015, and November 30, 2015. (J-14; J-16; J-18; J-20; J-22; J-24; J-26; J-27; J-28.) On November 30, 2015, Reece signed an acknowledgment listing the seven no-credit/non-participation dates and stating that the PTC "has set minimum standards for

participation as per Directive 6-98," and that "[t]rainees must complete 80% of scheduled performance objectives as per 13.1."[1] (J-27.)

Reece did not receive PT credit for the PT runs on December 2, 2015, December 3, 2015, December 4, 2015, December 7, 2015, December 8, 2015, December 9, 2015, December 10, 2015, December 11, 2015, and December 23, 2015. (J-30; J-32; J-34; J-36; J-38; J-40; J-42; J-44; J-46; J-47.) December 23, 2015, was the twenty-seventh day of PT. (J-46.)

On January 4, 2016, the second physical condition assessment was conducted and all group 1 trainees were moved to group 2, so group 1 was eliminated. Based on performance, some group 2 trainees were moved into group 3. On that date, Reece weighed 248 pounds and his 1.5-mile-run time was 14.38. (J-12.)

Reece did not receive PT credit for the PT run on January 15, 2016. (J-49; J-50.) January 15, 2016, was the thirty-fifth day of PT. (J-50.) The total number of PT sessions on the schedule for Reece's class was seventy-five, so Reece needed participation credit for at least sixty PT sessions in order to meet the PTC standard of 80 percent participation. (J-50.)

Schlosser recommended that Reece be dismissed from the PCPA for failure to fully participate in 80 percent of the total physical-conditioning sessions as per PTC standards. (J-50.) On February 2, 2016, Reece was notified of his dismissal from the PCPA. (J-51.) The Dismissal Notice reflects that he was being dismissed for (1) violation of the PCPA Rules and Regulations, specifically Chapter 6-1d; and (2) violation of PTC Rules—N.J.A.C. 13:1-5.1 and failure to participate in the minimum standard of PT as set by the PTC as per Directive #6-98. (J-51.)

Reece was subsequently removed from his position as a police officer by the Passaic PD because he was dismissed from the PCPA. (PS-1.)

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[1] Sections 13.1.1 through 13.1.13 are the Performance Objectives in the PTC Physical Conditioning Training Manual.

Physical Training Non-Participation and Trainee Report Forms

Physical Training Non-Participation reports (Non-Participations) were completed by the instructors and Trainee Report Forms (Trainee Reports) were completed by Reece for each of the seventeen dates on which Reece did not receive PT credit. Non-Participations are not provided to the trainees. The Non-Participations list the instructors present. The Non-Participations vary in terms of running pace, running time, and time completed, and the manner in which the times are recorded varied by instructor. However, the pertinent portions of each of the seventeen Non-Participations and seventeen corresponding Trainee Reports are detailed below.

November 18, 2015

Physical Training Non-Participation (J-14):

Time separated from group: 19:20
Time walking or not at a running pace: N/A
Time lapped by group: N/A
Time observed/report injury: N/A
Instructor Comments: Recruit Reece #95 will not receive PT credit today because he failed to participate with his exercise group by separating and running at his own pace.

Trainee Report Form (J-13):

I HEREBY REPORT this recruit fell back today about 5--10 steps from group #1. End of report.[2]

November 19, 2015

Physical Training Non-Participation (J-16):

Time separated from group: 1:53 seconds
Time walking or not at a running pace: Trainee separated [from] group at approx. 14:45 seconds and walking @ 15 minutes into the run.
Time lapped by group: N/A
Time observed/report injury: N/A
Instructor Comments: Trainee separated from Group #1 and later observed to be walking @ 15:00 minutes by this Instructor. Trainee advised to increase pace/stride

[2] Instructor Lostan wrote below Reece's report: "Recruit was over 30 yards behind his group."

and to catch up to his group and participate in the run. Trainee finished 300 meters behind his group at completion of 20 minute run. *No credit for PT/ non-participation.

Trainee Report Form (J-15):

I HEREBY REPORT this recruit started walking during today's PT run due to cramping in my right thigh. End of report.[3]

November 20, 2015

Physical Training Non-Participation (J-18):

Time separated from group: 7:00 minutes
Time walking or not at a running pace: Trainee separated from group and walking pace established next to him by this Instructor at 7:00 minutes.
Time lapped by group: 14:45 seconds into run.
Time observed/report injury: N/A
Instructor Comments: Trainee observed to be at walking pace @ 7:00 minutes by himself at his own pace. Trainee did not participate in group run and slow shuffled, and walked during 20 minute cardio run on PCT track. *no credit for PT/ non-participation.

Trainee Report Form (J-17):

I HEREBY REPORT this recruit today fell back out of his group run but did not stop running at any time for the 20 minute run today. End of report.[4]

November 23, 2015

Physical Training Non-Participation (J-20):

Time separated from group: 10:30 seconds
Time walking or not at a running pace: 11:30 seconds trainee was at walking pace. This Instructor was able to get Reece at a running pace for 100 yards, then he stopped and was walking. Trainee cannot maintain a continuous 20 minute run pace with group.
Time lapped by group: N/A
Time observed/report injury: N/A
Instructor Comments: Trainee separated from his group approx. 10:30 and performing a slow shuffle. Trainee later at walking pace next to this Instructor; he cannot maintain a continuous running pace for 20 minutes. *no credit for PT/ non-participation.

Trainee Report Form (J-19):

I HEREBY REPORT that this recruit fell out of his run today. End of report.

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[3] Instructor wrote below Reece's report: "No credit for PT/Non-Participation."
[4] Instructor wrote below Reece's report: "No credit for PT/Non-Participation."

November 24, 2015

Physical Training Non-Participation (J-22):

Time separated from group: 8:40 minute in run
Time walking or not at a running pace: 10:17 moving at slow shuffle/walking at 11:55
Time lapped by group: Group passed him at 19:51
Time observed/report injury: N/A
Instructor Comments: Recruit Reece #95 will not receive PT credit today because he failed to participate with the company run by separating and moving at his own pace/walk. He was also passed by the group at 19:51 minutes into run.

Trainee Report Form (J-21):

I HEREBY REPORT that this recruit started felling [sic] the need to threw [sic] up during the run today and did so then fell out of the run after. End of report.[5]

November 25, 2015

Physical Training Non-Participation (J-24):

Time separated from group: Unknown
Time walking or not at a running pace: N/A
Time lapped by group: He was passed by the group at 19:03
Time observed/report injury: N/A
Instructor Comments: Recruit Reece will not receive PT credit today. Recruit failed to participate in the group run by separating from the group and moving at his own pace. He was also lapped by the group once.

Trainee Report Form (J-23):

I HEREBY REPORT that this recruit fell out of the group run today to throw up and then never caught back up with my group after that. End of report.[6]

November 30, 2015

Physical Training Non-Participation (J-26):

Time separated from group: 7:30 seconds

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[5] Instructor wrote below Reece's report: "Recruit was asked if he was sick or injured. He stated No."
[6] Instructor wrote below Reece's report: "No PT credit/Non-Participation."

Time walking or not at a running pace: Trainee was walking @ 16:10 and 16:40 seconds
Time lapped by group:
Time observed/report injury: Trainee observed on bench as sick @ 18:45 seconds[7]
Instructor Comments: Trainee separated from his group @ 7:30 seconds and began to slow shuffle, then run, then walk, back to slow shuffle and [. . .] this time. Observed walking at least two times (16:10 and 16:40). Trainee paced with walk by this instructor as well. [. . .] did not maintain a continuous running pace for 20 minutes. *no credit for PT/ non-participation.

Trainee Report Form (J-25):

I HEREBY REPORT that this recruit stopped to spit at about 17 minutes into the group run and then was instructed by Sergeant Forst from Newark Police Department to stop and head over to the bench area. So I did so at this time. End of report.

December 2, 2015

Physical Training Non-Participation (J-30):

Time separated from group: 8:57 into run
Time walking or not at a running pace: N/A
Time lapped by group: N/A
Time observed/report injury: N/A
Instructor Comments: Recruit Reece will not receive PT credit for today. Recruit separated from his exercise group and moved at his own pace.

Trainee Report Form (J-29):

I HEREBY REPORT that this recruit got short of breath after the 4th lap of his groups run today and then fell back from his group afterwards. End of report.

December 3, 2015

Physical Training Non-Participation (J-32):

Time separated from group: 4:24 seconds
Time walking or not at a running pace: slow shuffle @ 5:15, 9:00 minutes. Observed walking @ 18:30 seconds.
Time lapped by group: N/A
Time observed/report injury: Stopped 5:45 seconds and reported pain in his left knee to Inst. Ricciardiello.
Instructor Comments: Trainee Reece separated from Group #1 @ 4:24 seconds and began to slow shuffle by himself at a slow pace. He was instructed to increase his

[7] First aid was noted to be refused and not given.

pace/ stride and participate in the run with his group. Reece was observed walking @ 18:30 by this writer with a walking pace established beside him. Attempts to increase his pace and stride were made by this Instructor and Inst. Berger. Trainee Reece was 1/4 mile behind his group when they finished the 20 minute run. *no credit for PT/ non-participation.

Trainee Report Form (J-31):

I HEREBY REPORT that this recruit fell out of his groups run today due to cramping in the left thigh. End of report.

December 4, 2015

Physical Training Non-Participation (J-34):

Time separated from group: N/A
Time walking or not at a running pace: N/A
Time lapped by group: N/A
Time observed/report injury: N/A[8]
Instructor Comments: Recruit Reece will not receive PT credit for today. Recruit separated from his exercise group and moved at his own pace. He finished 2:50 minutes behind his group.

Trainee Report Form (J-33):

I HEREBY REPORT that this recruit fell out of his groups run today. End of report.

December 7, 2015

Physical Training Non-Participation (J-36):

Time separated from group: 3:00 minutes
Time walking or not at a running pace: 3:00 minutes/ slow shuffle at 4:30 seconds
Time lapped by group: 18:58 seconds trainee was lapped by group #1.
Time observed/report injury: N/A.
Instructor Comments: Trainee Reece separated from Group #1 @ 3:00 minutes and began to slow shuffle at his own pace away from group 1. Observed to be at a slow shuffle, and walking when Instructors were not looking, @ 9:30 seconds. Trainee finished one full lap behind group #1 and finished with cardio @ 23:45. Trainee did not participate in the run. *no credit for PT/ non-participation.

Trainee Report Form (J-35):

I HEREBY REPORT that this recruit fell behind of his groups run today. End of report.[9]

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[8] First aid was noted to be refused.
[9] Instructor wrote below Reece's report: "No PT credit/Non-Participation."

December 8, 2015

Physical Training Non-Participation (J-38):

Time separated from group: 4:10 minute into the run
Time walking or not at a running pace: Observed moving at a slow shuffle at 8:30 by Capt. Schlosser
Time lapped by group: N/A
Time observed/report injury: N/A
Instructor Comments: Recruit Reece will not receive PT credit for today. Recruit separated from his exercise group and moved at his own pace for the rest of the run. He finished 3:00 minutes behind his group.

Trainee Report Form (J-37):

I HEREBY REPORT that this recruit finished the run today approximately 3 minutes after my group. End of report.

December 9, 2015

Physical Training Non-Participation (J-40):

Time separated from group: 4:10 minutes
Time walking or not at a running pace: n/a
Time lapped by group: 19:49 minutes
Time observed/report injury: n/a
Instructor Comments: Recruit failed to keep up with his running group, recruit stopped running at 4:10 minutes and 4:20 minutes. Recruit ran at his own pace and was lapped by his group at 19:49 minutes, and finished the run 3 minutes and 13 seconds behind the group. Recruit will not get credit for todays [sic] P.T. because recruit failed to keep up with the group.

Trainee Report Form (J-39):

I HEREBY REPORT that this recruit fell behind his group during today's run and finished the run 3 minutes after his group at 23 minutes. End of report.

December 10, 2015

Physical Training Non-Participation (J-42):

Time separated from group: 7 min. 40 sec.

Time walking or not at a running pace: Recruit Reece was observed separated from his running group in 7 min. 40 sec.
Time lapped by group: Recruit Reece was lapped by his running group in 18 min. 40 sec.
Time observed/report injury: N/A
Instructor Comments: Recruit Reece was observed to be separated from his running group in 7 minutes 40 seconds. At 16 minute 40 seconds he was at a slow shuffle running at his own pace[.] Reece was lapped by his running group at 18 minutes 40 seconds and completed the 20 minute run in 23 [minutes] 30 seconds. *No credit for PT/non-participation.

Trainee Report Form (J-41):

I HEREBY REPORT that this recruit fell out of group one's run and did not catch up. End of report.

December 11, 2015

Physical Training Non-Participation (J-44):

Time separated from group: 2:00 minutes into run
Time walking or not at a running pace: Observed moving at a slow shuffle at 7:50 and walking at 8:00 into the run
Time lapped by group: Passed by the group at 18:33
Time observed/report injury: N/A
Instructor Comments: Recruit Reece will not receive PT credit for today. Recruit separated from his exercise group and moved at this own pace for the remainder of the run. He was seen moving at a slow shuffle and walking at least once. His exercise group also passed him during the run.

Trainee Report Form (J-43):

I HEREBY REPORT that this recruit fell out of his groups run today and caught up twice but did not finish with the group at the end of the run. End of report.[10]

December 23, 2015

Physical Training Non-Participation (J-46):

Time separated from group: 12:30 seconds
Time walking or not at a running pace: Trainee separated from his group @ 12:30. Run form was corrected and he rejoined his group. Later observed walking for a few steps next to an Inst. Ricciardiello in lower lot as class was circling around to go around the Fire Academy perimeter.

[10] Instructor wrote below Reece's report: "No PT credit/Non-Participation."

Time lapped by group: N/A
Time observed/report injury: N/A
Instructor Comments: Class ran as Company from Police Academy to Fire Academy via Kattak Pkwy. Once at the Fire Acad. Class ran with instructors around perimeter and front parking lot for 22 minutes. Trainee Reece separated from group @ 12:30 sec. and was approx. 10–15 yards behind. He was able to increase pace and rejoin group for short period of time. At 19:20 he was observed separated from the group by 50 yards and walking for a few steps by Inst. Ricciardiello in the lower parking lot by the row of trees. Trainee started to run again after seeing this Instructor coming his way. Trainee remained in the rear of the formation and was unable to catch up to group. Inst. Lostan, leading run, circled class around light poles in front and trainee was able to rejoin the group. Repeated attempts were made by this instructor and Inst. Alemy for Reece to not fall behind and he cannot remain with the group unless they circle around and "pick him up." *no credit for PT/ walking during run/ non-participation. 27th PT day for this class. .

Trainee Report Form (J-45):

I HEREBY REPORT that this recruit was at the back of the group run today, and took a few steps towards the back of the Fire Academy. End of report.[11]

January 15, 2016

Physical Training Non-Participation (J-49):

Time separated from group: 5:00 minutes
Time walking or not at a running pace: slow shuffle @ 5:00–5:40 minutes by himself at slow shuffle pace.
Time lapped by group: 20 minutes
Time observed/report injury: N/A
Instructor Comments: Trainee Reece separated from class in 5:00 minutes. Class was performing a Company run on the PCT running track (35th PT day since class started). At 6:25 seconds Trainee was 30 yards behind company and going slower. At 12:40 Trainee still at a slow shuffle himself approx. 100 yards behind the rest of the class and not at run pace. This writer, in work boots, ran past Reece and attempted to train him by increasing his pace/stride and participate in the company run. Trainee later lapped by the group @ 20 minutes. Company run completed in 29 minutes (3.2 miles). Trainee was behind the rest of the class by over 1 lap. Class had hydrated and formed up for calisthenics on field and Trainee Reece was on the other side of the track trying to make up a lap; still at slow pace by himself. Reece finished @ 32 minutes and he was 3 minutes behind the rest of the class as they had already started performing pushups. Reece finally ran with an instructor at the end of the run, but the rest of the class was already exercising and he coasted during the run up to this point and slow

[11] Instructor wrote below Reece's report: "(Details/Why fell out?) Separated @ 12:30/Walking for few steps @ 19:20 seconds. Class ran 22 minutes. *No credit for PT/Non-Participation."

shuffled at his own pace by himself and he refuses to train with his class. *no credit for PT/non-participation.

Trainee Report Form (J-48):

I HEREBY REPORT that this recruit today got lapped during the group run but did not stop running at any time and finished the run also making up the lap that was owed by this recruit. End of report.[12]

Testimony

Captain Dennis Schlosser

Schlosser recommended Reece's dismissal from the PCPA based upon Reece's failure to fully participate in 80 percent of the total PT sessions. Trainees are given notice of the trainee requirements with the enrollment packet, before they get to the PCPA. The rules and regulations and the general program are covered on the first day of orientation at the PCPA. The class generally reads the PCPA Rules and Regulations word for word and then the trainees are required to sign the Confirmation of Rules and Regulations.

Schlosser described the physical-conditioning exercises' timing and procedure. Trainees must continuously run for twenty minutes, usually three days per week. The total time of an exercise session may not exceed seventy minutes. The minimum run is twenty minutes, but sometimes they run twenty-two to twenty-three minutes. Instructors train with the classes and therefore actively run with the groups. Schlosser actively runs with group 1 because he is generally unable to keep pace with the faster groups. The pace is decided in advance by the instructor depending upon which instructors are present. Instructors utilize a stopwatch. Trainees are not permitted to utilize fitness devices. At the end of a run, the instructor will announce the length of the run and time that the group completed the run. The pace is typically around 2:30 (two minutes, thirty seconds) for one lap around the track. The PCPA has two GoPro video cameras to video the runs.

[12] Instructor wrote below Reece's report: "No credit for PT/Non-Participation."

Examples of non-participation are walking, stopping, or not finishing a run. The run must be a continuous twenty-minute run. One instructor generally leads the run, and, depending upon how many instructors are present, an instructor will run in the middle and/or the back. The instructor's job is to keep the group together. If a trainee separates to walk or stop, the trainee will not get credit for PT that day. The group generally completed the runs in twenty minutes, but at times Reece took longer than twenty minutes. There were various reasons that Reece did not complete the runs in twenty minutes, including stopping and walking.

A general PT report is prepared daily by an instructor. The trainees are required to complete a Trainee Report if they fall out of a run, are injured, or otherwise do not participate. Instructors want details on Trainee Reports to determine the problem and help the trainee improve. Trainees are expected to improve in PT. After seven Non-Participations, they sit the trainee down and tell the trainee to get with the program. Non-Participations are written by the PT instructors at the end of PT for trainees who receive a Non-Participation.

The PTC Rules are adhered to at all times. The PTC did not define a run step-wise. If the instructors set a pace, then the trainees must keep up with that pace. It is not possible to train an individual who is behind the group on the other side of the track or by himself or herself. That is not participating. Trainees are verbally notified of their assessment numbers/scores, and know their scores. The information is not provided to the trainees in writing. The PCPA has been implementing the program this way for at least the eight years that Schlosser has been an instructor there. The PTC makes unannounced visits and verifies compliance, and the PCPA has not had any complaints from the PTC.

Captain Mohamed Lostan

The PTC requires full participation. If a trainee is not with the group, the trainee is not participating. Reece was running by himself. If Reece were not running at the pace set by the instructor or separated from the group it would result in a Non-Participation. There is a difference between a shuffle and a jog. A slow shuffle by

definition is not running. Based upon his twenty-eight years of experience as an instructor, Lostan knows the difference between a jog and a shuffle. A shuffle is a leisurely pace.

Lostan sometimes ran with group 1. One instructor cannot keep track of every trainee during the runs. Before and after PT the trainees are asked if they are sick or injured, and they are instructed that if they are sick or injured to report it to an instructor. Videos are taken daily, in order to keep records on times, but they are not all saved due to server space. The PCPA is not required to video the runs, but does so to keep track of times. The videos are reviewed by the instructors after the runs. One GoPro is at the front, primarily used for audio.

The PTC recommends a 10 percent increase in running distance per week. The pace is also increased in order for trainees to progress. There is no limit or maximum on run time, but the total exercise session cannot exceed seventy minutes. The PCPA is allowed to schedule a thirty-minute run. The PTC Aerobic Activities Prescription Guidelines are sample guidelines. No electronic equipment is allowed at the PCPA. The trainees start off going to PT five days per week. PT is later reduced to three days per week to allow for defensive tactics, after the trainees are more physically fit.

Reece was dismissed before the end of the class because he already had more than fifteen Non-Participations and it was not possible for him to meet the 80 percent requirement.

Christopher Reece

To prepare for the PCPA, Reece began running 1.5 miles a day the day after he received the paperwork packet from the PCPA. Reece utilized several fitness technology "apps" to record his runs, including Map My Run, Nike+ Run Club, and Fitbit. According to his fitness-apps data, in October Reece was running 1.5 miles three days per week in approximately 14:20, thereby averaging a mile in under ten minutes.

For the first physical condition assessment run, trainees were broken into three groups. He was in a mixed group, with some trainees who were slow and some who were fast, because the PCPA did not yet know the trainees' abilities. Reece tried to keep up with the fast runners for laps one, two, and three, at a faster pace than his normal pace, so by the end of lap three he was winded.

Captain Schlosser and Captain Lostan told the trainees that if a trainee reaches out his hand and cannot touch the back of the trainee running in front of him, provided that the trainee running in front is still in/with the group, then the trainee is deemed to have fallen out. Reece estimated that he did not participate in approximately four PT runs. If a trainee falls out of a run, the instructors require the trainee to complete a Trainee Report. The trainees submit the Trainee Reports to the squad leader and the reports are handed up the chain of command. He never saw the Trainee Reports again, unless he was later advised that additional information was required. An example of such additional information would be if an instructor wanted the trainee to include that the instructor had observed the trainee being lapped by the group. Reece tore up and rewrote numerous Trainee Reports.

Reece denied that he stopped running on November 18, 2015. Reece denied that he stopped running on November 20, 2015, and testified that he was "absolutely not" walking and was not slow shuffling; rather, he was jogging. He denied that he stopped running on November 23, 2015, but he could not reach out and touch the trainee in front of him. He stopped running to throw up on November 24, 2015, but then resumed running. He caught up with the group, but then fell back again. He stopped running to throw up on November 25, 2015. On November 30, 2015, he did not participate. On December 2, 2015, he stopped running and fell back from the group and then resumed running, but he was not with the group. On December 3, 2015, he stopped running one or two times to stretch on the fence because of cramping and then resumed running. He ran continuously on December 4, 2015, and December 7, 2015, but could not touch the trainee in front of him. He did not stop running on December 8, 2015, or December 9, 2015. He was told what to write on the December 8, 2015, and December 9, 2015, reports because he was not permitted to use a technology device and would not otherwise have known what time he finished or how far behind the group

he was. The reports are completed in the lecture hall, and on any given day there were fifteen to twenty trainees completing reports. Reece did not stop running on December 10, 2015, or December 11, 2015. He denied walking, because there would have been no way for him to have caught up if he had been walking. Reece did not stop running on January 15, 2016. Reece denied that he would have been three minutes behind the group, because most of the time he fell out, he was only five to fifty yards behind, and three minutes behind is a large amount of time.

Outside of the PCPA, Reece tried to address the running problem by signing up for fourteen sessions with a private trainer, on Thursday evenings and Saturday mornings, beginning on November 28, 2015. He did not run very often outside of the PCPA. The PCPA had instructed the trainees to run on Saturdays, but to rest on Sunday. One or two days per week he ran outside the PCPA at Garret Mountain, so he was consistently running six days per week. The PCPA run was flat, but Garret Mountain was up and down. While at the PCPA, Reece asked Captain Lostan for help improving his running performance. Captain Lostan told Reece that if he could run a ten-minute mile there would be no reason why he would fall out and not stay with the group. Reece told Captain Lostan that he can run a ten-minute mile outside of the PCPA, but at the PCPA with the group the pace seemed faster.

Before the PCPA, Reece did not run, ate what he wanted, and only did light gym work. After the PCPA, his lifestyle dramatically changed. He ate sardines and protein shakes at the PCPA, and he now weighs 225 pounds. He presently runs two miles per day, five days per week, at Tryon Park. He has been running approximately a 9:20 mile.

Reece was not provided with a copy of the Trainee Counseling Form/Written Notification for his records. He thinks at the end of the run the instructor shouted out the times to the individual trainees. Reece did not receive copies of the Physical Training/D.T.s or the January 15, 2016, Instructors Report memo. Reece was never provided with a copy of his Individual Physical Fitness Assessment Profile.

Captain Schlosser called him out of the study hall for the February 2, 2016, meeting. There were three officers there from the Passaic PD, and Reece was advised

that he had failed. He was shocked and did not understand how he had failed when others behind him had not. He was never absent, was never cited for any rule violation, never received any demerits, and had approximately an 80 average when he was dismissed.

Additional Findings of Fact

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

The Non-Participations and corresponding Trainee Reports establish that Reece repeatedly fell behind in the group runs. Twelve of the seventeen Non-Participations have entries for "Time walking or not at a running pace," and the instructor specifically indicated that Reece was at some point during the run observed to be either walking or slow-shuffling: November 19, 2015 ("walking"); November 20, 2015 ("walking pace" and "slow shuffled"); November 23, 2015 ("walking pace" and "slow shuffle"); November 24, 2015 ("slow shuffle/walking" and "moving at his own pace/walk"); November 30, 2015 ("walking," "slow shuffle, then run, then walk, back to slow shuffle," and "[o]bserved walking at least two times"); December 3, 2015 ("slow shuffle" and "walking"); December 7, 2015 ("slow shuffle" and "walking"); December 8, 2015 ("slow shuffle"); December 10, 2015 ("slow shuffle"); December 11, 2015 ("slow shuffle" and "walking"); December 23, 2015 ("walking"); and January 15, 2015 ("slow shuffle" and "not at run pace"). Although Reece denied that he stopped running on November 20, 2015, the Non-Participation reflects that Schlosser established a walking pace next to him at 7:00

minutes. Additionally, although the December 9, 2015, Non-Participation reflects "n/a" at "Time walking or not at a running pace," the comments reflect that Reece "stopped running" twice, and that he was lapped by his group and finished more than three minutes behind. Accordingly, there were thirteen days on which Reece was not continuously running.

Reece was advised on November 30, 2015, that he had received seven Non-Participations, but thereafter he received additional Non-Participations for the same physical training. Given that Reece signed up for fourteen sessions with a private trainer to address his running problem beginning on November 28, 2015, Reece was already aware that his running was an issue. Additionally, Reece testified that he had a conversation with Captain Lostan about improving his running, and told Captain Lostan that he could run outside the PCPA, but at the PCPA the pace seemed faster.

Reece's testimony that his technology "apps" indicated that he was running approximately a 9:20 mile was credible, but even assuming that the apps were accurate in recording and reporting Reece's run times, this does not establish that Reece was running at that pace during PT, nor does it establish that Reece never stopped running or that he never slow-shuffled. There are any number of reasons that the PT runs may have resulted in stopping, walking or slow-shuffling or in physical effects, including, but not limited to, differences in routes, warm-ups, hydration, or other training.

It is noted that four other Non-Participations reflect "N/A" for "Time walking or not at a running pace," and the instructor comments reflect only that Reece was not with the group and was moving at his own pace: November 18, 2015 ("separating and running at his own pace"); November 25, 2015 ("separating from the group and moving at his own pace" and "lapped by the group once"); December 2, 2015 ("separated from his exercise group and moved at his own pace"); and December 4, 2015 ("separated from his exercise group and moved at his own pace" and "finished 2:50 minutes behind his group"). While these four Non-Participations may not specifically state that he stopped running, they do reflect that Reece was not with his group.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

Reece signed up for fourteen sessions with a private trainer twice per week, beginning on November 28, 2015. In seventeen of thirty-five group PT runs, Reece failed to maintain pace with his group and fell out from his group. On at least seven of those seventeen group runs, Reece was far enough behind that he was lapped by his group. On thirteen of the thirty-five group runs, Reece did not maintain a continuous run because he stopped, walked, and/or slow shuffled. Stopping, walking, and slow-shuffling are not running and will result in a Non-Participation. If a trainee is not within arm's length of the group, the trainee is not participating.

LEGAL ANALYSIS AND CONCLUSIONS

Dismissal by PCPA

N.J.S.A. 52:17B-66 states:

> The Legislature of New Jersey hereby finds and declares that a serious need for improvement in the administration of local and county law enforcement exists in order to better protect the health, safety and welfare of its citizens; that police work, a basic adjunct of law enforcement administration, is professional in nature, and requires proper educational and clinical training in a State whose population is increasing in relation to its physical area, and in a society where greater reliance on better law enforcement through higher standards of efficiency is of paramount need; that the present need for improvement can be substantially met by the creation of a compulsory educational and training program for persons who seek to become permanent law enforcement officers wherein such persons will be required, while serving in a probationary capacity prior to permanent appointment, to receive efficient training in this profession provided at facilities selected, approved and inspected by a commission created for such purpose; and that by qualifying and becoming proficient in the field of law enforcement such persons shall individually and

> collectively better insure the health, safety and welfare of the citizens of this State in their respective communities.

N.J.S.A. 52:17B-70 established the PTC in the Division of Criminal Justice in the Department of Law and Public Safety. The PTC is vested with multiple powers, responsibilities and duties, including: (a) to prescribe standards for the approval and continuation of approval of schools at which police training courses are conducted, including but not limited to presently existing regional, county, municipal and police chief association police training schools; (b) to approve and issue certificates of approval to such schools, to inspect such schools from time to time, and to revoke any approval or certificate issued to such schools; (c) to prescribe the curriculum, the minimum courses of study, attendance requirements, equipment and facilities, and standards of operation for such schools; (d) to prescribe minimum qualifications for instructors at such schools and to certify, as qualified, instructors for approved police training schools and to issue appropriate certificates to such instructors; and (e) to certify police officers, corrections officers, juvenile corrections officers and juvenile detention officers who have satisfactorily completed training programs and to issue appropriate certificates upon completion. N.J.S.A. 52:17B-71.

Generally, all instructors participating in a course authorized by the PTC must be certified before they are permitted to teach. N.J.A.C. 13:1-4.1. The Passaic County Police Academy and its instructors are certified by the PTC in accordance with N.J.A.C. 13:1-3.1 to -3.7 and N.J.A.C. 13:1-4.1 to -4.6. A curriculum issued by the PTC is the required curriculum at a PTC-approved school and constitutes the minimum requirements for trainee certification. N.J.A.C. 13:1-6.1. The PTC curricula are incorporated into the act by reference. Ibid. An approved school must conduct basic courses and other courses required by the PTC. Ibid. A school's certification may be suspended or revoked by the PTC for failure to comply with PTC requirements. N.J.A.C. 13:1-3.7(a)(1).

A trainee is eligible for certification when the school director affirms that: (1) the trainee has achieved the minimum requirements set forth in the basic course and has demonstrated an acceptable degree of proficiency in that course's performance objectives; (2) the trainee has participated in no less than 90 percent of the total instructional time assigned to those performance objectives designated by the PTC; and (3) the trainee has

successfully completed the training required by the PTC to be conducted by the employing law enforcement agency. N.J.A.C. 13:1-5.1(a).

Per Chapter 6 of the PCPA's Rules and Regulations, "[a]ll Trainees are to participate fully in physical training sessions," and the PTC "has set minimum standards for participation as per Directive #6-98." Reece confirmed that he understood the Rules and Regulations and agreed to comply with them. Additionally, Reece signed the PCPA's Participation Notice, which required that Reece keep up with his assigned group and advised that if Reece refused to keep up with his assigned group he would not be participating in the program and that such non-participation would result in no credit for the training session.

Further, the PTC's Physical Conditioning Exercise Program in the PTC's Physical Conditioning Training Manual states, in pertinent part, as follows:

> The third component of the program is the physical conditioning exercise program (see Section V, The [] Administration and Implementation of the Physical Conditioning Exercise Program). The exercise program serves two purposes. It will improve one's ability to perform job-related physical tasks and instill the concept of maintaining lifetime fitness. Each exercise session shall emphasize these dual objectives. The following are requirements of the exercise program that must be met:
>
> 1. Each exercise session, including the warm-up and cool-down phase, shall not exceed 70 minutes in length. (An additional 10 minutes, however, will be allowed for more highly fit trainees undergoing exercise. Also, additional time is permitted for trainees who require rest during the performance of speed and agility exercises. These variations are delineated in the exercise prescription [guidelines] for each activity.) The time needed to change clothes and to move to the appropriate training facilities is not to be included in the 70 minutes of exercise time.
>
> . . .
>
> 2. A minimum of 40 physical conditioning sessions shall be scheduled in a five-day program, and 20 physical conditioning sessions shall be scheduled in a three-day

> program. In addition, a trainee must fully participate in eighty-percent of the scheduled physical training sessions, and meet the standard which produces the higher number of sessions based upon the course schedule. Failure to fully participate in eighty-percent of the total physical conditioning sessions shall be grounds for dismissal from the police academy.
>
> . . . .
>
> 7. Full participation shall be defined as participating continuously and without stopping in a twenty-minute run. Recruits shall demonstrate to staff their ability to engage in aerobic training running continuously for this period of time. Full participation in calisthenics and strength exercises shall be approved by the evaluation of physical training staff at each academy, on a recruit-by-recruit basis.

Reece argues that he was still maintaining a "running" pace, albeit slower than his group, and that his own pace was sufficient to satisfy the PTC requirement that "[f]ull participation shall be defined as participating continuously and without stopping in a twenty-minute run." The PTC's definition of full participation is vague, in that it does not also define "participating continuously." However, as set forth in the regulations, the curriculum issued by the PTC constitutes the minimum requirements for trainee certification. Therefore, I accept the PCPA's definition of participation in the Participation Notice and the testimony of the instructors and Reece that the PCPA's requirement is that Reece be no further than an arm's length from the trainee immediately in front of him, and that he be "keeping up with [his] assigned group." There were initially three groups. Reece was assigned to group 1, but was unable to keep up with the entry-level group.

On thirteen of the group runs Reece stopped, walked, and/or slow shuffled. There were four instances in which the Non-Participations do not clearly reflect that Reece had stopped, or that he was walking or slow-shuffling at any point. Reece argues that he was still maintaining a continuous "running" pace in those instances. However, even if Reece had been "running," he nevertheless fell out of those four runs, and failed to meet the PCPA's participation requirement. Thus, Reece failed to participate in seventeen PT exercises.

In sum, I **CONCLUDE** that the PCPA has established that Reece failed to participate in at least 80 percent of the PT exercises as required by the PTC, and I further **CONCLUDE** that the PCPA thereby established good cause for Reece's dismissal.

Removal by City of Passaic Department of Public Safety

Prior to the acceptance of a trainee into a basic course, the chief police officer or chief executive officer of the employing law enforcement agency must certify by completing a trainee record card issued by the PTC that, with respect to police officers, the appointing authority has complied with the provisions of N.J.S.A. 52:17B-68.1 and -69 and N.J.S.A. 18A:6-4.4, including, but not limited to: (i) the individual has received a probationary appointment; and (ii) the individual has been granted a leave of absence with pay during the period of the police training course. N.J.A.C. 13:1-8.1(a).

The position of the City of Passaic Department of Public Safety is that Reece did not complete the BCPO at the PCPA, and by statute a police officer must complete the academy, so upon receipt of notice that Reece was dismissed from the PCPA, he was terminated from his probationary appointment. (PS-1.) Reece was not terminated for any other reason.

N.J.S.A. 52:17B-68(a) states:

> Every municipality and county shall authorize attendance at an approved school by persons holding a probationary appointment as a police officer, and every municipality and county shall require that no person shall hereafter be given or accept a permanent appointment as a police officer unless such person has successfully completed a police training course at an approved school; provided, however, that the commission may, in its discretion, except from the requirements of this section any person who demonstrates to the commission's satisfaction that he has successfully completed a police training course conducted by any Federal, State or other public or private agency, the requirements of which are substantially equivalent to the requirements of this act.

As established by N.J.S.A. 52:17B-68(a), Reece may not be given or accept a permanent appointment as a police officer unless he successfully completed a police training course at an approved school. Reece was dismissed from the BCPO at the PCPA and therefore failed to successfully complete the approved police training course. Accordingly, I **CONCLUDE** that Reece's removal by the City of Passaic Department of Public Safety for failure to complete the police academy was mandated by statute and therefore appropriate.

ORDER

I **ORDER** that Reece's dismissal from the PCPA, effective February 2, 2016, is **AFFIRMED**, and Reece's appeal is **DISMISSED** with prejudice. I further **ORDER** that Reece's removal by the City of Passaic Department of Public Safety, effective February 22, 2016, is **AFFIRMED**, and Reece's appeal is **DISMISSED** with prejudice.

I hereby **FILE** this Initial Decision with the **POLICE TRAINING COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **POLICE TRAINING COMMISSION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **POLICE TRAINING COMMISSION** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **POLICE TRAINING COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/5/18
DATE

KELLY J. KIRK, ALJ

Date Received at
POLICE TRAINING COMMISSION:

Date Mailed to Parties: APR 9 2018

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

mm

APPENDIX

WITNESSES

For Petitioner/Appellant:

Christopher Reece
Mohamed Lostan

For Passaic County Police Academy:

Dennis Schlosser

For City of Passaic Department of Public Safety:

None

EXHIBITS IN EVIDENCE

Joint

J-1 (Not in Evidence)
J-2 (Not in Evidence)
J-3 (Not in Evidence)
J-4 (Not in Evidence)
J-5 (Not in Evidence)
J-6 (Not in Evidence)
J-7 (Not in Evidence)
J-8 PCPA Rules & Regulations
J-8A Rules & Regulations Confirmation, dated November 5, 2015
J-9 (Not in Evidence)
J-10 Participation Notice
J-11 Trainee Exercise Report Form
J-12 Individual Physical Fitness Assessment Profile
J-13 Trainee Report Form, dated November 18, 2015

J-14 Physical Training Non-Participation, dated November 18, 2015
J-15 Trainee Report Form, dated November 19, 2015
J-16 Physical Training Non-Participation, dated November 19, 2015
J-17 Trainee Report Form, dated November 20, 2015
J-18 Physical Training Non-Participation, dated November 20, 2015
J-19 Trainee Report Form, dated November 23, 2015
J-20 Physical Training Non-Participation, dated November 23, 2015
J-21 Trainee Report Form, dated November 24, 2015
J-22 Physical Training Non-Participation, dated November 24, 2015
J-23 Trainee Report Form, dated November 25, 2015
J-24 Physical Training Non-Participation, dated November 25, 2015
J-25 Trainee Report Form, dated November 30, 2015
J-26 Physical Training Non-Participation, dated November 30, 2015
J-27 Trainee Counseling Form/Written Notification
J-28 Physical Training/D.T., through November 30, 2015
J-29 Trainee Report Form, dated December 2, 2015
J-30 Physical Training Non-Participation, dated December 2, 2015
J-31 Trainee Report Form, dated December 3, 2015
J-32 Physical Training Non-Participation, dated December 3, 2015
J-33 Trainee Report Form, dated December 4, 2015
J-34 Physical Training Non-Participation, dated December 4, 2015
J-35 Trainee Report Form, dated December 7, 2015
J-36 Physical Training Non-Participation, dated December 7, 2015
J-37 Trainee Report Form, dated December 8, 2015
J-38 Physical Training Non-Participation, dated December 8, 2015
J-39 Trainee Report Form, dated December 9, 2015
J-40 Physical Training Non-Participation, dated December 9, 2015
J-41 Trainee Report Form, dated December 10, 2015
J-42 Physical Training Non-Participation, dated December 10, 2015
J-43 Trainee Report Form, dated December 11, 2015
J-44 Physical Training Non-Participation, dated December 11, 2015
J-45 Trainee Report Form, dated December 23, 2015
J-46 Physical Training Non-Participation, dated December 23, 2015

J-47 Physical Training/D.T., through December 23, 2015
J-48 Trainee Report Form, dated January 15, 2016
J-49 Physical Training Non-Participation, dated January 15, 2016
J-50 Instructor's Report, dated January 15, 2016
J-51 Dismissal, dated February 2, 2016
J-52 (Not in evidence)
J-53 PTC Physical Conditioning Training Manual
J-54 PTC Directive 6-98

For Petitioner/Appellant:

A-1 Physical Training Video
A-2 Physical Training Video
A-3 Physical Training Video
A-4 Physical Training Video
A-5 (Not in Evidence)
A-6 (Not in Evidence)

For Passaic County Police Academy:

None

For City of Passaic Department of Public Safety:

PS-1 Stipulation of Facts

STATE OF NEW JERSEY

In the Matter of Frank Roman
Jersey City School District

CSC DKT. NO. 2018-1946
OAL DKT. NO. CSV 01361-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01361-18

AGENCY DKT. NO. 2018-1946

IN THE MATTER OF FRANK ROMAN,
JERSEY CITY SCHOOL DISTRICT.

Philip Feintuch, Esq., for appellant, Frank Roman (Feintuch, Porwich & Feintuch, Attorneys)

Theresa Moore, Esq. for respondent Jersey City School District (Riker, Danzig, Scherer, Hyland & Perretti, LLP)

Record Closed: June 6, 2018 Decided: June 8, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 4, 2018, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a hearing on April 27, 2018 and during that time, the parties engaged in settlement discussions and agreed to settle the matter. A signed copy of the Settlement Agreement and General Release is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 8, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Date Mailed to Parties:
sej

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800
Attorneys for Respondent
Jersey City Public Schools

2018 JUN -6 P 3:37

FRANK ROMAN, Appellant, vs. JERSEY CITY PUBLIC SCHOOLS, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No. CSV 01361-18 Agency Ref. No. 2018-1946 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is made by and between the JERSEY CITY PUBLIC SCHOOLS, with an address at 346 Claremont Ave., Jersey City, New Jersey 07305 ("School District"), and FRANK ROMAN ("Roman") (collectively, the "Parties").

WHEREAS School District is an employer subject to the New Jersey Civil Service Act, N.J.S.A. 11A:1 *et seq.*;

WHEREAS Roman was employed by the School District as a custodial worker;

WHEREAS in 2017 the School District brought charges of chronic and excessive absenteeism and other just cause against Roman, resulting in Roman's removal from his position and this subsequent appeal to the Civil Service Commission (the "Appeal"); and

WHEREAS the Parties wish to resolve this matter in accordance with the terms set forth herein;

NOW, THEREFORE, subject to approval by the Civil Service Commission ("Commission"), the Parties hereby agree as follows:

1. The School District agrees to pay Roman, at his rate of compensation in effect in December 2017, for twelve and one-half (12.5) unused personal illness days, forty-five and 48/100 (45.48) unused vacation days and thirty (30) terminal leave days.

2. Roman agrees to resign his position as custodial worker with the School District effective December 22, 2017.

3. The School District agrees to take all steps necessary to convert Roman's termination to a resignation in good standing, and to inform the Civil Service Commission of the conversion.

4. Roman agrees to withdraw the Appeal with prejudice, and any and all claims or suits that he may have previously filed against the School District that are still pending in any and all courts and/or before any and all agencies, including the Civil Service Commission. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Roman. Should Roman fail to withdraw any pending claims or suits, this Settlement Agreement will serve as Roman's formal written notice of withdrawal of those pending claims or suits.

5. This Settlement shall not constitute a precedent in any matters involving other employees.

6. Roman waives all claims of any nature against the School District with regard to his employment with and/or his separation from the School District, including fees, or other monetary relief.

7. By entering into this Settlement Agreement, and in exchange for good consideration as set forth above, the sufficiency of which is hereby acknowledged by the

parties, Roman releases and discharges the School District and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the School District regarding his employment with the School District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Roman's employment with the School District. It specifically includes, without limitation, all claims which Roman may have regarding discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensation laws,

disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment by the School District, with the exception of workers compensation proceeding 2018-2095 and the right, if any, to reopen C.P. Nos. 2012-9358, 2015-1026 and 2015-3767 workers compensation proceedings. Roman agrees to save, hold harmless and indemnify the School District for any legal costs and attorneys' fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

8. Notwithstanding Paragraph 7 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the School District based upon any of the above-released claims in Paragraph 7, Roman agrees not to seek or accept any resulting relief whatsoever.

9. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Roman of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Roman acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current

claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Roman understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

10. The Parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

11. This Settlement Agreement constitutes the full agreement between the Parties, and shall be construed and enforced in accordance with New Jersey law.

12. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

13. This Settlement Agreement shall be and is subject to final approval by the Commission. The effective date of this Agreement ("Effective Date") shall be the date of the School District's receipt of this Settlement Agreement, approved by the Commission, or the eighth day after the School District's receipt of this Settlement Agreement executed by Roman, whichever is later, provided that Roman has not exercised any right to rescind this Settlement Agreement. In the event of disapproval by the Commission or any failure to act on such approval, this Settlement Agreement shall be void and of no effect, and both Parties shall have the right to pursue any and all matters relating to the other, including but not limited to the Appeal.

14. The School District agrees to pay Roman the sum referenced in paragraph 1 above within sixty (60) days of approval of the Settlement Agreement by the Commission.

Dated: 5/25/2018

FRANK ROMAN

Dated: 6/4/18

DR. MARCIA LYLES
State District Superintendent
Jersey City Public Schools

CERTIFICATION

I, FRANK ROMAN, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my legal representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my legal representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 5/25/18

FRANK ROMAN

7-18-18

A-1

STATE OF NEW JERSEY

In the Matter of Michelle Rouse
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2018-2789
OAL DKT. NO. CSV 05575-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05575-18

AGENCY DKT. NO. 2018-2789

IN THE MATTER OF MICHELLE ROUSE,
HUNTERDON DEVELOPMENTAL CENTER,
DEPARTMENT OF HUMAN SERVICES.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: June 14, 2018 Decided: June 15, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Michelle Rouse from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on April 23, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 15, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 6-18-18

Date Mailed to Parties: 6-19-18

caa

OAL DKT. NO. CSV 5775-2018

AGENCY DKT. NO. 20 – 2018-2789

SETTLEMENT AGREEMENT

IN THE MATTER OF

Michelle Rouse

AND

Hunterdon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. ~~The **Final Notice of Disciplinary Action dated**~~ Appeal of Working Test Period Unsatisfactory Ratify dated 3/19/2018. ~~contained the following charges and proposed discipline:~~

	Charge	Discipline	Dates Effective
1.			
2.	Working Test Period Failure. Separated from		
3.	Employment on 3/27/18.		
4.			
5.			

B. The Appellant Michelle Rouse withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	See page 4.		
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following: See Page 4

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following See Page 4

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Michelle Rouse 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall be returned to work in the title, Senior Food Service Handler, and placed into a working TEST PERIOD.

J. The Preliminary Notice of Disciplinary Action dated 3/19/18 seeking Appellant's removal for A.1.4, NJAC 4A:2-2.3(a)4, 6, 12 which is pending at Hunterdon Developmental Center is resolved by Appellant accepting 30 days suspension on the charges. 30 days shall be recorded from 3/27/18 followed by 5 days SUSTAINED for a prior suspension for charges under A.D. 4:08, A.1.3. Any other days from the time of last suspension day until reinstatement are recorded as leave without pay.

K. Appellant acknowledges she is expected to report to work as scheduled. Any call offs from work that are absolutely necessary must be made at least one hour prior to the start of the shift.

L. Any further infractions under A.D., A.I. will result in DTHS seeking Appellant's removal.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

06/14/18 MR
~~06/19/18~~
DATE

Michelle Rouse
Appellant

6/14/18
DATE

Respondent

6-14-18 RCL
~~6-19-18~~
DATE

Robert C Little
ON BEHALF OF APPELLANT

6/14/18
DATE

ON BEHALF OF

OAL DKT. NO. CSV 5775-2018

CERTIFICATION

I, MICHELLE ROUSE, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

06/24/13
DATE

Michelle Rouse
NAME

STATE OF NEW JERSEY

In the Matter of Kathleen Sermon
Bergen Vicinage
Judiciary

CSC DKT. NO. 2018-2498
OAL DKT. NO. CSV 03395-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03395-18

AGENCY DKT. NO. 2018-2498

IN THE MATTER OF
KATHLEEN SERMON,
SUPERIOR COURT OF NEW JERSEY,
BERGEN VICINAGE.

John Seiler, CWA, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Thomas Russo, Esq. for respondent

Record Closed: June 6, 2018 Decided: June 6, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Kathleen Sermon from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 6, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 6, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 6.7.18

Date Mailed to Parties: 6.7.18

cmo

RECEIVED
2018 JUN -6 P 12:07
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as "the Agreement") is made and entered into by and between Kathleen Sermon (hereinafter referred to as "the Employee"); the Communications Workers of America, Local 1036 (hereinafter referred to as "the Union"); and the State of New Jersey Judiciary, Bergen Vicinage (hereinafter referred to as "the Vicinage").

WITNESSETH:

WHEREAS, the Employee is employed by the Vicinage as a Judiciary Clerk 3 in the Vicinage's Probation Division; and

WHEREAS, the Employee is a member of a collective negotiations unit represented by the Union; and

WHEREAS, the Vicinage served a Final Notice of Disciplinary Action ("FNDA"), dated February 16, 2018, upon the Employee, which imposed a forty-five (45) day suspension for chronic or excessive absenteeism and/or lateness; and neglect of duty; and

WHEREAS, the Employee has begun to serve the 45-day suspension; and

WHEREAS, the Employee has appealed the suspension to the Civil Service Commission of the State of New Jersey (hereinafter referred to as "the CSC"), which has transmitted the appeal to the Office of Administrative Law (hereinafter referred to as "the OAL") for hearing as a contested case; and

WHEREAS, the OAL has scheduled a settlement conference in this matter for May 15, 2018; and

WHEREAS, the Employee, Union and Vicinage desire to fully and finally settle all matters in dispute between them regarding the matters encompassed by the FNDA, a copy of which is appended hereto as Exhibit A, and incorporated herein by reference; and

WHEREAS, in consideration for the settlement of all claims that have been, or could have been, raised by the Employee and/or the Union in connection with the matters encompassed by the FNDA, and for other good and valuable consideration, including the mutual promises and terms and conditions contained in this Agreement;

IT IS AGREED AS FOLLOWS:

1. The Employee accepts the charges set forth in the FNDA. The Employee agrees to accept a forty (40) day suspension for the charges, which shall consist of a 35 day suspension (unpaid) and 5 days served "on the record." The Vicinage shall issue an Amended FNDA specifying the aforementioned 40-day suspension. The Employee understands that her disciplinary record will reflect the full 40-day suspension, which may be used in the future by the Vicinage for purposes of progressive discipline.

2. The Employee agrees to, and does hereby, withdraw, with prejudice, the pending appeal filed with the CSC/OAL, wherein she challenges the 45-day suspension, which is captioned Kathleen Sermon vs. Superior Court of New Jersey, Bergen Vicinage, Agency Ref. No. 2018-2498; OAL Dkt. No. CSV 03395-2018S.

3. The Employee and Union agree not to appeal this matter in any other forum, including, but not limited to, a court of law, grievance proceeding, arbitration, the CSC and/or the Public Employment Relations Commission.

4. In consideration of the promises made herein by the Vicinage, the Employee agrees to release and forever discharge all potential and existing claims arising out of this

matter, including, but not limited to, any alleged violation of the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, Section 1981 et seq. of Title 1974, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Occupational Safety and Health Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, Family and Medical Leave Act, the New Jersey Family Leave Act, each of the foregoing as amended, and any and all other federal, State or local wage and hour laws, civil or human rights laws, or any other alleged violation of any local, State or federal law, regulation, ordinance, and/or public policy, collective negotiations agreement, contract or tort or other common law claim and/or any claim for attorney's fees having any bearing whatsoever on these matters which the Employee now has, or may have, as of the date of this Agreement. The Employee acknowledges and agrees that this release extends to anyone who succeeds to her rights and responsibilities, including, but not limited to, her heirs and assignees, and that this release is given for the benefit of the State of New Jersey Judiciary, the Vicinage and said entities' employees, agents and representatives.

5. In consideration of the promises made herein by the Vicinage, the Union agrees to release and forever discharge all potential and existing claims arising out of this matter, including, but not limited to, any alleged violation of the New Jersey Employer/Employee Relations Act, or any other alleged violation of any local, State or federal law, regulation, ordinance and/or public policy, collective negotiations agreement, contract or tort or other common law claim and/or any claim for attorney's fees having any bearing on these matters, which the Union now has, or may have, as of the date of this Agreement.

6. This settlement shall not be considered binding or as precedent in any other matter, except as set forth herein.

7. The Employee acknowledges that she has carefully read and fully understands all of the provisions of this Agreement. The Employee acknowledges that she was afforded the opportunity to review and discuss this Agreement with an attorney and/or Union representative. To the extent that the Employee utilized the services of an attorney and/or Union representative, she acknowledges her satisfaction with the advice and services provided by said individual(s).

8. The Employee acknowledges that she is voluntarily executing this Agreement.

9. The individual executing this Agreement on behalf of the Union represents that he is authorized to do so, and is doing so voluntarily.

10. The parties acknowledge and agree that each party shall be responsible for their own attorney's fees and costs, if any, incurred in connection with the matters encompassed by the discipline charges set forth in the FNDA and/or this Agreement.

11. This Agreement contains the entire agreement between the parties and fully supersedes any and all prior agreements and/or understanding pertaining to the subject matters addressed in this Agreement. The parties represent and acknowledge that, in executing this Agreement, they have not relied upon any representation or statement not set forth herein with regard to the subject matters addressed in this Agreement.

12. The parties acknowledge and agree that no party is to be regarded as the prevailing party in the aforementioned discipline matter. The parties further acknowledge and agree that nothing contained herein shall be construed, in a court or agency of competent jurisdiction, or in any other legal matter or proceeding, to be an

admission of liability or wrongdoing by any party, except as otherwise specifically provided herein.

13. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed an original, but all of which together shall constitute one and the same instrument. Any signatory hereto may indicate acceptance of this Agreement with a facsimile signature, provided that an original signature is provided to all other parties thereafter.

14. If any term or condition of this Agreement shall be declared invalid or unenforceable to any extent, or in any application, by a court or agency of competent jurisdiction, then such term or condition shall automatically, and without any further action, be reformed so as to retain the fullest extent of any restriction therein permitted by law and the remainder of this Agreement, including such term or condition, except to such extent or in such application, shall not be affected thereby, and each and every term and condition of this Agreement shall be valid and enforced to the fullest extent and in the broadest application permitted by law.

15. The construction, interpretation and performance of this Agreement shall be governed by the laws of the State of New Jersey.

16. The parties understand and agree that this Agreement is subject to, and shall take effect upon, the approval of its terms by the OAL and the CSC. Both parties agree to waive their right to file exceptions and cross-exceptions in the above-referenced appeal.

Kathleen Sermon,
Employee

Dated: May 25, 2018

John Seiler, Representative
CWA, Local 1036

Dated: May 25 2018

Lynda M. Villareal,
Human Resources Division Manager
Bergen Vicinage

Dated: May 29, 2018

Thomas Russo, Esq.,
Attorney for Bergen Vicinage

Dated: ~~May~~ June 1, 2018

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
New Jersey Judiciary - Bergen Vicinage	10 Main St., Room 425, Hackensack, NJ 07601 (201) 527-2254	02/16/2018

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Meryl Nadler, Esq.	AOC - Counsel's Office - Hughes Justice Complex, Trenton NJ 08625 609-815-2900 X52400

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Kathleen Sermon	Judiciary Clerk 3	000370575

Address/ Phone Number	Pension Number
116 William Street, Apt 1, Englewood, NJ 07631	1194218

On 9/13/17 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ You requested a hearing which was held on 11/30/17 ☐ You did not request a hearing

☐ You requested a hearing and did not appear at the designated time and place

Sustained Charges:	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
NJAC 4A:2-2.3(a)(4) Chronic or excessive absenteeism and/or lateness. NJAC 4A:2-2.3(a)(7) Neglect of Duty	Ms. Sermon was last disciplined on 4/4/17 (date of settlement agreement). From 4/4/17 - 9/13/17, Ms. Sermon continues to exhibit a record of excessive absenteeism and lateness. During this period, she called out sick 17 times, and took 5 days off without approval. Nine of these 17 sick callouts occurred on Mondays and Fridays. She has exhausted all sick time for 2017. During this same period, she arrived late to work on 36 occasions.
☐ *If checked, charges are continued on attached page.*	☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for 45 working days, beginning 2/26/18 and ending 6/15/18 (see attached Schedule)

☐ Indefinite suspension pending criminal charges effective (date)_____

☐ Removal, effective (date)_____

☐ Demotion to position of_____ effective (date)_____

☐ Resignation not in good standing, effective (date)_____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing authority or authorized agent's signature and title.

Signature [signature] Title Trial Court Administrator

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☐ Receipt Number _____

☒ Signature of Server [signature] ☐ Date of personal service 2/16/18

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq*, are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

EXH. A

SUPERIOR COURT OF NEW JERSEY

BERGEN VICINAGE
Bergen County Justice Center
Suite 425
Hackensack, New Jersey 07601-7699
(201) 527-2700
Fax (201) 371-1111

Laura Simoldoni
Trial Court Administrator

Lynda Villareal
Human Resources Manager

February 16, 2018

MEMORANDUM

To: Kathleen Sermon, JC3

From: Lynda M. Villareal, HR Manager

Re: Suspension Dates

As you are aware, Hearing Officer Matthew Sapienza, Esq. recommended a 45-day suspension for your recent disciplinary action. His recommendation was accepted by the Vicinage.

The dates of your unpaid suspension have been determined as follow:

Feb. 26th through March 9th
March 26th through April 6th
April 23rd through May 4th
May 21st through June 1st
June 11th through June 15th

You are not to appear for work on these above-listed dates. You will not be paid for these dates. Should any of these dates change due to organizational need, you will be notified in advance.

If you have any questions, please let me know.

c: Nicole Jaccoi-Ryan, VCPO
Lori Tirri, VACPO
Jan Russo, Supervisor 1
John Seiler, CWA Representative
Ryan Coyle, Payroll Coordinator

STATE OF NEW JERSEY

In the Matter of Ronald Wiggs
Ocean County Board of Social Services

CSC DKT. NO. 2018-2775
OAL DKT. NO. CSV 05089-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 18, 2018 BW

The Civil Service Commission, at its meeting of July 18, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05089-18

AGENCY DKT. NO. 2018-2775

IN THE MATTER OF RONALD WIGGS, OCEAN COUNTY BOARD OF SOCIAL SERVICES.

Barbara A. O'Connell, Esq., for appellant, Ronald Wiggs (Sweeney & Sheehan, attorneys)

Linda Murtagh, Director, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2), for respondent, the Ocean County Board of Social Services

Record Closed: June 8, 2018 Decided: June 11, 2018

BEFORE **LISA JAMES BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Ronald Wiggs from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on April 9, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Prior to the June 12, 2018 settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement and General Release, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 11, 2018
DATE

LISA JAMES-BEAVERS, Acting Director
and Chief ALJ:

Date Received at Agency: 6-18-18

Date Mailed to Parties: 6.19.18

/lam

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS AGREEMENT entered into on this 8 day of May, 2018, by and between the OCEAN COUNTY BOARD OF SOCIAL SERVICES (hereinafter BOARD) and Ronald Wiggs (hereinafter EMPLOYEE) who was represented in this matter by Michelle Salecki, Executive Vice President, CWA Local 1088, sets forth the terms and conditions of the Settlement Agreement and General Release (Agreement) between BOARD and EMPLOYEE as the resolution of the Revised Final Notice of Disciplinary Action (FNDA) (Form 31-B), dated March 14, 2018, charging EMPLOYEE with violating N.J.A.C. 4A:2-2.3 (a) 1, 2, 6, 7, 8 and 12, including Incompetency, Inefficiency or Failure to Perform Duties; Insubordination; Conduct Unbecoming a Public Employee; Neglect of Duty; Misuse of Public Property; and Other Sufficient Cause: Violation of Personnel Handbook Section 102.61 Cell Phone Policy, Appendix XXVIII Violence in the Workplace and Poor Judgment.

WHEREAS, BOARD and EMPLOYEE wish to resolve this matter by way of this AGREEMENT in lieu of a hearing or any further proceedings on the merits of the disciplinary charges set forth in the FNDA dated March 14, 2018; and

WHEREAS, BOARD and EMPLOYEE intend to be legally bound and for good and valuable consideration, receipt of which BOARD and EMPLOYEE hereby acknowledge, memorialize herein the following covenants, agreements and restrictions.

NOW, THEREFORE, BOARD and EMPLOYEE agree and memorialize the following:

1. EMPLOYEE acknowledges all charges set forth in the FNDA dated March 14, 2018;

2. Pursuant to the provisions of N.J.A.C. 4A:2-6.3, EMPLOYEE, in conjunction with his UNION representative, and BOARD agree that EMPLOYEE shall be deemed to have received a GENERAL RESIGNATION from employment for

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

purposes of reaching a resolution and settlement of any appeal of the disciplinary action set forth herein, specifically including EMPLOYEE's pending appeal filed with the New Jersey Office of Administrative Law. The GENERAL RESIGNATION shall be deemed effective as of February 16, 2018. BOARD agrees to provide EMPLOYEE's civil service title and dates of employment at the request of EMPLOYEE/future employers.

3. By executing this Agreement, EMPLOYEE specifically releases and gives up any and all claims which he may have against BOARD, its officers, employees, agents, and assigns, arising from or relating to his employment with BOARD, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against BOARD, it's employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party at any time with respect to the events, information or disputes giving rise to this action up to the date of this Agreement including, but not limited to, claims arising under the following;

- The Uniformed Services Employment and re-Employment Rights Act;
- The National Labor Relations Act;
- Title VII of the Civil Rights Act;
- The Civil Rights Act of 1991;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act;
- The Fair Credit Reporting Act;
- The Americans with Disabilities Act;
- The Rehabilitation Act;
- The Age Discrimination in Employment Act;
- Executive Order 11246;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- The Family and Medical Leave Act;
- The Equal Pay Act;
- Worker Adjustment and Retraining Notification Act;
- The New Jersey Law Against Discrimination;
- The New Jersey Civil Rights Act;

- The New Jersey Family Leave Act;
- New Jersey State Wage and Hour Laws;
- The New Jersey Conscientious Employee Protection Act;
- "Weingarten Rights";
- New Jersey Smoking Act
- The New Jersey Equal Pay Act;
- The New Jersey Occupational Safety and Health Laws;
- New Jersey laws regarding: Political Activities of Employees; Lie Detector Tests; Jury Duty; Employee Protection; Consumer Reports; Discrimination; and any other federal, state, or local civil rights law of any local, state of federal law, regulation of ordinance;
- New Jersey Workers' Compensation Act;
- Any public policy, contract (express, written or implied), tort, or common law claim;
- Any claims for vacation, sick, personal leave pay or payment pursuant to any practice, policy, handbook, manual, Collective Negotiations Agreement, or contract with the Ocean County Board of Social Services.
- Any grievance under any Collective Negotiations Agreement;
- Any claims for costs, fees, or other expenses, including attorneys' fees, except as may be recoverable in any pending workers' compensation action; or
- Any claims for salary increases, pay raises, retroactive promotion, seniority and any and all associated benefits.

4. *Age Discrimination in Employment Act of 1967 (ADEA) Release*: If EMPLOYEE meets the criteria for protection under the ADEA, it is further acknowledged by EMPLOYEE that:

a. He has the right to take at least twenty-one days to consider this Agreement before signing it;

b. He has the right to revoke this Agreement within seven (7) days after executing it;

c. This Agreement will not become effective or enforceable until the seven (7) day revocation period set forth in Clause (b) has expired;

d. The release set forth herein includes a release and waiver of any rights or claims which EMPLOYEE may have had under the ADEA arising on or prior to the date of execution of this Agreement, but does not include such rights or claims after the date of this Agreement;

e. In exchange for this Agreement, EMPLOYEE is to receive the consideration requested and agreed to by the BOARD as described in this Agreement, specifically a GENERAL RESIGNATION;

f. The parties to this Agreement have expressly been advised by their representatives that they have the opportunity to consult with an attorney prior to executing this Agreement.

5. EMPLOYEE acknowledges that the disciplinary action set forth herein was not undertaken by BOARD for discriminatory reasons due to race, creed, color, national origin, nationality, ancestry, age, sex, familial status, marital status, domestic partnership or civil union status, affection or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status.

6. EMPLOYEE agrees not to contest the terms of this Agreement in any forum whatsoever, including but not limited to appeals to the United States District Court for the District of New Jersey, any and all Federal appeals courts, the Superior Court of New Jersey, the New Jersey Division of Civil Rights, the United States Equal Employment Opportunities Commission, the New Jersey Office of Administrative Law, the New Jersey Civil Service Commission, the New Jersey Public Employee Relations Commission, and/or any other forum whatsoever (judicial, quasi-judicial and/or administrative).

7. EMPLOYEE agrees not to return to BOARD to seek employment.

8. EMPLOYEE consents to everything in this Agreement.

9. EMPLOYEE acknowledges that he was given ample time and opportunity by BOARD to review, to consider and to consult with his Union representative before executing this Agreement.

10. EMPLOYEE recognizes that the provisions of this Agreement may not be amended, waived, changed or modified except by an instrument in writing signed by EMPLOYEE or his authorized representative, and BOARD.

11. This Agreement constitutes the entire Settlement Agreement and General Release between EMPLOYEE and BOARD with respect to the matters set forth in the FNDA dated March 14, 2018. There are no other agreements and/or releases between the parties, expressed or implied, oral or written with respect to the matters set forth. The terms and conditions of this document are confidential and may only be disclosed in the context of an administrative or legal proceeding between the parties or by Board personnel on a need-to-know basis, to carry out the terms of this Agreement or as otherwise required by law.

12. EMPLOYEE acknowledges that he entered into this agreement freely, knowingly, voluntarily and without coercion, threats, and/or pressure having been placed upon him by BOARD, its representatives and/or employees or by his union representative and that no other promises were made to him other than those expressly set forth herein in reaching his decision to execute this Agreement. EMPLOYEE acknowledges that he has had union representation throughout the course of this matter and that he is satisfied with the representation afforded to him.

13. The parties, as memorialized by their signatures affixed hereto, agree that this Settlement Agreement and General Release shall not be considered precedent setting for any future disputes that may arise between BOARD and any other employees.

14. All parties are solely responsible for any costs or fees incurred by them individually, including but not limited to filing fees and attorney's fees and costs, and there shall be no sharing of these costs.

15. If any part of this Agreement is determined to be unenforceable it shall be severable and all other parts, terms and conditions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, BOARD and EMPLOYEE, as evidenced by their signatures below, executed this Agreement on the date(s) set forth below.

EMPLOYEE: Ronald Wiggs
Ronald Wiggs

BOARD:
LINDA MURTAGH,
Director 6/5/18

Sworn and subscribed to before me this
2 day of ~~May~~ June, 2018

Michelle Salecki

Sworn and subscribed to before me this
5 day of ~~May~~ June, 2018

Attorney at Law

WITNESS:

Date:_____

Date:_____

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

August 3, 2018

Deborah A. Spencer
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Yvonne Soto-Colon
Trenton Psychiatric Hospital
100 Sullivan Way
West Trenton, New Jersey 08628

Re: *Carol Calabrese v. Trenton Psychiatric Hospital, Department of Health* (CSC Docket No. 2018-2957 and OAL Docket No. CSV 6410-18) - **SETTLEMENT**

Dear Ms. Spencer and Ms. Soto-Colon:

The appeal of Carol Calabrese, a Senior Building Maintenance Worker with Trenton Psychiatric Hospital, Department of Health, of her resignation not in good standing effective February 17, 2017, was before Acting Director and Chief Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on July 23, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on July 23, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on September 6, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective September 7, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 06410-18

AGENCY DKT. NO. 2018-2957

IN THE MATTER OF
CAROL CALABRESE
DEPARTMENT OF HEALTH,
TRENTON PSYCHIATRIC HOSPITAL.

Deborah Spencer, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Yvonne Soto-Colon, Employee Relations Coordinator, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: July 19, 2018 Decided: July 23, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Carol Calabrese from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on May 4, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 23, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 7-27-18

Date Mailed to Parties: 7-30-18

cmo

OAL DKT. NO. CSV 06410-2018 S

AGENCY DKT. NO. 2018 [redacted] 2957

SETTLEMENT AGREEMENT

IN THE MATTER OF

Carol Calabrese

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

1. The Appellant withdraws his/her appeal and request for a hearing, and the Respondent agrees to:

Official written Reprimand for Abuse of Sick Leave
No backpay
Return to work July 23, 2018
Approved leave of absence without pay
from 2/17/18 to 7/20/18

2. The Respondent shall amend the Appellant's personnel records to conform to the terms of the settlement.

3. The Appellant waives all claims against the Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

4. Except for the assessment of the Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

5. The Appellant waives all rights, suits, actions, claims, whether known or unknown, vested or contingent, civil, criminal, or administrative, in law or in equity, against the State of New Jersey, the Department of, [or identify appointing authority] its agents, employees, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this agreement, including but not limited to all claims under Title VII of the Civil Rights Acts of 1964 and 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and any contract express or implied.

6. Both parties agree to waive the right to file exceptions and cross-exceptions.

7. This agreement will become effective only if approved by the **MERIT SYSTEM BOARD**. Any disapproval by the Merit System Board shall not interfere with the rights of either party to pursue the matter further.

July 19, 2018
DATE

(Print name) Carol A. Calabrese APPELLANT

July 19, 2018
DATE

ON BEHALF OF APPELLANT

(Print name) Deborah A. Spencer

7/19/18
DATE

ON BEHALF OF RESPONDENT

(Print name) Yvonne Soto. Colón

CERTIFICATION

I, , being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **MERIT SYSTEM BOARD**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

July 19, 2018
DATE (Print name) Carol A. Calabrese APPELLANT

7-23-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

August 3, 2018

Deborah A. Spencer
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Ila Bhatnagar
Department of Banking and Insurance
P.O. Box 325
Trenton, New Jersey 08625

Re: *John P. Farley v. Department of Banking and Insurance* (CSC Docket No. 2018-2899 and OAL Docket No. CSV 5781-18) - **SETTLEMENT**

Dear Ms. Spencer and Ms. Bhatnagar:

The appeal of John P. Farley, an Investigator 2 with the Department of Banking and Insurance, of his removal on charges, was before Acting Director and Chief Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on July 23, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on July 23, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on September 6, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective September 7, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05781-18

AGENCY DKT. NO. 2018-2899

IN THE MATTER OF
JOHN P. FARLEY,
DEPARTMENT OF BANKING
AND INSURANCE.

Deborah Spencer, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Ila Bhatnagar, Manager, Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: July 19, 2018 Decided: July 23, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of John P. Farley from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on April 23, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 23, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 7-26-18

Date Mailed to Parties: 7-26-18

cmo

OAL DKT. NO. CSV 05781-2018S
AGENCY DKT. NO. 2018-2899

SETTLEMENT AGREEMENT

IN THE MATTER OF

John P. Farley

AND

Dept. of Banking and Insurance

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/20/18 & Amended 3/19/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-6.2(b)(c)	RNCS	11/21/17
2. NJAC 4A:2-2.3(a)(2)	Insubordination	"
3. NJAC 4A:2-2.3(a)(3)	Incapility	"
4. NJAC 4A:2-2.3(a)(4)	Chronic/excessive	"
5. NJAC 4A:2-2.3(a)(6)	conduct unbecoming a public employee	" "

NJAC 4A:2-2.3(a)(12) Other Sufficient Cause

B. The Appellant John P. Farley withdraws his/her appeal and request for a hearing, and the Respondent Department of Banking and Insurance agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.	All Charges Rescinded	
2.		

OAL DKT. NO. CSV 05781-2018S

3. All Charges Rescinded
4.
5.

C. The parties have agreed to the following:

For Suspensions, Complete the Following: N/A

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of ~~0~~ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: N/A (NO Back Pay)

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A (NO Suspension).

4. (Strike if not applicable) The Appellant agrees to a
✓ resignation in good standing ~~NO Re-Employment with N.J. Dept. of Banking & Insurance~~
~~general resignation~~
which shall be effective 11/21/17 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

OAL DKT. NO. CSV 05781-2018S

Respondent N.J. Department of Banking & Insurance fully waives Overdrawn Sick and Vacation time balance used (40 hrs) 4.0 hrs $554.62.

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Dept. of Banking & Insurance (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Banking & Insurance will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of John P. Farley 's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Banking & Insurance, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/19/18
DATE 7/19/18

Appellant John P. Fahey

DATE 7/19/18

Respondent Dept. of Banking and Insurance
By: Ila Bhatnagar, manager of Employee Relations

DATE

ON BEHALF OF

July 19, 2018
DATE

ON BEHALF OF Local 195, IFPTE

OAL DKT. NO. CSV 05781-2018S

CERTIFICATION

I, John P. Farley, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

July 9, 2018
DATE

NAME

7-23-18

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

August 3, 2018

Deborah A. Spencer
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Nonee Lee Wagner, DAG
Department of Law and Public Safety
P.O. Box 114
Trenton, New Jersey 08625-0114

Re: *Ismael Rivera v. Motor Vehicle Commission* (CSC Docket No. 2018-2779 and OAL Docket No. CSV 5776-18) - **SETTLEMENT**

Dear Ms. Spencer and DAG Wagner:

The appeal of Ismael Rivera, an Investigator 1 with the Motor Vehicle Commission, of his 10 working day suspension, was before Acting Director and Chief Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on July 23, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on July 23, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on September 6, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective September 7, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05776-18

AGENCY DKT. NO. 2018-2779

IN THE MATTER OF
ISMAEL RIVERA,
MOTOR VEHICLE COMMISSION.

Deborah Spencer, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Nonee Lee Wagner, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 19, 2018 Decided: July 23, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Ismael Rivera from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on April 23, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 23, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 7-27-18

Date Mailed to Parties: 7-30-18

cmo

OAL DKT. NO. CSV 05776-2018S
AGENCY DKT. NO. 2018-2779

SETTLEMENT AGREEMENT

IN THE MATTER OF

Ismael Rivera

AND

Motor Vehicle Commission

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated March 2, 2018 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	Conduct Unbecoming		March 2,
2.	Other Sufficent Cause	10 day	2018
3.	MVC Code of	suspension	
4.	Ethics		
5.			

B. The Appellant Ismael Rivera withdraws his/her appeal and request for a hearing, and the Respondent ~~Department of~~ Motor Vehicle Commission agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	Conduct Unbecoming	sustained	8 days
2.	Other Sufficient Cause: MVC Code of Ethics		4 served/ 4 on the record

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of 10 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 6 days back pay.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: 4 suspension days already served

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Motor Vehicle Commission (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the ~~Department of~~ Motor Vehicle Commission will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ismael Rivera 's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, ~~the New Jersey Department of~~ Motor Vehicle Commission their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/19/18
DATE

Appellant

July 19, 2018
DATE

~~Respondent~~ Appellant's Attorney Local 195 IFPTE

7/19/18
DATE

Mary Scullin
ON BEHALF OF RESPONDENT

7/19/18
DATE

Robert Lee Wagner, DAG
ON BEHALF OF NJMVC

OAL DKT. NO. CSV 09776-2018S

CERTIFICATION

I, Emae Rivera, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/19/18
DATE

NAME

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Hakiem Batemon
City of Newark,
Department of Public Works

CSC DKT. NO. 2018-2368
OAL DKT. NO. CSV 03255-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 03255-18
AGENCY DKT. NO. 2018-2368

IN THE MATTER OF HAKIEM BATEMON, CITY OF NEWARK, DEPARTMENT OF PUBLIC WORKS.

Arnold Shep Cohen, Esq., for appellant Hakiem Batemon (Oxfeld Cohen, attorneys)

Karron A. Rizvi, Assistant Corporation Counsel, for respondent City of Newark (Kenyatta Stewart, Acting Corporation Counsel)

Record Closed: June 28, 2018 Decided: June 28, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

Appellant Hakiem Batemon filed an appeal from a Final Notice of Disciplinary Action dated February 2, 2018, issued by respondent City of Newark, Department of Public Works. The Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed on February 28, 2018, for determination as a contested case. Prior to the commencement of the hearing on June 28, 2018, the parties engaged in discussions toward an amicable resolution of the matter. The

parties reached a settlement and provided the undersigned with the attached settlement indicating the terms of agreement.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 28, 2018
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

STATE

OAL DKT. NO. CSV 03255-2018N
AGENCY DKT. NO. 20-18-2368

SETTLEMENT AGREEMENT

IN THE MATTER OF

Hakiem Bateman

AND

City of Newark, Dept. of Public Works

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 02/02/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	Charges as indicated on FNDA dated 02/02/2018		
2.			
3.			
4.			
5.			

B. The Appellant Hakiem Bateman withdraws his/her appeal and request for a hearing, and the Respondent Department of Public Works, City of Newark agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	Resignation Not in Good Standing	- Dismissed	
2.	Chronic Absenteeism	~~GUILTY~~ BASED ON THE PRIOR CHARGES	
3.	Conduct Unbecoming	~~GUILTY~~ BASED ON THE PRIOR CHARGES	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges. ~~Date of~~ suspension for 6 (six) months any additional time will constitute unpaid leave of absence.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 0 zero.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: unpaid leave of absence.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. City of Newark, Dept. of Public Works (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Public Works will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Hakiem Bateman 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Public Works, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. LAST CHANCE AGREEMENT

1. Hakiem Bateman is to report to:
   IronBand Medical on June 28, 2018 at 12:00p
   221 Chestnut Street, Newark, NJ
   Repat to: Tony Hughes, Drug testing Cardinator

2. if the Drug test taken on June 28, 2018 yields a positive result, Hakiem Bateman agrees he will be immediately terminated and he waives any and all rights of appeal.

3. if the Drug test taken on June 28, 2018 yields a negative result, then the terms and conditions of the Last chance Settlement Agreement executed by Hakiem Bateman on October 30, 201 continues to have full force and effect. Any violation of said terms will constitute grounds for immediate termination.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6/28/18
DATE

Appellant

06/28/18
DATE

Respondent

6/28/18
DATE

ON BEHALF OF Hakeem Bakemon

6/28/18
DATE

ON BEHALF OF Dept. of Public Works

OAL DKT. NO. CSV _____

CERTIFICATION

I, Hakeem Bateman, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily. I am satisfied with my representation by both my attorney and SEIU Local #617 and have had the opportunity to review this settlement with my attorney.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/28/18
DATE

Hakeem Bateman
NAME

CL No. 17-00011

HAKIEM BATEMON, Appellant, -v- CITY OF NEWARK Respondent.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 00162-2017N** **LAST CHANCE SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Last Chance Settlement Agreement and General Release ("Agreement",) is made and entered into between CDL Truck Driver, Hakiem Batemon ("Batemon" or "Appellant"), The LOCAL 617 SEIU ("Union") and the City of Newark ("City" or "Respondent") (Batemon, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against him by the City's Preliminary Notice of Disciplinary Action dated September 19, 2016 (PNDA) and Final Notice of Disciplinary Action dated December 13, 20167 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about September 14, 2016, and September 16, 2016, Laborer 1 (Laborer Sanitation Truck), Hakiem Batemon, sent an unbecoming and unprofessional text messages to the management staff in response to a meeting held earlier that day regarding Batemon's time deletions (*see PNDA dated 9/19/16 and FNDA dated 12/13/16).*

2. From April 26 – September 2, 2016, Batemon has amassed over 50 unanticipated absences from work (*see PNDA dated 9/19/16; and FNDA dated 12/13/15).*

3. As a result of the conduct outlined in paragraphs one (1) through three (3) herein, a PNDA was issued and Batemon was brought up on disciplinary charges for removal at the close of business on 9/16/16 prior to a hearing (*See attached PNDA*).

4. On November 10, 2016, a departmental hearing was held and a finding was made that there was sufficient cause for removal based upon the two (2) text messages Batemon sent to the City employees and his chronic absenteeism from work.

5. Batemon was removed from City employment on October 13, 2016. The FNDA was issued on December 13, 2016(*See attached FNDA*).

6. Batemon appealed the decision on the FNDA to the Office of Administrative Law.

7. **The parties have agreed to resolve all issues herein and referenced as follows:**

   a. The Parties acknowledge and agree that Batemon is given a 'last chance' opportunity to return to employment with Newark as a Laborer 1 (Laborer Sanitation Truck) effective October 30, 2017.

   b. The Parties acknowledge and agree that Batemon has served a six (6) month suspension effective September 19, 2016 and that the balance of time after the suspension period will be deemed as an unpaid leave of absence through the execution of this Agreement.

   c. The Parties acknowledge and agree that Batemon is not entitled to any seniority, salary increase, bumping rights, and that he has waived and all back pay, counsel fees, and/or compensation of time

and/or benefits of any sort from September 19, 2016 through the execution of this Agreement.

d. Batemon agrees that immediately upon his return to work, he may be subject to drug/alcohol testing.

e. Batemon agrees to submit to random drug/alcohol testing per Department of Transportation guideline and that the failure to submit to testing or a positive test will result in immediate termination.

f. Batemon further waives any and all rights and/or claims which he has and/or may have to: (1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; (2) To challenge the PNDA, FNDA and/or this Agreement; (3) Initiate and/or partake in Grievance procedures; and/or (4) Initiate, pursue and/or partake any and all litigation against the City in State, Federal and/or Administrative Courts.

g. Batemon and the Union each further agree that there is no consideration due Batemon other than what is explicitly outlined herein, his counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement.

h. Batemon and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

i. Batemon and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

j. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Batemon's estate, and purchasers and/or assignees of Batemon's, the City's and/or the Unions interests shall also be bound.

k. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

l. Batemon and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

m. Batemon and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

n. This Agreement contains the sole and entire agreement between Batemon, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject

matter hereof. Batemon specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

o. Batemon agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

p. Batemon agrees and acknowledges that he has had a full opportunity to review this Agreement with his Attorney and/or Union representative and he enters into same knowingly and voluntarily.

q. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

r. **By signing this Settlement Agreement, Batemon states that:**

1. He has read it;
2. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as

amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

3. He agrees with everything contained in this Agreement;
4. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;
5. He consulted with his Attorney prior to executing this Agreement;
6. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

11/8/17
Date

BY: Khalif Thomas/mbr
Khalif Thomas, Director
Department of Public Works

10-30-17
Date

BY: Hakiem Batemon
Hakiem Batemon

11/6/17
Date

Samuel Wenocur, Esq.
Attorney for Hakiem Batemon

Approved as to Form and Legality:

11/8/17
Date

Kimberly K. Holmes, Esq.
Law Department, City of Newark

CERTIFICTION

I, Hakiem Batemon, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10-30-17
DATE

Hakiem Batemon

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Jose DeJesus
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2018-3149
OAL DKT. NO. CSV 07210-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07210-18

AGENCY DKT. NO. 2018-3149

IN THE MATTER OF JOSE DEJESUS,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

John F. McDonnell, Esq., for appellant (McDonnell Artigliere, Attorneys at Law)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: July 2, 2018 Decided: July 3, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Jose DeJesus from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on May 17, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 3, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 7-10-18

Date Mailed to Parties: 7-10-18

caa

OAL DKT. NO. CSV 07210-2018
AGENCY DKT. NO.#2018-3149
SETTLEMENT AGREEMENT

RECEIVED
2018 JUL -2 P 5:06
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

IN THE MATTER OF:

Jose DeJesus
AND
Hunterdon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated 4/20/2018 contains the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.O. 4:08: B.2.3 and E.1.3.	Removal	4/20/18

B. The Appellant, Jose DeJesus, withdraws his appeal and request for a hearing, and the Respondent, Department of Human Se ices, Hunterdon Developmental Center agrees that the following will occur with regard to each charge:

Charge	Disposition	New Penalty
1. A.O. 4:08: B.2.3 and E.1.3	The parties agree to a General Resignation effective 4/20/18.	

C. The parties have agreed to the following:

1. To date, appellant has been without pay since 4/20/18 based upon the charges.
2. There is no pack pay to be paid by the appointing authority to the appellant.
3. The appellant agrees to a General Resignation effective 4/20/18 pursuant to N.J.A.C. 4A:2-6.3(b). The parties have agreed to a general resignation as a resolution to the disciplinary appeal. Appellant agrees not to seek or accept employment with the Department of Human Services in the future. Respondent shall modify appellant's personnel records to conform to these terms.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

OAL. DKT. NO. CVS 07210-2018

D. The Department of Human Services, Hunterdon Developmental Center (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services, Hunterdon Developmental Center will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department of Human Services, Hunterdon Developmental Center with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Jose DeJesus's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits, or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to events, information or disputes giving rise to this action up to the date of this agreement, including but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the American with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A – the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employees Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or

OAL. DKT. NO. CVS 07210-2018

common law claims and any contract express or implied. This wavier includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7-2-2018
DATE

Jose DeJesus, Appellant

7/2/18
DATE

John McDonnell, On Behalf of Appellant

7/2/18
DATE

Anita Pinkas, RESPONDENT

7/2/2018
DATE

Kim Heft, Hunterdon Dev. Center

OAL. DKT. NO. CVS 07210-2018

CERTIFICATION

I, Jose DeJesus, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION,** my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7-2-2018
DATE

Jose DeJesus
APPELLANT

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Timothy Grimsley
Newark Public School District

CSC DKT. NO. 2017-615
OAL DKT. NO. CSV 13990-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13990-16

CSC DKT NO 2017-605

IN THE MATTER OF TIMOTHY GRIMSLEY,
NEWARK PUBLIC SCHOOL DISTRICT.

Arnold S. Cohen, Esq., for appellant (Oxfeld Cohen, P.C., attorneys)

Sabrina Styza, Esq., for respondent

Record Closed: July 3, 2018 Decided: July 5, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 13, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Settlement Agreement and Release were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 5, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

dr

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent State-operated
School District of the City of Newark

RECEIVED
18 JUL -3 A 10:31

Timothy Grimsley, Appellant, vs. Board of Education of the City of Newark, in the county of Essex Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV 13990-2016N AGENCY REF. NO.: 2017-615 SETTLEMENT AGREEMENT,

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Timothy Grimsley ("Appellant" or "Grimsley") and Respondent Board of Education of the city of Newark, in the county of Essex ("Respondent" or the "District"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, his appeal and request for a hearing filed under OAL Docket No. CSV 13990-2016N, Agency Ref. No.: 2017-615 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, any and all other claims or suits that he may have previously filed against the District that are still pending in any and all other courts and/or before any and all other agencies, with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Appellant up to this point in time.

3. In exchange, the parties agree that the charges set forth in the Final Notice of Disciplinary Action dated May 18, 2016 are sustained but that Appellant's fifty-five (55) day suspension will be reduced to an forty-five (45) day suspension. The 10 day reduction in suspension time shall be converted to and recorded as an "Administrative Leave Without Pay". The Final Notice of Disciplinary Action will be amended accordingly.

4. Appellant will not receive any back pay as part of this Agreement.

5. This Agreement shall not constitute a precedent in any matters involving other employees.

6. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including fees, back pay, front pay or any other monetary relief.

7. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that she may have against the District and the Released Parties relating to his employment with the District up to this point in time. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with the District up to this point, including but not limited to any and all rights or claims he may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should same become necessary.

8. Notwithstanding Paragraph 7 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving his rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 7, Appellant agrees not to seek or accept any resulting relief whatsoever.

9. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

10. Appellant understands, agrees to and acknowledges that he is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

11. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

12. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

13. Appellant agrees that he has been fully and fairly represented by his Union.

14. This Settlement Agreement constitutes the full agreement between the parties and shall be construed and enforced in accordance with New Jersey Law.

15. This Settlement Agreement is subject to the approval of the Board of Education of the city of Newark in the county of Essex and will only become effective on the District upon the approval of the Board of Education of the city of Newark. Any disapproval by Board of Education of the city of Newark shall not interfere with the rights of either party to pursue the matter further.

16. This Settlement Agreement is subject to the final approval of the New Jersey Civil Service Commission and will only become binding on the parties upon the final approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

Dated: 4-12-18

TIMOTHY GRIMSLEY
Appellant

Dated: 4-12-18

ARNOLD COHEN, ESQ.
Attorney for Appellant

Dated: 5/14/2018

~~MARQUES AQUIL LEWIS~~ Yolanda Mérida
Board Chairperson Assistant Superintendent TALENT

Dated: 4/12/18

SABRINA STYZA, ESQ.
Attorney for Respondent

8-1-18

A-002

STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Juarez Hill, Newark

CSC Docket No. 2016-1885
OAL Docket No. CSV 03284-16

ISSUED: August 16, 2018 (WR)

The appeal of Juarez Hill, a Code Enforcement Officer with Newark, of his removal effective January 2, 2015, on charges, was before Administrative Law Judge Caridad F. Rigo (ALJ), who rendered her initial decision on June 15, 2018. Exceptions were filed on behalf of the appellant and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on August 1, 2018 ordered that this matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA), dated October 30, 2015, which charged him with conduct unbecoming a public employee; misuse of public property; and other sufficient cause and removed him from employment, effective January 2, 2015. Specifically, the appointing authority asserted that on December 29, 2014, the appellant stole a city-owned computer from his workplace. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

In her initial decision, the ALJ found that the appellant accessed city property to steal a city-owned computer from the city's Code Enforcement Department offices on December 29, 2014. The ALJ found surveillance video from

that date depicted the appellant pushing a cooler containing the city-owned computer and leaving the city-owned building. The ALJ also found that the testimony of the appointing authority's three witnesses "hung together and their respective pieces fit together." The ALJ further found inconsistencies in the appellant's and his witness' testimony and determined them to be not credible. Accordingly, the ALJ upheld the charges against the appellant. With regard to the issue of the penalty, the ALJ noted that, despite having no prior disciplinary history, removal was warranted due to the severity of the appellant's misconduct.

In his exceptions, the appellant argues that the ALJ improperly summarized the testimony of the appointing authority's three witnesses. The appellant also complains that the ALJ's initial decision improperly referred to irrelevant testimony from one of the appointing authority's witnesses concerning the appellant's work ethic and alleged absenteeism. Furthermore, the appellant argues that his testimony and his witness' testimony were credible. Finally, the appellant asserts that the appointing authority failed to prove that the he stole a city-owned computer. The appellant maintains that he removed a personal computer from the city-owned property.

In its reply, among other things, the appointing authority indicates that the testimony of Dorothy Townes, Alwanda Johnson and Marcia Harris was stricken from the record.[1]

Upon its *de novo* review of the record, the Commission finds it necessary to remand this matter to the OAL. Initially, the Commission notes that its review of the video was unavailing as to whether the contents of the cooler the appellant was pushing contained a computer. Thus, the Commission requests the ALJ to further detail her reasons, based on the witnesses' testimony and her credibility determinations, her finding to that effect. Additionally, the Commission requests that the ALJ explain why the testimony of Townes, Johnson and Harris was stricken from the record, and absent a compelling reason for excluding their testimony, the ALJ shall summarize their testimony. If necessary, the Commission further requests that the ALJ address how the stricken testimony affects her credibility determinations or her ultimate findings. Therefore, the Commission remands the matter to the OAL for the reasons herein explained.

ORDER

The Commission orders that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

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[1] The record indicates that this testimony was stricken by order of the ALJ. As no written order could be located, it is assumed that the order was verbal.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1st DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03284-16
CSC DKT. NO. # 2016-1885

IN THE MATTER OF JUAREZ HILL,
CITY OF NEWARK,
DEPARTMENT OF NEIGHBORHOOD
AND RECREATIONAL SERVICES.

Cynthia H. Hardaway, Esq., for petitioner

John J. Zidziunas, Esq., for respondent

Record Closed: April 24, 2018 Decided: June 15, 2018

BEFORE **CARIDAD F. RIGO**, ALJ (Ret. on recall)

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Juarez Hill appeals his termination from the position of a code enforcement officer for the City of Newark Code Enforcement Department on charges of conduct unbecoming a public employee, misuse of public property, and other sufficient cause. Specifically, the respondent City of Newark alleges that while petitioner was serving as a code enforcement officer he stole a Dell Optiplex 9010 computer from the city on December 29, 2014.

The matter was transmitted to the Office of Administrative Law (OAL) on February 29, 2016, for a hearing as a contested case. The matter was heard on August 25, 2016, November 21, 2016, December 28, 2016, January 12, 2017, and February 21, 2018. Both parties had a change of counsel, coupled with this ALJ's retirement, which delayed the conclusion of these proceedings.

ISSUES

Did petitioner take the Optiplex 9010 computer on December 29, 2014? Was petitioner's removal appropriate?

FACTUAL DISCUSSION

Thomas McDonald

Testified on behalf of City

Thomas McDonald at the time of his testimony was the liaison of the Code Enforcement Department to the city's Neighborhood Services Department, he had been with the city for twenty-eight years. He oversaw fourteen subordinates in the department. The department of Code Enforcement enforced city ordinances with respect to housing, sanitation, zoning ordinances, streets, sidewalks, public and building safety. The department has access to confidential information such as driver's licenses, business licenses, and other pertinent information for property owners and/or business owners, this information is stored in the department's offices and in their computers.

McDonald was petitioner's supervisor from 2003 until petitioner's termination. He said petitioner started out as an intern employed by the City on a temporary basis. According to McDonald petitioner in the first few years was extremely competent, efficient, and dedicated to the department. He said petitioner was very good with IT issues and the electronics they used. Petitioner worked his way into becoming a code enforcement officer in 2007. He knew petitioner personally. He observed petitioner to be "out of it" also known as "high" during petitioner's tenure. He said he told all three

directors about petitioner's behavior. McDonald furthered that in late 2014, petitioner's behavior got "pretty bad." McDonald referred to Exhibit R-1, the department's attendance log, showing petitioner's absences.

McDonald furthered that inspectors/code enforcement officers were assigned desktop computers. The inspectors were assigned passwords issued by the city but individuals could log into another computer if necessary. McDonald testified that the code enforcement officers used department computers because those computers contained information regarding violations or other issues that were pertinent to the city's codes and regulations. He furthered that the inspectors were assigned computers and each inspector was responsible for his/her individual computer. Hill had been assigned a computer sometime between 2013-2014. However, there came a time when Hill did not have a computer on his desk, but he was not the only officer that did not have a computer on his/her desk. The officers did not always need a computer to do their work.

Hill often brought in his own laptop to do his work. Some city computers had multiple users.

Code enforcement offices were located in City Hall Broad Street, Room 420, Newark, New Jersey. The inspectors all shared one large office. The Code Enforcement department was relocated on or about March 3, 2015, to Mt. Prospect Street, Newark. However, McDonald said that he did not authorize anyone to move equipment or anything from the City Hall offices on December 29, 2014, because they did not have access or authority to move anything into the new location. The new location was still under construction on December 29, 2014.

He furthered that the entry door to the Code Enforcement office was locked and the entire staff, clerical support, and officers were provided with keys.

McDonald stated that he learned that petitioner was terminated because he was accused of stealing a computer from the Code Enforcement Department. McDonald said that he learned of it from Marsha Harris, who was acting as a supervisor while he

was away. He said Harris asked him if he had moved a computer because one was missing. He said he told her no and that he had not been in the office and would not be returning until after the new year. He told Harris to report the matter to the director.

McDonald furthered that the matter was referred to the Inspector General's Office and an investigation ensued. After the investigation was completed he was given the reports, Exhibits R-2, R-3, R-4, and the video tape R-6.

On cross-examination McDonald stated that petitioner was assigned a computer between 2013 and 2014. However, McDonald furthered that although every officer had a desktop computer on his/her desk not every officer, at all times, had a computer. And, at the time that petitioner is alleged to have stolen a computer petitioner did not have a desktop computer assigned to him. There were times petitioner had his own personal laptop that he would bring into the office and he would hook it up into the city system. Every computer that is issued by the city any employee in the city has access to those computers using their own password.

The actual computer that went missing was assigned to Inspector Dorothy Townes. And it was Townes who actually reported the computer missing from the desk.

The department employees were told that the department was going to be moved to a new location outside of City Hall sometime in November 2014.

McDonald stated that some employees came to work on vacation days or on their days off but petitioner was not one of them.

McDonald said he viewed the video and observed petitioner exiting City Hall building on the Green St., employee exit door. The video is dated December 29, 2014, at 6:01:22 p.m. McDonald stated that petitioner was supposed to be on vacation on that day.

Patrick Council

Testified on behalf of City

Patrick Council is employed by the City of Newark and is the Director of Neighborhood and Recreational Services. He oversaw five departments such as park and grounds, code enforcement, and city recreation. He is the enforcer of policies and discipline. Thomas McDonald reported to him and McDonald was the manager of the Code Enforcement Department. He met petitioner when he became the director of the code enforcement department.

He found out about the missing computer when McDonald told him about it. McDonald had already referred the matter for investigation to the inspector general's office. When the investigation was completed the inspector general's office recommended that charges be filed against the petitioner. Council furthered that internal hearings occurred and he did not testify at that hearing. Council said he was told that the hearing officer recommended to uphold the charges.

Council testified that after he received the inspector general's report, the hearing officer's recommendation, and a review of petitioner's work attendance and work behavior, a conglomerate of things that added up. He decided to terminate petitioner's employment with the City of Newark. Council said that petitioner was not prohibited from accessing the building on his day off.

Council testified that although the issue of the theft was "still pending" it did not stop him with terminating petitioner. Council furthered that based on the reports of the investigation and his view of the video he determined that petitioner took the computer.

Under cross-examination Council testified that he in fact signed off on the final notice of disciplinary action, which resulted in petitioner's removal from the City of Newark's employment. Council acknowledged that none of petitioner's alleged work deficiencies and other factors that he took into consideration when deciding to terminate

petitioner were ever formally addressed in a hearing, oral or written warnings. Petitioner was never provided with progressive discipline.

Council testified that petitioner was fired based on the fact that he was identified as having stolen a computer.

Council stated that when he viewed the video he saw petitioner moving a wheeled ice cooler out of City Hall. He saw computer wiring hanging out of the cooler. He saw petitioner situating things in the cooler and pushing things down into the cooler.

Khalif Thomas

Testified on behalf of City

Khalif Thomas is the manager of Newark's public buildings and has been so for about three years. He oversees sixty-two buildings. He is responsible for armed security, general maintenance, the HAVC, electrical, plumbing, and the security systems for all city buildings.

Thomas explained that Newark has its' own thirty-two channel DVR which sees all exit doors around City Hall; inside as well as the side buildings; and the system is backed up to the city's data network in his office. The system records for fifteen days. After fifteen days they erase and start back re-recording.

Thomas furthered that supervisor, McDonald, came to him asking if they could go over the video and see if a computer was taken out of City Hall. Thomas furthered that they went to the DVR in his office and reviewed the video of every camera in the building. As he watched the video of the 31 Green St., entrance/exit he saw petitioner coming in and leaving the building. The date of the video was December 29, 2014, at 18:01 hours. The video records everyone entering and leaving the building at Green St. Thomas testified that the camera system is High Definition (HD). He said when a request is made for a specific video he gives them fifteen minutes after and fifteen minutes before the time requested. He testified that his procedure is to put the portion

of the video requested on a flash drive and gives that flash drive to the person that made the request, this is what he did in this case.

City Hall is open to all employees 24/7. He furthered that only Code Enforcement and personnel and himself have access to the code enforcement offices, the offices where the subject computer was.

Thomas testified that as he looked at the video he saw that it was petitioner. And, when he zoomed in on the cooler he saw the side of a computer in the cooler. On the stand at the hearing as he viewed the scene from the flash drive he again identified the petitioner and the side of a computer in the cooler. He said he first saw this when he and Mr. McDonald looked at the video in his office.

Under cross-examination Thomas said that McDonald specifically asked for Juarez Hill on a specific date and time. Thomas stated that City Hall has six exit/entrance doors and that after 4:00 p.m. there is only one exit/entrance open and that is on Green Street. He furthered that at the time that he reviewed the tape in his office he said he saw the side of a computer. He said on the tape he could zoom in on the cooler. He said that the video tape was clearer than the flash drive.

The original tape with the original footage no longer exists. He copied the original footage on to a CD then onto flash drive. He testified that he had to zoom in onto the cooler in order to see the computer in the cooler.

Det. Lt. Louis Wohltman

Testified on behalf of the City

Detective Lieutenant Louis Wohltman is employed by the City of Newark Police Department assigned to the special investigations unit that investigates city employees. He is a twenty-four-year veteran of the city. He investigates employees and vendors that do business with the city. He also investigates referrals that he receives from

department managers or anonymous employees. If the matter is of a criminal nature he refers the matter to the Inspector General's Office.

This matter came to his attention when Thomas McDonald told him about the computer being missing from the Code Enforcement office and he thought a computer was taken some time between December 29 and 30. McDonald told him that Juarez Hill was in the office on that day and that Hill should not have been there. Wohltman then testified that he went to Khalif Thomas and looked at the videos in his office.

Wohltman testified that he saw the video on Thomas' flat screen TV. He said he saw Hill leaving City Hall from the Green St. entrance wheeling a big cooler down three steps. He furthered that he saw Hill lift the cooler over the steps. He testified that he saw a computer in the cooler especially because he was able to zoom in on the cooler. He said he knew it was a city computer because city computers are unique to the city. The city computers have the monitor and tower attached and they have a carrying handle attached to it. He said it was the attached metal handle that identified it to him as a city computer. There was a bag sitting on top of the computer but he could still see what was under the bag.

Wohltman said he zoomed in on the screen on DVR in Thomas' office and that he was able to identify the computer as a City of Newark computer. He also said that those computers can be used at home. He was familiar with what that computer looked like because he uses one like that every day. He got his computer in the summer of 2014.

Wohltman furthered that he did not have enough to prosecute petitioner criminally because he had no eye witnesses. He said he never spoke to the petitioner.

Under cross-examination Wohltman said he could not find an eye witness. He said he made his determination based on what he saw was in the cooler and that the computer he saw belonged to the City of Newark. He described the silver handle that is unique to the city. He did not see the monitor but he saw the tower that is black. He

noted that the lid to the cooler was open because the computer was standing up straight.

Arlene Chambers

Testified on behalf of petitioner

Arlene Chambers is employed by the City of Newark for twenty-one years as a code enforcement officer. Chambers knew petitioner as they were co-workers, she worked the heating schedule in January and her hours were 1:00 p.m. to 9:00 p.m.

Chambers stated that December 29, 2014, was a Friday and that she worked the heating schedule. Chambers was certain that December 29, 2014, was a Friday because she took the following Monday off and returned to work on the following Tuesday.

Chambers testified that petitioner came into the office that afternoon and she told him that while he was there he was to pack up his stuff because on Monday they were moving. She said that petitioner did not have a city computer so he brought his own computer. Chambers furthered that she saw petitioner pack up all of his stuff and leave the office. She furthered that about a half-hour later she left the office, went downstairs, and she saw petitioner talking to the security guard and then he left. Chambers stated that petitioner never had a city computer on his desk. Chambers furthered that some months prior to December 29, 2014, when petitioner returned from vacation he discovered that his computer was gone. She recalled that petitioner asked other co-workers about his computer but no one knew what happened to his computer. She said petitioner always had his cooler by his desk. She said after that petitioner used his personal computer/laptop.

Chambers stated that when she returned to work after that Friday, December 29, 2014, she took off the following Monday and returned to work that next Tuesday and she reported to the new location on Mount Prospect street and not to City Hall.

Chambers said that on all city issued computers the towers were on the floor and the monitors were on the desk.

She said no one asked her anything about this investigation.

Under cross-examination Chambers testified that her schedule of working 1:00 p.m. to 9:00 p.m. started in January of 2015, and that was the time she saw petitioner in the office and it was at that time that she told petitioner to pack his stuff because on the following Monday the department was moving to Mount Prospect Ave. Chambers furthered that it was that next Tuesday, when she returned to work, that she heard about the missing computer. And, that she reported to work on that Tuesday to the Mount Prospect Avenue work site.

Chambers also testified that on December 29, 2014, she left the office about 6:30 p.m. or so and went downstairs and saw petitioner talking to the guard he was about to leave out the door carrying his stuff.

Chambers said that she was the only one that was physically present in the office with petitioner when he was packing and moving his stuff on the day that he allegedly took the computer. She also said that she never told anyone that she was there and knew that petitioner did not take a computer. She did not say anything because no one asked her.

Under re-direct Chambers testified that when she returned to work on Tuesday she saw petitioner and she saw him at the City Hall offices. Chambers also furthered that petitioner would gather his stuff just about every day and leave the City Hall offices and sometimes he would take his cooler.

Juarez Hill

Juarez Hill is the petitioner and he testified on his own behalf. Hill stated he started working for the City of Newark in 2001 as a code enforcement officer. Petitioner's job required him to protect and enforce the City's interests and ordinances

pertaining to housing, zoning ordinances, building safety, and sanitation. As a code enforcement officer, he had 24-hour access to the City Hall building and his offices.

Hill stated that on December 29, 2014, a Monday he was on vacation but went to his job offices located in City Hall to do some paperwork on his laptop. While he was there Arlene Chambers told him that he should pack his things because they were moving the office to the new location. He had a refrigerator, microwave, a Nutri-bullet, laptop, printer, monitor, a shredder, books and photos at the office; these were all his personal property. Hill furthered that he took it upon himself to bring them into the office so he could do his city work. He testified that he only packed his personal things and denied taking anything that belonged to the city.

Hill said that on December 29 he went into City Hall twice. The first time he came in and saw Chambers he was told to remove his personal belongings, which he did. However, he realized he forgot some paperwork so he returned got those and then left again. The next time he returned to City Hall was on January 2, 2015.

When questioned as to why he returned to the City Hall and not the new location Hill responded that he had not packed all of his things that he had only taken some of his belongings home on December 29, 2014. He said he had massive stuff in his office; that he had a whole apartment in his area of the office. He testified that his moving from City Hall to the Mt. Prospect Avenue office was a process.

Hill said that at one time he had a city computer assigned to him but he was out on a medical leave and when he returned his computer was missing and he later found out that his computer was given to someone else. He never received another computer so he did his work on his own personal computer and equipment that he brought into the office.

During cross-examination petitioner acknowledged that he was visible on the video of the Green St., entrance/exit of the City Hall building. Petitioner explained that the cooler was a mid-size cooler, less than 2-feet wide and 2-feet deep. It was on wheels and had a handle so he could pull/push it similar to a suitcase with wheels. He

stated that he stacked up the items in the cooler to the point that he could not close the cooler's lid. He stated that the cooler was heavy because the bag he had on top of the open cooler was heavy with his stuff.

Summary of Video

There are two views of the surveillance video of the passage way of the Green St. entrance/exit of City Hall. One view shows petitioner walking towards the camera as he walks towards the exit doors. The video shows petitioner pushing a blue cooler by its handle down a hallway. The cooler lid is open. The cooler is packed with items and has a black bag/backpack sitting on top of the items. It is apparent that the cooler is heavy because petitioner is seen lifting the cooler with both hands trying to manage a few steps. Petitioner is also seen trying to steady with both hands the black bag/backpack so it does not fall off the cooler. The black bag/backpack sitting on top of the open cooler obstructed the ability to see an item in its complete form. However, one can definitely see a flat silver metal plate or board that can be described as the side of a computer. There was something large protruding from the cooler and it was evident that the black bag/backpack was blocking a full view of the contents of the cooler.

The second view of the video shows the same passage way but from the opposite angle, in this video the petitioner is walking away from the camera pushing the cooler.

FINDINGS OF FACT

The central issue to be determined is did petitioner commit an act of theft of a City of Newark computer on December 29, 2014.

Having listened to the testimonies of all of the witnesses and having viewed the surveillance video, Exhibit R-6, and the other documentary evidence I **FIND** the following:

I **FIND** It is more reasonable than not that petitioner knowingly and willfully committed an act of misconduct when he utilized his position and access to city property to facilitate a theft of a Dell Optiplex 9010 computer from the city's Code Enforcement Department offices on December 29, 2014, at approximately 6:00 p.m. I make this finding because of the credible testimony of Khalif Thomas, who oversaw the City of Newark's building security and the security surveillance DVR systems that monitored all doors around City Hall. Mr. Thomas identified the petitioner pushing a cooler and he saw the side of an Optiplex 9010 city computer inside the cooler. Thomas testified that he zoomed in on the video and saw the computer.

I **FIND** the testimony of Detective Louis Wohltman, a detective in the City's Special Investigations Unit credible and persuasive. Wohltman's testimony made sense in view of what he saw in the video. Det. Wohltman, like Mr. Thomas, was able to zoom in on the cooler on a flat 30-inch flat screen HD-TV. Wohltman noted that he could not see more of the computer in the cooler because it had a black bag on top of it. Wohltman said the computer model that was missing was the same model he was currently using.

I **FIND** the testimony of Arlene Chambers incredible. She was adamant that the day in question was a Friday when in fact it was a Monday. Chambers said she told petitioner to pack because the office was moving on Monday when in fact the office moved on March 5, 2015. Also, the fact is that no manager or department head told her to tell anyone to move their personal belongings. Ms. Chambers had many inconsistencies with respect to her own work schedule especially as to where she was working, the times she worked and the days and months she worked. And, according to Chambers she knew petitioner had not stolen the computer because she allegedly saw him pack his personal things on December 29, 2014, yet at no time prior to the instant hearing did she relay what she saw petitioner do to anyone at City Hall. I **FIND** it incredible that Ms. Chambers told petitioner to pack up his things because the office was going to move to Mt. Prospect Avenue over the weekend. What weekend was Chambers referring to? Her testimony was not coherent.

I **FIND** the testimony of Juarez Hill incredible. I **FIND** it incredible that Hill went into the office on his vacation day during Christmas week and that he went there to do work after normal working hours. Of significance is the fact that December 29, 2014, was a Monday. Hill testified that it was a Monday and he testified that that after that Monday he returned to work on January 2, 2015, that was a Friday. Chambers and Hill's account of what happened on December 29, 2014 are not in sync. And, by Hill's own account, the next time he reported to work, he went to City Hall not Mt. Prospect Avenue, unlike Chambers' account that they reported to Mt. Prospect Avenue, allegedly on that following Tuesday.

The testimony of McDonald, Thomas, and Wohltman hung together and their respective pieces fit together.

LEGAL DISCUSSION AND CONCLUSION

In an appeal such as this from a disciplinary action or ruling by an appointing authority, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A;2.21; N.J.A.C. 4A:2-1.4(a). The burden is to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47(1975).

Credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story, in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837

(1973). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

In proceedings before an Administrative Law Judge, it is only necessary to establish the truth of the charges by a preponderance of the believable evidence. In re Polk, 90 N.J. 550, 560 (1982). Preponderance of the evidence is the minimum standard of proof required in administrative proceedings. This standard of proof requires a litigant in this venue to establish that a desired inference is more probable than not.

Hill was charged with "conduct unbecoming a public employee" which is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons 63 N.J. Super., 136, 140(App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstance "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 155 (quoting In re Zeber, 156 A.2d 821 (1959). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super., 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Service, 17 N.J. 429 (1955).

In a civil service disciplinary action the penalty should be determined based on the charges and the proofs presented during the hearing. A fact finder must also determine if there are mitigating circumstances which should impact the charges and penalty. Mitigating circumstances must be taken into consideration when determining whether there is just cause for the penalty imposed. A misappropriation of the property of another is a complete disregard of basic property rights that show a lack of an ethical standard.

I **CONCLUDE** Hill's conduct was unbecoming of a public employee. I **CONCLUDE** that Hill failed to uphold the high standards of being a public employee.

Hill's actions showed a complete disregard of the City's and the general public's property rights.

Therefore, for the reasons set forth herein, I **CONCLUDE** that the City of Newark was correct in terminating Juarez Hill as an employee. The City's decision is supported by the preponderance of the credible evidence and should be affirmed.

PENALTY

When dealing with the issue of penalty at an Office of Administrative Law hearing such as this what penalty should be imposed is determined on a case by case basis. A key factor in determining the severity of the penalty depends on the facts and circumstances of the conduct complained of and the employee's disciplinary history. W. New York v. Bock, 38 N.J. 500 (1962). Removal, suspension or a fine of no more than six months and disciplinary demotion are considered major discipline. N.J.S.A. 11A:2-6(a)-20; N.J.A.C. 4A:2-2.2-2.4.

In this case Hill has no disciplinary history. However, the severity of his misconduct in this matter cannot be disregarded or mitigated simply because this was his first misconduct. To reduce the penalty in any way would send the wrong message to the public and to the other city employees.

I have taken into consideration Hill's claim that he should be reinstated in his position with the City of Newark and be reimbursed for his lost wages and benefits. However, having **FOUND** the above-stated misconduct, I have no choice but to agree with the City of Newark's removal of Juarez Hill from employment.

Accordingly, I **CONCLUDE** that respondent's termination is appropriate.

ORDER

Based on all of the above findings it is hereby **ORDERED** that petitioner's removal as a Code Enforcement Officer, for the City of Newark, Department of

Neighborhood and Recreational Services effective January 2, 2015, is hereby **AFFIRMED**.

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

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

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

June 15, 2018
DATE

CARIDAD F. RIGO, ALJ (Ret., on recall)

Date Received at Agency: June 15, 2018

Date Mailed to Parties:

lr

APPENDIX

WITNESSES

For petitioner:

Juarez Hill

Arlene Chambers

For respondent

Patrick Council

Thomas McDonald

Khalif Thomas

Det. Lt. Louis Wohltman

EXHIBITS

For petitioner:

P-1 Preliminary Notice of Disciplinary Action

P-2 Final Notice of Disciplinary Action

P-3 Letter of Termination dated 1/2/15

P-4 Letter dated 1/5/15 re: immediate suspension

P-6 Picture of Optiplex 780 computer

P-7 thru P-11 Photos of personal items placed in cooler

P-13 Photo of 9010 computer monitor

P-14 Photo of 9010 computer tower

For respondent:

R-1 Department sign-in sheet

R-2 Police Department report

R-3 Newark Police Report

R-4 Photos

R-5 Electronic time sheets for Code Enforcement Dept.

R-6 Video of Green Street exit/entrance on 12/29/14 approximately 6:00 p.m.

R-5 Electronic time sheets for Code Enforcement Dept.

R-6 Video of Green Street exit/entrance on 12/29/14 approximately 6:00 p.m.

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Allen Holden
Woodbine Developmental Center,
Department of Human Services

CSC DKT. NOS. 2017-2685 & 2017-2890
OAL DKT. NOS. CSV 11522-17 & 11523-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11522-2017
AGENCY REF. NO. CSC 2017-2685
AND
OAL DKT. NO. CSV 11523-2017
AGENCY REF. NO. CSC 2017-2890
(CONSOLIDATED)

IN THE MATTER OF ALLEN HOLDEN, DEPARTMENT OF HUMAN SERVICES, WOODBINE DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant, Allen Holden (Nash Law Firm, LLC, attorneys)

Aaron Cruez, Deputy Attorney General, for respondent, Department of Human Services, Woodbine Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 6, 2018 Decided: June 8, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

Appellant, Allen Holden, a Human Services Assistant at Woodbine Developmental Center, received a disciplinary action of removal effective January 3, 2017, and a disciplinary action of resignation not in good standing effective January 4, 2017. He

appealed the matters and they were transmitted to the Office of Administrative Law on August 10, 2017, for determination as contested cases pursuant to N.J.S.A. 52:14B-1 to 14B-15 and 14F-1 to 14F-13. The matters were consolidated pursuant to Consolidation Order dated December 13, 2017.

The parties appeared on June 6, 2018, for the scheduled hearing date and advised they had agreed to a settlement of all issues in dispute and presented a fully executed Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement, and having heard testimony of the petitioner on June 6, 2018, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 8, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 6-18-18

Date Mailed to Parties: 6-19-18

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

OAL DKT. NO. CSV 11522-2017 S
CSV 11523-2017
CSC DKT. NO. 2017-2685
2017-2890

SETTLEMENT AGREEMENT

ALLEN HOLDEN

v.

DEPARTMENT OF HUMAN SERVICES, WOODBINE DEVELOPMENTAL CENTER

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated February 8, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. E1.5, Violation of a rule, regulation, policy, procedure, order or administrative decision – removal effective 01/03/17;
2. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a state employee – removal effective 01/03/17;
3. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective 01/03/17.

B. The **Final** Notice of Disciplinary Action dated February 9, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. A3.1, Abandonment of job as a result of absence from work as scheduled without permission for five (5) consecutive days – resignation not in good standing (indefinite suspension checked in error) effective 01/04/17;
2. N.J.A.C. 4A:2-6.2(c), Resignation not in good standing – resignation not in good standing (indefinite suspension checked in error) effective 01/04/17.

C. The parties have agreed to the following:

1. The Appellant withdraws his appeal and request for a hearing with OAL Docket No: CSV 11522-2017 S, and CSV 11523-2017.
2. The Appellant shall be reinstated to the position of Human Services Assistant contingent upon:
    a. Contacting the Employee Advisory Service (1-866-327-9133) and scheduling an appointment within one week of the approval of this agreement by the Civil Service Commission;
    b. Successfully completing the treatment program mandated by the Employee Advisory Service due to a positive drug test verified on November 10, 2016;
    c. Adhering strictly to all rules as prescribed by the Employee Advisory Service, any outside counselor as assigned while endeavoring to complete the program mandated by the Employee Advisory Service, and adhering to the Employee Advisory Service Direct Care Employee Compliance Signature Sheet, including but not limited to:
        i. Attending all scheduled appointments;
        ii. Notifying Employee Advisory Service staff in all appropriate circumstances;
        iii. Promptly notifying the Employee Advisory Service as to any problems encountered during treatment.
    d. Clearing any and all DHS Human Resources' (re)hiring prerequisites.
3. The Final Notices of Disciplinary Action dated February 8, 2017 and February 9, 2017 will be modified as follows:
    a. Modified to a 60-day suspension (time already served) for charges E1.5 and N.J.A.C. 4A:2-2.3(a)(6);

i. Any additional time from the conclusion of the suspension to a return to work will be recorded as leave of absence without pay

b. Charges A3.1, N.J.A.C. 4A:2-2.3(a)(12), and N.J.A.C. 4A:2-6.2(c) are withdrawn.

4. This is a Last Chance Agreement. Any subsequent positive drug test or failure to adhere to all rules and regulations pursuant to the Administrative Order 4:23 drug policy and the Employee Advisory Service and its affiliates will result in removal.

D. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

E. Department of Human Services shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of Allen Holden's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to

the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6-6-18	Allen Holden
DATE	Allen Holden
6-6-18	
DATE	ON BEHALF OF Appellant
6-5-18	
DATE	ON BEHALF OF Respondent

CERTIFICATION

I, Allen Holden, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6-6-18 _____ _____

DATE Allen Holden

Angiulo, Nicholas

From: Aaron Creuz <Aaron.Creuz@law.njoag.gov>
Sent: Thursday, July 19, 2018 2:01 PM
To: Angiulo, Nicholas; 'wnash@thenashlawfirm.com'
Cc: Messina, JoAnn
Subject: RE: IMO Allen Holden, Department of Human Services, Woodbine Developmental Center - CSC Docket Nos. 2017-2685 and 2890

Good afternoon,

Thank you for your patience. We have agreed to the following language to finalize the settlement agreement:

"In the event that Appellant fails to complete all requirements imposed by this agreement, Appellant's removal shall be reinstated and this settlement agreement shall be null and void. The Respondent will issue the Appellant a Preliminary Notice of Disciplinary Action detailing the grounds upon which Appellant has failed to qualify for rehiring."

Please let us know if this is sufficient and if you have any questions.

Thank you,

Aaron J. Creuz, Deputy Attorney General
Department of Law and Public Safety, Division of Law
Employment Counseling & Labor Section
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112
Phone: (609) 376-2960
Fax: (609) 633-7434
Aaron.Creuz@law.njoag.gov

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, July 16, 2018 2:34 PM
To: Aaron Creuz <Aaron.Creuz@law.njoag.gov>; Aaron Creuz <Aaron.Creuz@law.njoag.gov>; 'wnash@thenashlawfirm.com' <wnash@thenashlawfirm.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: IMO Allen Holden, Department of Human Services, Woodbine Developmental Center - CSC Docket Nos. 2017-2685 and 2890

Mr. Nash and DAG Creuz:

I have not received a reply to my below e-mail.

Please advise as soon as possible.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Monday, June 25, 2018 12:00 PM
To: 'Aaron Creuz' <Aaron.Creuz@law.njoag.gov>; 'Aaron.Creuz@lps.state.nj.us' <Aaron.Creuz@lps.state.nj.us>; 'wnash@thenashlawfirm.com' <wnash@thenashlawfirm.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>; Hendricks, Candice <candice.hendricks@oal.nj.gov>
Subject: RE: IMO Allen Holden, Department of Human Services, Woodbine Developmental Center - CSC Docket Nos. 2017-2685 and 2890
Importance: High

Mr. Nash and DAG Creuz:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Allen Holden from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Mr. Holden is to be reinstated. However, that reinstatement is "contingent upon" him contacting EAS, completing an EAS program and clearing any and all Department of Human Services rehiring prerequisites. The Civil Service Commission will not acknowledge a settlement where contingencies are not completely accounted for. In this matter, the settlement does not indicate what will happen should Mr. Holden fail to complete all the referred to prerequisites. For example, will he then be entitled to reinstate his appeals of his removal/resignation not in good standing or will he be issued new disciplinary action, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Gregory Kimbro, Jr.,
Palisades Interstate Park Commission

CSC DKT. NO. 2018-1300
OAL DKT. NO. CSV 16919-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16919-17

AGENCY DKT. NO.: CSC 2018-1300

IN THE MATTER OF GREGORY KIMBRO, JR., PALISADES INTERSTATE PARK COMMISSION.

Jeffrey S. Ziegelheim, Esq., for Appellant, Gregory Kimbro, Jr. (Alterman & Associates, LLC, attorneys)

Ryan C. Atkinson, Deputy Attorney General, for Respondent Palisades Interstate Park Commission

Record Closed: June 29, 2018 Decided: July 10, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals a Final Notice of Disciplinary Action, dated October 23, 2017, providing for a penalty of seven days suspension.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on November 15, 2017.

A settlement agreement was submitted to the undersigned on June 29, 2018, signed by the parties.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Appellant's appeal is withdrawn with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 10, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____
db

GURBIR S. GREWAL
Attorney General of New Jersey
Attorney for Palisades Interstate
Park Commission
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, New Jersey 08625

By: Ryan C. Atkinson
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(609)984-5065

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. CSV 16919-17

GREGORY KIMBRO, JR., Petitioner, v. PALISADES INTERSTATE PARK COMMISSION, Respondent.	ADMINISTRATIVE ACTION SETTLEMENT AGREEMENT

Gregory Kimbro, Jr. ("Petitioner") and Palisades Interstate Park Commission (Respondent") have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy in the above captioned matter.

A. The Final Notice of Disciplinary Action dated October 24, 2017, contained the following charges and proposed discipline:

Charges

1. Violation of Rule and Regulation – 4:1.10 – Insubordination (2 counts).

Discipline

The original discipline contained in the October 24,

2017, Final Notice of Disciplinary Action was a seven (7) working days, fifty-six (56) hours suspension.

B. The parties have agreed to the following:

1. The Petitioner and Respondent agree to a six (6) working days, forty-eight (48) hours suspension in total.

2. The total number of days of suspended pay, the Petitioner has served to date is 2 working days, sixteen (16) hours.

3. The Petitioner agrees to serve an additional four (4) working days, 32 hours suspension.

4. The final charges shall be sustained as follows:

Violation of Rule and Regulation - 4:1.10 - Insubordination (2 counts).

C. Petitioner withdraws his appeal and request for a hearing. The parties acknowledge that under N.J.A.C. 17:2-4.5 (b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Respondent shall amend Petitioner's personnel records to conform to the terms of the settlement. Nothing herein shall preclude the Respondent from releasing information on this matter to anyone who has a release executed by Petitioner or as consistent with the law.

E. Petitioner waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Petitioner waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, Palisades Interstate Park Commission, their employees, agents, or assigns, including but not limited to, those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title ~ 1 A -the Civil Service Act, the Older

Workers Benefits Protection Act, the occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes, but is not limited to, all claims involving any continuing effects on actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Authorization has been given to the Respondent to agree to the Settlement the parties have read the Settlement Agreement and freely and voluntarily agree to its provision.

On Behalf of Petitioner

Date: Jeffrey S. Ziegelheim, Esq.

On Behalf of Respondent

Date: 6-29-18 Ryan C. Atkinson

CERTIFICATION

I, Gregory Kimbro, Jr., being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily. I also understand that if this Settlement Agreement is approved, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date:

Gregory Kimbro, Jr.

1

8-1-18

A-3

STATE OF NEW JERSEY

In the Matter of Shawynae Loatman
Woodbine Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-3384
OAL DKT. NO. CSV 07313-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 3, 2018 BW

The appeal of Shawynae Loatman, Human Services Assistant, Woodbine Developmental Center, Department of Human Services, 20 working day suspension, on charges, was heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on June 26, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 1, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07313-17
AGENCY DKT. NO. 2017-3384

SHAWYNAE LOATMAN,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

William A. Nash, Esq., for Shawynae Loatman, appellant (Nash Law Firm, LLC, attorney)

Steven Katz, Employee Relations Coordinator, for Department of Human Services, Woodbine Developmental Center, respondent, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: June 20, 2018 Decided: June 26, 22018

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Appellant, Shawynae Loatman ("appellant" or "Loatman") a Human Services Assistant (HSA), with the respondent, Woodbine Developmental Center ("respondent" or "Woodbine") appeals a Final Notice of Disciplinary Action and the twenty-day suspension

for Insubordination (C9.2). The basis for the suspension originate from Loatman's alleged refusal to complete Active Treatment Notes (Notes) and usage of derogatory language towards Cottage Training Supervisor (CTS), Brooke Butler (Butler).

PROCEDURAL HISTORY

On April 29, 2015, Loatman was issued a Preliminary Notice of Disciplinary Action (PNDA) suspending her for twenty days on a date to be determined. A departmental hearing was held on March 28, 2017, the result of which was the issuance of a Final Notice of Disciplinary Action (FNDA) on April 3, 2017, suspending Loatman for twenty days.[1] Loatman requested a hearing and the matter was transmitted to the Office of Administrative Law where it was received on May 22, 2017, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on May 11, 2018, and upon receipt of written summations, the record closed on June 20, 2018.

FACTUAL DISCUSSION

Grant Robinson (Robinson), a Supervisor of Professional Residential Services (SPRS) for Woodbine, testified that he has worked for Woodbine for the past twenty-five years. Woodbine is a long-term care facility for men and women with mental and physical disabilities (consumers) who cannot care for themselves. In addition to taking care of consumers' physical needs (feeding, bathing, clothing), the facility offers various services which include among other things, programs for speech and hearing.

According to Robinson, each consumer has an individualized program that staff members from all disciplines (Nursing, HSA, Psychology, etc.), follow to take care of a consumer. Documentation or Notes are placed in consumers files based upon different situations that may occur during the day. The Notes allow staff members to gauge how a consumer is progressing or digressing from their program and evaluate their needs. Notes may include among other things, a consumer's refusal to attend a program on one

[1] Woodbine's representative, Steven Katz sought to amend the FNDA during the hearing conceding that Loatman completed the Notes and that the only issue that remained before the Tribunal was the derogatory language and conduct towards CTS Butler.

of the days; refusal to eat; or acting out. Such actions are documented so that a consumer's care can be adjusted accordingly. Notes are continuous and it is the responsibility of staff members who interact with a consumer to write Notes in a consumer's file with whom they have interacted with. Failure to do so by a staff member is grounds for discipline.

Woodbine has implemented a Disciplinary Action Program which outlines various offenses and levels of discipline that may be imposed based upon the incident. (R-2.) It also has a zero tolerance for a hostile work environment. When discipline is initiated, the facility has a checks and balances in place. Part of that checks and balances is a review of the file for completeness. When the instant matter arose, it was his job to ensure that all information had been gathered; determine if the charge was appropriate and review everything for accuracy and completeness and then forwarding the matter for a hearing and/or settlement. He did not witness the incident and no additional investigation was undertaken.

Robinson went on to state that as part of his responsibilities, he provides supervision to second line supervisors who oversee certain buildings where the consumers live. He has known Loatman for approximately ten years and was at one point her supervisor, but in his current position, she is not in his chain of command. He is also familiar with Butler. It was his opinion that Butler was a good supervisor who was attentive to her staff and consumers and was never known to be partial to either. She was not known to have conflicts with other staff members.

On cross-examination, Robinson was questioned about employee training – specifically whether Loatman had received training on Documentation/Notes when she transferred from food handling into direct care as a HSA. In response he stated that all staff members, including Loatman, are routinely in-serviced on documentation. In-service training covers a myriad of topics that range from consumer injuries to trips on and off the facility grounds. While he could not recall the last time Loatman received in-service

training, she was not on the "non-compliant list" which he checks periodically as part of his job responsibilities.

Robinson was also questioned whether he knew a Benita Dickerson, a CTS in Cottage 8 (C-8). In response, he stated that he knew Dickerson and that she and Butler were friends. At the time of the incident, he was not the direct supervisor of Butler as he was an Assistant SPRS. Butler's immediate supervisor was the Head Cottage Training Supervisor.

Brooke Butler (Butler), testified that she has been a CTS since 2015 which was when she started working at Woodbine. Prior to Woodbine, she worked in a group home for Vineland Development Center. Her current responsibilities include direct care to consumers and administrative oversight of staff members which include HSA's. According to Butler, HSA's are responsible for consumer personal hygiene and assistance in feeding, active treatment, and are required to complete documentation.

She is familiar with Loatman, an HSA in C-8, from a shift that she (Butler) picked up on April 4, 2015, and because of an incident that occurred between the two of them on that same date. Specifically, Loatman had been charged with taking a couple of consumers to church which was located on the facility grounds. According to Butler, when a consumer goes on an outing, the event and any concerns from the outing are required to be documented in the consumer's Notes. The Notes should be completed as expeditiously as possible as things happen as the day goes on and the information may not get recorded.

Several times throughout the day she reminded Loatman to complete the required documentation. The last time she told her to complete the Notes which was at the end of Loatman's shift, Loatman told her that, "I get on her fucking nerves" and that she (Butler) should stop trying to be a "super CTS... ." Loatman additionally told her that "the management ain't doing nothing to her so call them because they know who she be and

she is Shawynae and I can tell anybody I want". The inference being that management would not do anything to her if Butler were to report the incident.

Butler testified that immediately after Loatman made the comments, she called the on-duty Assistant SPRS, Penny Maurone (Maurone), who instructed that both she and Loatman complete a written statement about the incident which she did. (R-3.) Maurone arrived at C-8 a few minutes later and spoke separately to the two of them.

Butler acknowledged that she is familiar with Dickerson through work however did not elaborate on whether they socialized outside of work.

On cross-examination, Butler stated that she had been working at Woodbine for approximately three months when the incident occurred. While she could not remember the exact number of times she asked Loatman to complete the Notes, she believes it was several times during the day - the last time ending with Loatman using derogatory language towards her.

When questioned where the incident occurred, Butler indicated that they were in the front of the cottage. In describing the location, she stated that she was in the CTS office and across the small hallway, Loatman was in the "family room." Neither room was very large and there was not much distance between the doorway of the two rooms. She could not remember what Loatman was doing in the family room; however, noted that there was a bathroom, TV and a table in that room. Butler also indicated that the binders for the Notes are kept in that room and that staff use the table to write on. It was her belief that Loatman had not yet completed the Notes at the time of the incident; however, upon arrival of Maurone, was directed to do so.

Shawynae Loatman (Loatman), testified that she was hired by Woodbine in June 2005 as a part-time HSA for a year. In 2006, she transferred into Food Services where she held the title of food service worker. In 2012 she took the position of full-time HSA which title/position she currently holds today. When she was first hired, as part of her

orientation, she was trained on Documentation – specifically Notes. When she became a full-time HSA, she once again received orientation and in-service training.

On April 4, 2015, she worked her normal shift (7:00 a.m. to 3:30 p.m.) in C-8. At the time there were approximately thirty residents in C-8 with three HSA's on duty. Butler was the CTS on duty however this was the first time that she had worked on the same shift as her. Early that the morning, Butler asked Loatman to take three consumers to church, which she did as she was trying to be helpful and "give her a chance" as she (Butler) had a reputation for being harassing. Nothing eventful occurred on the way to, from, or at church with the consumers – the church located only twenty to thirty feet away from C-8.

Upon returning from church, she notified Butler of their return and went directly to the game room to start getting the consumers ready for lunch. Butler did not request or saying anything about documenting the church visit. While at lunch, Butler approached her and inquired whether Notes were required in the consumers' records after attending church. In response, she stated "not to her knowledge." An hour later Butler asked her again if Notes were required, to which she stated "no, I don't think so". An hour after that Butler again approached her, this time stating that she (Loatman) needed to document the church visit.

Around 2:30 p.m., Butler approached her and asked if she had a chance to document the church visit to which she responded that she had not; however, would get to it. At no time did she refuse to do the Notes. Given the fact that it was close to the shift change and there was consumer care required to be done prior to the end of the shift, she was not able to complete the documentation until 3:15 p.m. which was the end of her shift. It was at that time that she made her way to the family room to update the consumers' Notes.

When she was in the family room writing the Notes, Butler was in the CTS office located across the hallway and again asked her if she had done the Notes. Loatman

kiddingly responded that she would do them tomorrow - both laughing as she was already in the process of completing them and was not working the next day. At no time did Butler explain the importance of doing the Notes in a timely fashion. In fact, she requested Butler to in-service her again because she did not recall learning that documentation was required when a consumer was taken to church. Loatman went on to state that she never used the terminology that she was accused of nor did she yell, scream or be hostile towards Butler. Her only comment to Butler was that she did not recall learning that Notes were required when taking a consumer to church. It was apparent to Loatman that Butler was determined to "debate" her. While she heard Butler on the phone with Maurone, she could not hear the conversation. When Butler got off the phone with Maurone, she came into the family room and told her (Loatman) that to write a statement.

When Maurone arrived, she questioned what the issue was. In response, Loatman told her that there was no issue, but rather a training question on when Notes were required to be completed. She wrote a statement to that effect. (P-2). The first time she learned that she was accused of using vulgar language was when she received the Preliminary Notice of Disciplinary Action four or five months later.

It is Loatman's belief that Butler's actions were premeditated and retaliatory and resulted from a conflict that she had with Butler's close friend and colleague Dickerson, whom she had filed a harassment charge against. At the time she filed the harassment charges, Dickerson was her supervisor. In describing some of the harassing conduct, Loatman stated that during shift change, Dickerson and Butler would get together and if she (Loatman) asked a question they would either ignore her or say something rude. On several occasions, when she walked in the room, they would slam the door on her. The charges were ultimately deemed unfounded and since that time her relationship with Dickerson has been uncomfortable. According to Loatman, Dickerson uses her power in a harassing manner which is exactly what Butler did on the date in question. She went on to state that Butler had a reputation for harassing the workers to get things done. It is her opinion that Butler lied and fabricated the entire incident due to her close friendship with Dickerson.

FINDINGS

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After hearing the testimony presented and review of the documentary evidence submitted, and having had an opportunity to observe the witnesses and assess their credibility, I **FIND** as **FACT** that the testimony presented by Butler to be credible and consistent in that she reminded Loatman several times during the shift to complete the Notes for the consumers who were taken to church earlier in the day. I further **FIND** that the last time she reminded Loatman to complete the Notes, Loatman used derogatory

language towards Butler. I **FIND** that as a result of Loatman's conduct, Butler called in the Assistant SPRS on duty, Maurone, to report the incident. I **FIND** that Maurone within minutes of being called, responded to C-8 and spoke to both Loatman and Butler regarding the incident. I **FIND** that it is important for Notes to be completed as expeditiously as possible to ensure accuracy of reporting and consumer welfare.

I further **FIND** Loatman's testimony and written statement inconsistent. Specifically, Loatman testified that after being reminded several times to write the Notes, she went to the family room at the end of her shift to write them. When Butler, who was across the hall in the CTS office asked if she had written the Notes, she kiddingly told Butler that she would write them the following day – both laughing as Loatman was off the following day and she was already in the process of writing them.

This testimony was contradictory to her statement wherein she reported that "my shift has ended and I wanted to go home. She demanded that I do it. I then wrote my active treatment notes." (P-2).

I further **FIND** that Loatman's and Butler's written statements, both of which were written almost contemporaneous with the event, were consistent in that both reflected intent and comments by Loatman that her shift was at and end; she wanted to go home; her belief that she was not in-serviced on writing Notes for church visits; and that she was not going to complete the Notes until commanded to do so.

I **FIND** that Loatman's testimony did not "hang together" as it relates to how rude and insulting Butler's and Dickerson's treatment towards her was over the preceding months had been, yet on the date of the incident, she went out of her way to assist Butler to "give her a chance."

Regarding Loatman's testimony that Butler's actions were premeditated and retaliatory on behalf of her (Butler's) friend Dickerson, I **FIND** that no credible evidence was presented in support of such an argument. The testimony that was presented

consisted of unsupported hearsay and conjecture. The same holding true for Loatman's assertion that Butler had a reputation of harassing staff members to get work done.

LEGAL DISCUSSION AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14, 2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982).

This matter involves a major disciplinary action brought by Woodbine against Loatman seeking a twenty-day suspension. Specifically, Loatman has been charged with insubordination - C9 (intentional disobedience or refusal to accept a reasonable order,

assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor)

The "incident" giving rise to the FNDA identifies the following basis for the sustained charges:

> On April 4, 2015 at 3:15 p.m. you were directed to complete Active Treatment Notices on three gentlemen who you had taken to church that day. You began to yell and curse refusing to complete the documentation.

Loatman's argument centers on credibility or lack thereof on Butler's part and a perceived premeditated and retaliatory motive by Butler due to a complaint that she had previously lodged against Butler's friend Dickerson. For the reasons cited above - I disagree.

Insubordination is defined as intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority; disrespect or use of insulting or abusive language to supervisor. Black's Law Dictionary 870 (9th ed. 2009) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Id. at 802. Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

Similarly, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971).

According to Webster's II New College Dictionary (1995) "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience.

I **CONCLUDE** that respondent has demonstrated by a preponderance of the legally competent, credible evidence that appellant committed acts of insubordination. Appellant's behavior towards her supervisor in raising her voice and use of inappropriate and derogatory language, demonstrated defiance and an utter lack of respect for authority.

PENALTY

A civil service employee who commits a wrongful act related to her duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

Respondent seeks to suspend the appellant twenty-working-days for her actions. In her thirteen years working for Woodbine, appellant has been disciplined multiple times. (J-1.) In 2006, she was disciplined for fighting or creating a disturbance and insubordination for which she received a ten-day suspension. On at least six occasions from 2007 through 2017, she was disciplined for chronic excessive absenteeism. The penalties ranged from a written warning and official reprimand to a six-day suspension January 2009. On three occasions (July 28, 2011, February 1, 2013 and May 2, 2013), she was disciplined for violation of a rule, regulation, policy procedure or administrative

decision. The penalties ranged from a final to a six-day suspension in May 2013. She has been disciplined for being absent from work without permission and/or proper notice on two occasions (October 5, 2013 and September 12, 2017) for which she received either an official reprimand or a written warning. In March 2017, she received a written warning for a serious mistake due to carelessness.

After having considered the proofs offered in this matter and the impact of the appellant's behavior upon the institution, and after having given due deference to the principal of progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon her the seriousness of her actions and conduct towards her supervisor.

As this is a second violation for insubordination, I **CONCLUDE** that the action of the appointing authority in suspending the appellant for twenty working days is reasonable and consistent with progressive discipline, and should be affirmed.

ORDER

I hereby order that the charges are sustained. Accordingly, I **ORDER** that the action of the respondent is **AFFIRMED**, and the appellant shall be suspended for twenty working days.

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

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

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

June 26, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/lam

APPENDIX

WITNESSES

For Appellant:

Shawynae Loatman

For Respondent:

Grant Robinson

Brooke Butler

EXHIBITS

For Appellant:

P-1 Residential Services Daily Tour of Duty Report (1 page)

P-2 Confidential Incident Statement of Shawynae Loatman (1 page)

For Respondent:

R-1 Final Notice of Disciplinary action (1 page)

R-2 New Jersey Department to Human Services Disciplinary Action Program (6 pages – two sided)

R-3 Confidential Incident Statement of Brooke Butler (2 pages)

Joint Exhibits:

J-1 Shawynae Loatman's Disciplinary Record (6 pages)

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Pearl Noble
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2017-2742
OAL DKT. NO. CSV 3972-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 3972-17

AGENCY DKT. NO. 2017-2742

IN THE MATTER OF PEARL NOBLE,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Andy Jong, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 21, 2018 Decided: June 22, 2018

BEFORE **JEFFREY N. RABIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 31, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 22, 2018
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 6-28-18

Date Mailed to Parties: 6-28-18

/cb

OAL DKT. NO. CSV 03972-2017 S
AGENCY DKT. NO. 2017-2742

IN THE MATTER OF
PEARL NOBLE

AND

DEPT. OF HUMAN SERVICES/
DEPT. OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL

SETTLEMENT AND LAST CHANCE AGREEMENT

J-1

The parties in this appeal, Appellant Pearl Noble ("Appellant") and Respondent Department of Human Services/Department of Health, Ancora Psychiatric Hospital ("Respondent") have voluntarily resolved all disputed matters and enter into the following Settlement and Last Chance Agreement ("Agreement"), which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **February 9, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)6 – Conduct unbecoming a public employee – Resignation not in good standing effective 11/01/16.
2. N.J.A.C. 4A:2-2.3(a)12 – Other sufficient cause – Resignation not in good standing effective 11/01/16.
3. ADMINISTRATIVE ORDER 4:08 A-3.1 Abandonment of job as a result of absence from work as scheduled without permission for five (5) consecutive days – Resignation not in good standing effective 11/01/16

4. ADMINISTRATIVE ORDER 4:08 E-1.5 Violation of a rule, regulation, policy, procedure, order or administrative decision – Resignation not in good standing effective 11/01/16

B. The parties have agreed to the following:

1. Appellant shall be reinstated to the position of Human Services Technician ("HST") at Ancora Psychiatric Hospital.
2. The Final Notice of Disciplinary Action dated February 9, 2017 shall be modified as follows: six (6) months consecutive suspension without pay (time already served).
3. Appellant waives any and all claims for back-pay or attorney's fees from Respondent.
4. Any other days from the time of the last suspension day until reinstatement shall be recorded as Approved Leave of Absence Without Pay.
5. This settlement constitutes a final warning and last chance agreement arising from Appellant's conduct in this matter. Appellant shall be subject to discharge and/or removal by Respondent for any future conduct that results in violation of <u>any</u> of the regulations, policies or procedures cited in Paragraph A of this Agreement, including any violations of Respondent's policies regarding absenteeism. There would be no negotiations regarding settlement.
6. Upon the parties' signing of this Agreement, and only after the Civil Service Commission approves this Agreement, Respondent shall begin procedures for reinstatement of Appellant.

C. Appellant agrees to withdraw her appeal and request for a hearing.

D. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

E. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, Department of Human Services/Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers

Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending worker's compensation claims.

I. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of this Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6-21-18	Pearl Noble
DATE	Pearl Noble, Appellant
6-21-18	
DATE	ON BEHALF OF Appellant
6-6-18	Mara Mahon
DATE	ON BEHALF OF Respondent

CERTIFICATION

I, Pearl Noble, being the moving party in this matter, hereby certify that I have reviewed this Settlement and Last Chance Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement and Last Chance Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement and Last Chance Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement and Last Chance Agreement voluntarily.

I also understand that if this Settlement and Last Chance Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6-21-18 — DATE

Pearl Noble — Pearl Noble

5-1-18

A-4

STATE OF NEW JERSEY

In the Matter of Malcolm Poulard
Hudson County,
Department of Family Services

CSC DKT. NO. 2018-2240
OAL DKT. NO. CSV 02417-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 3, 2018 BW

The appeal of Malcolm Poulard, Human Services Specialist 3, Hudson County, Department of Family Services, 15 working day suspension, on charges, was heard by Administrative Law Judge Ernest M. Bongiovanni, who rendered his initial decision on June 26, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 1, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. CSV 02417-18
AGENCY REF. NO. CSC 2018-2240

MALCOLM POULARD,
Appellant,
v.
HUDSON COUNTY, DEPARTMENT OF FAMILY SERVICES,
Respondent.

Seth Gollin, (Field Representative, AFSCME) appearing pursuant to N.J.A.C. 1:1-5.4(A)6 for appellant

John J. Collins, Esq., (Assistant County Counsel for Hudson County) for respondent

Record Closed: June 6, 2018 Decided: June 26, 2018

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Malcolm Poulard challenges the Final Notice of Disciplinary Action (FNDA) dated January 8, 2018, imposing a fifteen-day working suspension for chronic or excessive lateness, in violation of Civil Service Rule 4A:2-2.3(a)(2) neglect of duty, and other sufficient cause, in violation of Civil Service Rule 4A:2-2.3(a)(7).

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13 to the Office of Administrative Law, where it was filed on January 16, 2018.

The hearing was held on June 6, 2018 at which time the record was closed.

ISSUES

The issues in this case are whether there is sufficient credible evidence to sustain the charges of neglect of duty, chronic or excessive lateness, or other sufficient cause, and if sustained, whether a penalty of a fifteen-day working suspension is warranted.

UNDISPUTED FACTS

Malcolm Poulard is employed as a Hudson County Department of Family Services, as a Human Services Specialist #3. He was the subject of two prior disciplinary actions for lateness, one resulting in a one-day suspension, the other in a five-day suspension.

SUMMARY OF TESTIMONY

Respondent's Case

Roger Quinata, personnel officer for the Hudson County Department of Family Services, was the only witness for respondent. He has held the same title for ten years. He supervises staff in all matters of personnel, including issues concerning human resources, medical benefits and disciplinary matters. Part of his duties concern employee attendance, although support staff oversee and maintain these records. He is familiar with the appellant, his attendance and disciplinary history.

Mr. Quinata explained that Article XLI, entitled "Lateness," (R-2) of the local 2036 collective bargaining agreement governs the employees' duty to arrive to work on time. Under the policy, there is a five-minute grace period, so that an employee who arrives 5 minutes late or less is not marked as late. For a first infraction, an employee who is late nine or more times in a calendar quarter of a year (January-March, April-June, July-September, October-December) shall be subject to a one-day suspension. Subsequent infractions are based on "rolling quarters," that is 90 days commencing after the last instance of lateness for which the suspension was imposed. A second infraction occurs where the employee was late 9 times or more times in a quarter, subjecting the employee to a five-day suspension. A third infraction occurs where the employee is late seven or more times in a quarter, subjecting him to a fifteen-day suspension.

Mr. Quintana produced attendance records compiled for the hearing (R-3). This attendance record was based on the Department's "Kronos" system of maintaining attendance which designates the attendance by the employer issuing codes assigned to a given day, including such designations as, among others, MED/L for medical leave of absence and FAM/L for family leave, S, for sick, and AWOL for absent without leave. (R-4). Employees have access to this system and can track how their attendance is being kept by the employer. According to the attendance records, Poulard was late for work eight times between September 7, 2017 and November 15, 2017. Also, the exact amount of lateness for each instance was recorded, which ranged from the least being 9 minutes and the most being two hours.

All the instances of lateness on the Kronos record were designated by the numbers of minutes Poulard was late (as fractions of an hour or hours) and all were followed with the designation "WO" (the designations such as AWOL are abbreviated for space). Mr. Quintana explained the procedure by which the employee would call in to explain why he was late and the process of excusing lateness. In some instances, even where the employee doesn't call in, for instance when he is too sick to do so, an instance of lateness can be excused. In Mr. Poulard's case, there was no record of any request to excuse any lateness. None of the instances of lateness were excused. This was Mr. Poulard's third infraction for excessive lateness (R-6) and (R-7).

During the quarter under consideration, Mr. Poulard was covered by a leave of absence, for a six-month period, under the Family and Medical Leave Act, (FMLA) for having a serious health condition, evidenced by a statement signed by his treating doctor, allowing him to be absent, without pay, for 8 hours a day, twice a month. According to Mr. Poulard's chiropractor, his "flare ups" (the diagnosis or symptoms were not otherwise described) "can occur one time every two weeks" resulting in an "incapacity to work" for a period lasting up to two days (R-7, page 3, Addendum).

Under cross examination, Mr. Quintana was repeatedly asked if he was aware of instances where Mr. Poulard's supervisor (s) were made aware of, and/or approved of Mr. Poulard's use of his FMLA time during days when he was marked late. Mr. Quintana was unaware of any such instance. Moreover, he said, such instances could not be approved because the leave of absence permitted was for periods of eight hours a day, once every two weeks, not for the periods of work for which Mr. Poulard arrived late.

Moreover, according to Mr. Quintana, Mr. Poulard was given time between notification of a pending disciplinary charge to submit reasons for his lateness, and Mr. Poulard never explained during that period that he meant to use his FMLA time off to excuse his lateness.

Appellant's Case

Malcolm Poulard testified as follows. He has worked for the Hudson County Department of Family Services for seven years and is now a Human Services Specialist #3. He was never made aware of the lateness problem until he received the Preliminary Notice of Disciplinary Action (PNDA) (R-1).[1] He was aware that his doctor had prescribed the use of intermittent or periodic leave of absence, of 8 hours a day, every two weeks, but said he "could not afford to use" the leave in that manner as it

[1] Article XLI, paragraph 4 provides that "no disciplinary warnings will be issued for lateness."

would compel him to give up 8 hours of salary earned for those days, as FMLA is leave without pay.[2]

He said that when his FMLA began he was told by a Supervisor, Lucy Diaz, that although his doctor had authorized absences of 8 hours a day once every two weeks, he could exercise the leave for lesser periods, such as hours or minutes in a given day. He also called every time he was late or going to be late to advise, either Ms. Diaz, Susan Egbert, "Janet" or "Debbie" of the reason for lateness being attributable to his FMLA.

Under cross examination, he said that after the PNDA was taken it was "too late" for him to explain his belief that the instances of lateness were instead instances where he was using FMLA time. He said that although all the calls he made to his office during these lateness episodes to explain his reasons for being late were on his cellphone, he was not going to "go back a year" to search for records of calls. Asked if he recalled the December 2017 hearing, he stated that at the time "there was a lot going on in my life." Although he called in each time he was late owing to the use of FMLA, he believed that once the initial FMLA six-month period was approved he could "use it at my discretion" as to specific hours and dates. During the period in which the appellant is charged with excessive lateness, he took no paid sick time, vacation or personal time, as he had used all the accumulated or annual time for that period.

CREDIBILITY

When witnesses present conflicting testimony, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value that a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2D 718 (9TH Cir. 1963); see In Re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human

[2] He stated: "I do it in a way that allows me to...recuperate and make it to work in a timely manner."

experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 847, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witnesses, and credibility does not automatically rest on the party with more witnesses. In Re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middleton Twp. V. Murdoch, 73 N.J. Super 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954).

Mr. Quintana was forthright in his testimony. He was straightforward and direct in his answers. When he did not know an answer, such as in one case not knowing why on a specific date medical leave was granted, he said so. He was credible and believable. His testimony likewise was credible.

Mr. Poulard was not direct in his answers. He was at times vague and evasive. He appeared incapable of giving simple answers when called for, such as if he agreed he was late (whether excused or not) for the specific times that were recorded on the time sheets. At first, he said he didn't dispute the timesheets, then said he did dispute them. When asked if he was changing his testimony he asked to speak to his attorney before giving another answer. He also claimed he wasn't aware of the "idiosyncrasy" of having to call in to advise that he was using his FMLA time once he had an approved FMLA, yet he also said he always called in to advise when he would be late owing to the FMLA. Appellant also sidestepped the question of why he never noticed that none of his FMLA time ever appeared in the Kronos timekeeping system even though he had everyday access to these records. Specific statements he made simply defied credulity. To name a few, he claimed not to have heard anything about the charges in the Preliminary Notice of Disciplinary Action until the date of the Departmental hearing. Although he posited it that he called one of four named supervisors from his cellphone whenever he would be late because of his exercise of FMLA, regarding proof of same,

he said he would not check his cell records from "over a year ago", although the departmental hearing was only two months after the last lateness incident and the Administrative Appeal less than seven months after it. Finally, he claimed that when his FMLA was approved he was told by a supervisor, Ms. Diaz that he could use FMLA for minutes or hours over several days rather than 8 hours a day, once every two weeks. He said he had no reason to believe Ms. Diaz could not testify at the departmental or administrative hearings. He also had been through two prior disciplinary proceedings and regarding this current infraction, had representation at the departmental hearing and up to and including the administrative proceeding. Despite that background, in explaining why Ms. Diaz was not asked to be a witness, he claimed "I didn't know I could bring any witnesses."

FINDINGS OF FACTS

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**.

1. As a supervisor in the Hudson County Department of Family Services, Mr. Poulard is a full-time employee working eight hours daily beginning 8:30 A.M., Mondays through Fridays.

2. Poulard was late for work eight times in a measured "rolling quarter" or 90 days, between August 29, 2017 and November 15, 2017 as follows:

    1. September 7, 2017 - 52 minutes
    2. September 12, 2017 - 12 minutes
    3. September 14, 2017 – 9 minutes
    4. September 25, 2017 - 1 hour, 9 minutes
    5. October 2, 2017 - 11 minutes
    6. October 4, 2017 - 24 minutes
    7. November 14, 2017 – 2 hours
    8. November 15, 2017 – 21 minutes

3. Appellant has an approved leave of absence, under the Family and Medical Leave Act, for six months, which period included the rolling quarter in question, which permitted him to take off, without pay, 8 hours a day, once every two weeks.

4. During the quarter, in addition to the eight times Poulard was late, he had six additional days (August 30, September 21, September 27, October 17, October 30, November 3,) where he took approved medical leave for the entire day, and several other occasions with approved medical leave for part of the day.

5. During the quarter, the attendance records show no evidence that Mr. Poulard intended to exercise or did exercise his FMLA unpaid time.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super 583 (App. Div. 1972) Mastrobattista v. Essex County Park Comm'n., 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

The public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant

and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, 90 N.J. 550. The evidence must ne such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del Lackawanna and W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

This appeal to the Merit System Board requires that the Office of Administrative law conduct a de novo hearing and determine the appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super 143 (App. Div. 1987).

Charge 1 of the FNDA charges Poulard with "Chronic or excessive absenteeism or lateness." Courts have held that excessive absenteeism need not be accommodated and that attendance is an essential function of most jobs. Mueller v Exxon Research and Engineering Co., 345 N.J. Super 595, 605-606 (App. Div. 2001). Although Muller refers to absenteeism, logic dictates that it also applies to excessive lateness, for the impact of such conduct on the work environment is the same.

The collective bargaining agreement between the employees and employer contains a policy on lateness for employees with two prior infractions as having seven unexcused instances of lateness in a 90-day measured "rolling quarter." An instance of lateness is being late more than five minutes after reporting time. No cautionary warnings are needed before an employee can be disciplined for lateness. Here the evidence is irrefutable that the appellant was late eight times in said quarter. Although appellant had trouble admitting it, his case was not that he wasn't late but that his lateness was excused because he was exercising his FMLA leave of absence each time he was late. However, in his only instance of candor appellant stated that he couldn't "afford" to exercise his FMLA time with the prescribed 8 hours a day once

every two weeks, so that he chose to "do it in a way that allows me to... recuperate and make it to work in a timely manner." He believed he could exercise his FMLA time "at [his] discretion."

In fact, however, his approved FMLA gave him no such discretion. It was uncontested that all employees are required to call in sick when sick or as soon as they are physically able to do so, that all instances of lateness must be excused, and that employees that don't want to incur a disciplinary infraction only have a five-minute grace period from the reporting time or have an excused lateness before they are considered late. Poulard obviously was reluctant to use his FMLA time. If exercised six times in a quarter, as permitted, he would have lost 48 hours of pay, whereas he only lost approximately six hours of pay for lateness.

However, if an employee under FMLA doesn't exercise his excused leave time in accordance with the approved plan that his own doctor prescribed, he also can't expect to live by unwritten rules about FMLA substituting as lateness because a supervisor allegedly told him it was alright to do so. It flies in the face of the literal words of the approved FMLA, and it contradicts the uncontested attendance records. It strains all reason to believe his employer would reward the employee by letting him save money by being late to work. The respondent more than carried its burden of proving chronic or excessive lateness by preponderance of the credible evidence.

As to the second charge and third charges neglect of duty, and other sufficient cause, neither party presented evidence distinct from the lateness, nor made any arguments that those charges should be sustained. Accordingly, those two charges are dismissed.

There remains the issue of the imposition of a fifteen-day suspension for this infraction. In deciding which penalty is appropriate, the courts have looked toward the concept of progressive discipline. W. New York v. Bock, 38 NJ at 523-524. The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature number and proximity to prior instances of misconduct can be considered in

determining the appropriate penalty. The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In this matter, Poulard has a moderate disciplinary history, having been disciplined twice before, also for lateness. For the first infraction he received the one-day penalty prescribed in the collective bargaining agreement and for the second the prescribed five-day penalty. Both infractions took place in successive quarters in late 2016. This third infraction took place almost exactly one year after the first two. Combined lateness for all three infractions show 26 instances of lateness between October 1, 2016 and November 15, 2017. During a substantial portion of that time, Appellant has had the benefit of a requested FMLA.

The Collective Bargaining agreement provides for a 15-day suspension for a third infraction for lateness. As the aim of that policy is to provide a uniform penalty focused on one particular cause for discipline, lateness, the court should be reluctant to consider, if possible, a different penalty. Further, the policy reasonably addresses the interest of providing progressive discipline. Finally, neither of the parties argued for a different penalty if the charge was sustained.

I **CONCLUDE** by the preponderance of the credible evidence that Mr. Poulard was guilty of chronic or excessive lateness, and that the Final Notice of Disciplinary Action should be upheld. I further **CONCLUDE** that the penalty of a fifteen-day working suspension is appropriate.

ORDER

It is hereby **ORDERED** that the appellant's Appeal is **DENIED.**

It is further **ORDERED** that the appellant's fifteen-day suspension is hereby **AFFIRMED.**

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

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

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

June 26, 2018

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

APPENDIX

LIST OF WITNESSES

For Appellant

Malcolm Poulard

For Respondent

Roger Quintana

LIST OF EXHIBITS IN EVIDENCE

For Appellant

None

For Respondent

R-1 Preliminary Notice of Disciplinary Action

R-2 Article XLI – Policy on Employee Lateness

R-3 Record of Lateness from 8/31/17 to 11/15/17

R-4 Attendance Record for 2017

R-5 Record of 1st Disciplinary Action, 1-day suspension, 12/15/16

R-6 Record of 2nd Disciplinary Action, 5-day suspension 12/16/16-12/22/16

R-7 Leave History-approved FMLA, 9/7/17 to 3/7/18

R-8 Leave History-approved FMLA, 3/8/18 to 9/8/18

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Alphonze Richardson
Newark Public School District

CSC DKT. NO. 2018-1735
OAL DKT. NO. CSV 00179-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 00179-18

AGENCY DKT. NO. 2018-1735

IN THE MATTER OF ALPHONZE RICHARDSON,
NEWARK PUBLIC SCHOOL DISTRICT.

Arnold S. Cohen, Esq. for petitioner, Alphonze Richardson

Bernard Mercado, Esq., for respondent, Newark Public School District

Record Closed: July 3, 2018 Decided: July 3, 2018

BEFORE **ELLEN S. BASS,** ALJ:

On January 9, 2018, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The parties agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

July 3, 2018
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/sej

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent Board of
Education of the City of Newark

RECEIVED
2018 JUL -3 A 8:14
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ALPHONZE RICHARDSON, Appellant, vs. NEWARK PUBLIC SCHOOL DISTRICT, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV 00179-2018N AGENCY REF. NO.: 2018-1735 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Alphonze Richardson ("Appellant" or "Richardson") and Respondent Board of Education of the City of Newark, Essex County ("Respondent" or the "Board"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, his appeal and request for a hearing filed under OAL Docket No. CSV 00179-2018N, Agency Ref. No.: 2018-1735 including all claims which were raised or which could have been raised in relation thereto. Except for his current/pending unemployment claim/appeal,

2. Appellant also agrees to withdraw, with prejudice, any and all other suits or claims that he may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all of Appellant's outstanding claims against the District related to his employment. It is understood by the parties that this Settlement Agreement will serve as a formal letter of withdrawal for any other suits or claims, except for workers compensation claims, should Appellant fail to submit a formal letter of withdrawal for each suit or claim.

3. In exchange, and for good consideration as hereby acknowledged by the parties, the District will permit Appellant to resign his former position with the Board in good standing so that Appellant's separation from employment effective October 24, 2017 will be converted to and deemed to be a voluntary and permanent "Resignation in Good Standing". Appellant's personnel records will be amended to conform to the terms of the settlement. Except as required by law, upon inquiry from any third parties, the Board will only confirm Appellant's dates of employment, resignation, title and

4. Other than permitting Appellant to resign his former position, Appellant will not receive any back pay or other monies or emoluments from the District as part of this Settlement Agreement.

5. Appellant agrees that he will not apply for reemployment with the District at any time. If Appellant does apply for reemployment with the District and is approved for employment, the terms of this Settlement Agreement will control and shall be grounds for immediate termination of Appellant's employment.

6. As of the date of his resignation, all of Appellant's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

7. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including all fees, back pay, front pay or any other monetary relief, except for workers compensation claims.

8. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the Board, its Board of Education and its Board Members, Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that he may have against the District and the Released Parties relating to his employment with the District and/or separation from the District. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with and separation from the District, including but not limited to any and all rights or claims he may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or

ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with and separation from the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should enforcement of this agreement become necessary.

9. Notwithstanding Paragraph 8 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving his rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 8, Appellant agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Appellant of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient and adequate time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

11. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

12. Appellant understands, agrees to and acknowledges that he is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

13. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

14. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

15. This Settlement Agreement constitutes the full agreement among the parties and shall be construed and enforced pursuant to New Jersey Law.

16. This Settlement Agreement is subject to the approval of the undersigned representative of the Board who represents and warrants that she is authorized and empowered to sign this Agreement on behalf of the Board and is and is able to bind the Board to the terms of this Agreement. Any disapproval by the Board Representative shall not interfere with the rights of either party to pursue the matter further.

17. This Settlement Agreement is subject to final approval by Civil Service Commission and will only become final and binding on Appellant and Respondent upon the approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further

Dated: 6-7-18

ALPHONZE RICHARDSON
Appellant

Dated: 6/7/18

WILLIAM HANNAN, ESQ.
Attorney for Appellant

Dated: 6/26/18

YOLANDA MENDEZ
Assistant Superintendent, Talent

Dated: 6/7/18

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, ALPHONZE RICHARDSON, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney/representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily. I also understand that if this Settlement Agreement is approved by the Civil Service Commission, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 6-7-18

ALPHONZE RICHARDSON

8-1-18

A-5

STATE OF NEW JERSEY

In the Matter of Juan Rivera Hudson County, Department of Roads and Public Property	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NOS. 2018-506, 2018-1571 & 2018-1398 OAL DKT. NOS. CSV 12873-17, 18165-17 & 18185-17 (Consolidated)	

ISSUED: AUGUST 3, 2018 BW

The appeals of Juan Rivera, Truck Driver, Hudson County, Department of Roads and Public Property, 10 working day suspension and two 20 working day suspensions, on charges, were heard by Administrative Law Judge Susana E. Guerrero, who rendered her consolidated initial decision on June 26, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 1, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to uphold the 10 working day suspension, modify the first 20 working day suspension to a 15 working day suspension and uphold the second 20 working day suspension.

Since the penalty for Juan Rivera's first 20 working day suspension has been modified, he is entitled to five days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, he is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div.

March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although Rivera's penalty was modified by the Commission, charges were sustained and major discipline was imposed. Thus, Rivera did not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as they have failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining Juan Rivera was justified. The Commission therefore upholds the 10 working day suspension, modifies the first 20 working day suspension to a 15 working day suspension and upholds the second 20 working day suspension. The Commission further orders that Juan Rivera be granted five days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C.* 4A:2-2.10.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

IN THE MATTER OF JUAN RIVERA, HUDSON COUNTY, DEPARTMENT OF ROADS AND PUBLIC PROPERTY.

OAL DKT. NO. CSV 12873-17
AGENCY DKT. NO. 2018-506

IN THE MATTER OF JUAN RIVERA, HUDSON COUNTY, DEPARTMENT OF ROADS AND PUBLIC PROPERTY.

OAL DKT. NO. CSV 18165-17
AGENCY DKT. NO. 2018-1571

IN THE MATTER OF JUAN RIVERA, HUDSON COUNTY, DEPARTMENT OF ROADS AND PUBLIC PROPERTY.

OAL DKT. NO. CSV 18185-17
AGENCY DKT. NO. 2018-1398

Samuel B. Wenocur, Esq., for appellant Juan Rivera (Oxfeld Cohen, attorneys)

John J. Collins, Assistant County Counsel, for respondent Hudson County (Donato J. Battista, County Counsel)

Record Closed: May 24, 2018 Decided: June 26, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

This consolidated proceeding consists of three appeals by Juan Rivera (Rivera or appellant) of three suspensions imposed by the Hudson County Department of Roads and Public Property (Hudson County or respondent). Respondent issued a ten-day suspension and two twenty-day suspensions for three separate instances of alleged misconduct over the course of nearly four months. Rivera challenges the respondent's findings and the severity of the discipline imposed.

PROCEDURAL HISTORY

On or around June 28, 2017, respondent served Rivera, a truck driver, with a Preliminary Notice of Disciplinary Action (PNDA) informing him of the charges made against him for not completing his work assignment and failing to follow County procedures when picking up a county showmobile on June 11, 2017. Rivera was served with a Final Notice of Disciplinary Action (FNDA), dated August 10, 2017, which sustained all charges set forth in the PNDA. Rivera was issued a non-consecutive ten-day working suspension, from August 22, 2017 through October 25, 2017, which has since been served.

On or around October 5, 2017, Rivera was served with two additional PNDAs. One involved an incident that allegedly occurred on September 30, 2017, when appellant failed to appear for a 10:00 p.m. pick-up of a showmobile at Braddock Park. A FNDA was issued on November 30, 2017, which sustained all charges set forth in the September 30, 2017 PNDA, and appellant was assessed a twenty-day suspension to be served between March 6, 2018 and June 5, 2018. The second PNDA dated October 5, 2017, involved an incident that occurred on October 2, 2017, when appellant allegedly failed to return to work contrary to his supervisor's directive. A FNDA was issued on November 30, 2017, sustaining the charges and imposing a twenty-day suspension for the infraction, to be served non-consecutively between December 5, 2017 and March 1, 2018.

The New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, (Commission) transmitted the first matter with the FNDA dated August 10, 2017, to the Office of Administrative Law (OAL), where it was filed on September 5, 2017, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. This matter was initially assigned to the Honorable Joan Bedrin Murray, Administrative Law Judge, and the matter was reassigned to the undersigned after Judge Bedrin transferred to Tax Court.

The Commission transmitted the second and third matters, with the August 30, 2017 FNDAs to the OAL, which were filed on December 12, 2017. These matters were initially assigned to the Honorable Elissa Testa, ALJ.

On February 7, 2018, pursuant to N.J.A.C. 1:1-17.1 and 17.3, the undersigned consolidated the three matters in the interest of efficiency and economy, and pursuant to respondent's request and appellant's consent.

The consolidated hearing was held on April 19, 2018. The record closed on May 24, 2018, upon receipt of information from the parties concerning appellant's disciplinary history.

CHARGES

The sustained charges in each of the three FNDAs include: Conduct Unbecoming a Public Employee; Neglect of Duty; Insubordination; and Other Sufficient Cause.

The incident(s) giving rise to the charges listed in the August 10, 2017 FNDA, for which Rivera received a ten-day suspension, reads as follows:

> On June 11, 2017 you were scheduled to drop off and pick up the County Showmobile at Lincoln Park. This is a two man operation, the County procedure is that you are to go to the County Garage[,] pick up the showmobile with the other driver

> who is scheduled with you, then follow the same procedure when picking it up. Instead of picking the showmobile back up with the driver, you went directly to Lincoln Park in your personal car, dressed in a suit with your family, hitched the showmobile to the truck and got back in your personal car and drove off, leaving the driver by himself to return the showmobile. You submitted an overtime sheet for 4 hrs for the pickup of the Showmobile which was denied. This is a safety issue to the public and the other driver, and you did not follow procedure.

The incident(s) that allegedly took place on September 30, 2017, giving rise to the charges in a FNDA dated November 30, 2017, for which Rivera received a twenty-day suspension, reads:

> On September 30, 2017, you were assigned to pickup and transport the County Showmobile, you were advised to arrive at work at 10pm for an 11pm pickup, you failed to show up on time. Gregory McMillan at 10:30pm called Supervisor John Saar to inform him that you hadn't showed up. Sup[ervisor] Saar contacted you and you informed him you would be there in 10 mins. At 11pm you still weren't at work and Mr. McMillan was told to go home.
>
> The transport had to be rescheduled for the next day. During the winter and fall seasons the use of the Showmobiles are in high demand and the time scheduling is precise for delivery and pickup for multiple events that are on a time table. This is not acceptable. You are currently serving a 10 day suspension for another incident with Showmobile.

The incident(s) that allegedly occurred on October 2, 2017, giving rise to the charges in the second FNDA dated November 30, 2017, for which Rivera received a twenty-day suspension, reads:

> On October 2, 2017, your Supervisor was doing his rounds, drove up to your work area, where 4 employees were assigned to cut weeds and clean debris. Two of the employees were [sic] and two remained in the truck. After about 10 minutes your Supervisor approached the truck to inform you to get out of the truck and back to work. You [sic] found you on your personal cell phone while your coworkers were out working on their assigned jobs. You were told to get back to work, you told your Supervisor to wait a minute

> [and] you remained in the truck still on your cell phone for a [sic] least another 10 minutes before getting out of the truck. You have been written up several times for being insubordinate to your Supervisors.

Summary of Testimony

June 11, 2017 Incident (CSV 12873-2017)

Wally Wolfe (Wolfe), the Division Chief with the County of Hudson, Roads Divison, testified on behalf of the respondent. Wolfe explained that the County owns a thirty-foot long showmobile that is used for shows and events around the County. The showmobile is hitched to a County truck for transporting, and County Guidelines require that, for safety reasons, two County employees transport and set up the showmobile (referred to as the "two-man safety rule"). The drop-off and pick-up of the showmobile constitutes overtime when it occurs outside regular business hours. These overtime assignments are voluntary, and are offered to employees on the basis of seniority. If an employee declines the assignment, it is offered to the next employee on the seniority list. Prior to accepting the overtime assignments, employees are informed of the showmobiles drop-off and pick-up times, and location. When transporting the showmobile outside regular business hours, overtime is typically compensated in increments of four hours.

Wolfe had received complaints that employees transporting the showmobile were not following operating procedures by failing to report on time, wear the County uniform and adhere to the two-man safety rule, which caused safety concerns and risk of damage to the equipment. In response, Wolfe asked Robert Spinello (Spinello), a Traffic Supervisor, to check up on the showmobile transport scheduled for June 11, 2017.

Spinello observed the showmobile pick-up on June 11, 2017 at Lincoln Park in Jersey City, and reported his findings to Wolfe. Wolfe documented the information provided to him by Spinello in a memo to his supervisor, who then prepared the PNDA. (R-2.) In his June 13, 2017 memo, Wolf indicates that Spinello observed the

transportation of the showmobile following the completion of an event in Lincoln Park on June 11, 2017, and that:

> At approximately 11:50pm, Spinello observed a Class A operator D. Feliciano to drive from the Roads Duncan facility alone into Lincoln Park . . . . At approximately 12:00, Spinello observed the other Class A driver Juan Rivera to arrive shortly thereafter in a personal vehicle with a female within the car.
>
> He was observed out of uniform to assist Feliciano in hitching up the showmobile to the truck and then he re-entered the personal vehicle and drove away . . . . Subsequent to that, Spinello observed the single Class A driver to transport the showmobile back to Duncan/Roads and back . . . into the storage area in the yard alone without the required safety guide, (Rivera). Lastly, CDL Driver Rivera submitted a request for 8 hours overtime which is being held and denied."

Wolfe testified that County procedures require that both the driver and the guide ride in the County truck together when hauling the showmobile to and from an event. When transporting a County showmobile, County employees are also required to wear their County uniform. This is reflected in a memorandum dated June 10, 2015 to all Supervisors and Staff which states in part that Class A drivers, including operators and guides, "are to arrive on time, in uniform and operate the showmobile in a safe matter [sic] . . ." This memo was available to all employees, and it memorialized what was already Standard Operating Procedure (SOP).

Robert A. Spinello, Supervisor of Traffic Maintenance for Hudson County Roads and Bridges, also testified on behalf of the respondent. He was asked by Wolfe to check on the employees picking up the showmobile in Lincoln park at approximately noon on June 11, 2017, and he observed the pick-up at that time. The employee driving the County truck to the park to pick-up the showmobile, Feliciano, wore his County uniform. Rivera, however, was dressed in slacks and a dress shirt, not his County uniform. After they finished hitching the showmobile to the truck, Rivera got back into his minivan and drove away.

A request for eight hours of overtime was completed for the June 11, 2017 assignment, which Rivera signed. (R-5.) Spinello denied Rivera's request for overtime because Rivera did not complete his task, and violated SOP, when picking up the showmobile out of uniform and failing to accompany the driver back to the garage. An overtime sheet was later approved for Rivera, for four hours, to cover the drop-off of the showmobile at Lincoln Park. (R-6.)

Rivera has been employed by respondent since December 2005. He testified that prior to picking up the showmobile on June 11, 2017, he attended service from eleven to noon at a church near Lincoln Park. He conceded that he did not wear his County uniform when he presented to pick-up the showmobile, but that his supervisor, Saar, was aware that Rivera would attend church immediately before pick-up. Saar, did not, however, authorize Rivera to complete his assigned overtime in his church clothes or using his personal vehicle. Rivera was aware that he was required to wear his County uniform during these overtime assignments, but testified that he did not have time to change. He was also aware that, for safety reasons, two employees are required to pick-up and return the showmobile to the County garage. Rivera testified that he intended to go back to the County garage after hitching the showmobile to the County truck, but when he returned to his car after hitching the showmobile to the truck, his wife was crying in pain and he decided to take her home. Rivera never communicated with anyone at any time that he did not return to the garage because of his wife's condition.

Respondent imposed a ten-day suspension in light of his past behavior and prior discipline.

September 30, 2017 Incident (CSV 18185-2017)

John Saar (Saar), a General Roads Supervisor for Hudson County Roads Department, testified on behalf of respondent. He is charged with supervising Rivera, and prepared and signed the October 5, 2017 PNDA for an incident that allegedly occurred on September 30, 2017. At approximately 10:30pm on September 30, 2017,

Saar received a telephone call from a driver, Gregory McMillan (McMillan), who reported that he had been waiting for Rivera at the Jersey City Duncan Avenue garage for about half an hour. Rivera was scheduled to meet McMillan at the garage at 10:00 p.m. for an 11:00 p.m. pick-up of a showmobile in Braddock Park in North Bergen. This was an overtime assignment that Rivera voluntarily accepted. McMillan asked Saar to reach out to Rivera concerning his whereabouts, and when Saar called Rivera at approximately 10:30 p.m., Rivera indicated that he was on his way to the garage and that he would be there in about ten minutes.

When Rivera failed to arrive at the garage, McMillan called Saar back at approximately 11:00 p.m. and Saar gave McMillan permission to go home since Rivera had not arrived. Rivera arrived at the garage shortly after McMillan had left, and called Saar a few minutes past 11:00 p.m. Since Rivera did not present on time that evening to pick up the showmobile, the pick-up had to take place the next day (Sunday). The showmobile, which remained in Braddock Park overnight, was scheduled to be used in Kearny the following day, and since the showmobile was not returned to the Duncan Avenue garage in Jersey City on Saturday evening, respondent asserts that there was a delay in getting the showmobile to the event in Kearny the next morning.

Rivera conceded that he was aware that he was to appear at the Duncan Avenue garage at 10:00 p.m. for a scheduled showmobile pick-up on September 30, 2017. He testified that he was at his mother's house in Philadelphia that evening, and left her house at approximately 8:00 p.m. to go to the Duncan Avenue garage. He testified that it takes approximately an hour and forty-five minutes to get to Jersey City from Philadelphia, however, there was an accident on the road that evening that caused him to be late. He also testified that when Saar called him the first time, Rivera told him that he would be 15-20 minutes late. He then called Saar at approximately 10:55 when he arrived at the garage and offered to pick-up the showmobile alone but Saar told him that it would be picked up the next day. Rivera also testified that he dropped off the showmobile in Kearny the following day and that it did not arrive late to the event.

October 2, 2017 Incident (CSV 18165-2017)

Juan Rafael Vazquez (Vazquez), Assistant Supervisor at the Hudson County Roads Department, testified on behalf of respondent. Vazquez supervises Rivera and he completed and signed the statement in the PNDA dated October 5, 2017 relating to an alleged incident that took place on October 2, 2017. On October 2, 2017, Vazquez drove to a job site at Paterson Plank Road to ensure that the workers returned to the job site after lunch, which ended at noon. The truck with the four workers, including Rivera, arrived at the site from their lunch break sometime between 12:10 and 12:15 p.m. Two workers exited the truck and returned to work, however, Rivera and another employee, Keith Mortensen (Mortensen), remained in the truck. After another ten to fifteen minutes from when the truck returned to the job site, Vazquez walked over to the truck and asked Rivera and Mortensen to exit the truck and get to work. Mortensen was sleeping and Rivera was on his personal cell phone, according to Vazquez. Vazquez then watched the truck for approximately another ten minutes until Rivera and Mortensen finally exited the truck. Even after exiting the truck, Rivera remained on his phone for a few minutes before returning to work.

Vazquez wrote up Rivera and Mortenson for failing to comply with his direct order to return to work. He did not discipline the four employees for returning fifteen minutes late from lunch.

Rivera denied that he returned to work late. He testified that on October 2, 2017 he was assigned to Paterson Plank Road to clean sidewalks. Their lunch break ended at noon, and Rivera testified that they returned from lunch at 11:55 a.m., and that he stayed in the County truck while he spoke with his wife on the telephone for two to four minutes. Rivera testified that he called his wife at 11:55 a.m., and that he remained in the truck with Mortensen after the other two employees existed the truck. Rivera denies that Vazquez ever spoke to him at the job site. He asserts that he returned to work on time, and specifically at 11:59 a.m.

FINDINGS OF FACT

The parties stipulated that the following consists of Rivera's prior disciplinary history and I, therefore, **FIND** them as **FACTS**:

1. On February 28, 2012, Rivera received a three-day suspension for refusing to do work; refusing to hang up cell phone; and for not being able to be found by his supervisor. This was upheld on a mediation award.

2. On June 9, 2015, Rivera received a one-day suspension. This was upheld through an arbitrator's award.

3. On October 25, 2015, Rivera received a written warning for his failure to appear for pre-scheduled overtime.

4. On June 16, 2017, Rivera received a five-day suspension for his failure to pick-up a showmobile on pre-scheduled overtime.[1]

ADDITIONAL FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the

[1] This was processed prior to, but close in time to, the ten-day appeal here, and respondent considered this five-day suspension when imposing the ten-day suspension.

credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

While the underlying facts of what occurred on June 11, 2017 are largely uncontested, Rivera's testimony that he intended to return to the garage with his co-worker, but decided to drive his wife home when he saw her crying in pain, lacks credibility. This was not information that he shared with his co-worker or supervisor at the time, and his explanation did not appear truthful. Similarly, Rivera's explanation as to why he arrived approximately an hour late to his scheduled assignment on September 30, as well as his timing of the telephone calls with Saar and his arrival at the garage, strained credibility as contracted with Saar's account of the events that evening.

Finally, with respect to the incident of October 2, 2017, Vazquez testified convincingly concerning his recollection of the events that afternoon when he observed Rivera and his co-workers at the job site. Rivera's account, on the other hand, and particularly his timing of the events, including his testimony that he returned to work at 11:59, exactly one minute before the end of his lunch break, appeared entirely fabricated and farfetched.

Based on the documentary and testimonial evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following additional **FINDINGS of FACT**:

With respect to the June 11, 2017 incident (CSV 12873-2017), the underlying facts of what occurred are largely uncontested. Rivera arrived at the job site, at Lincoln Park, to pick-up the showmobile wearing his personal clothing, not his County uniform,

as Rivera concedes was required when dropping off and picking up the showmobile. Rivera also concedes that he did not accompany his co-worker (driver) back to the garage after hitching the showmobile to the truck. At the time, Rivera was aware of the "two man safety rule" which required him to accompany his co-worker to return the showmobile safely to the County garage. Rivera also signed and submitted an overtime sheet for the four hours of overtime when he did not complete his assignment by failing to return the showmobile to the garage with the driver.

With respect to the September 30, 2017 incident (CSV 18185-2017), Rivera volunteered to work overtime on that evening, and he knew that he was required to meet his co-worker at the County garage at 10:00 p.m. for an 11:00 p.m. pick-up of a showmobile. Rivera did not arrive at 10:00 p.m. At approximately 10:30 p.m., as Rivera had still not arrived, he received a telephone call from Saar, his supervisor, inquiring as to his whereabouts. Rivera indicated to Saar that he would be there in approximately ten minutes, but he failed to arrive until approximately 11:00 p.m. Due to Rivera's tardiness that evening, his co-worker was permitted to leave at approximately 11:00 p.m., and the pick-up could not be accomplished that evening since the job required two workers. Rivera arrived at the garage approximately an hour late and since his co-worker had been relieved, the pick-up had to take place the following morning and this created a disruption to the pick-up and drop-off schedules.

With regard to the October 2, 2017 incident (CSV 18165-2018), Vazquez testified credibly that while all four employees arrived at the job site approximately ten to fifteen minutes late, Rivera remained in the truck on his personal cell phone while Mortensen, a co-worker, slept in the truck. After approximately ten minutes after their arrival at the job site, Vazquez instructed them to exit the truck and get back to work. Rivera, however, remained on his cell phone and did not return to work for another ten minutes, approximately. While the four employees were not disciplined for returning to work fifteen minutes late, Rivera and Mortensen were disciplined for failing to comply with their supervisor's directive.

LEGAL ANALYSIS AND CONCLUSIONS

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11).

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the employee and lodge the charges. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

The first issue in this proceeding is whether a preponderance of the credible evidence establishes that the appellant's actions constitute a violation of the charges set forth in the three FNDAs. If so, the second issue is whether the violations warrant the discipline imposed.

Rivera is charged with Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in the three FNDAs. "Conduct Unbecoming" is an "elastic" phrase that encompasses conduct that "adversely affects the morale or efficiency of a governmental unit . . . [or] which has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citing In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit

standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

June 11, 2017 Incident (CSV 12873-2017)

On June 11, 2017, Rivera failed to follow County protocol by appearing at the job site out of County uniform. More importantly, after hitching the showmobile to the County truck, he failed to complete his work assignment by allowing his co-worker to return the showmobile to the County garage without him. Rivera was aware of the "two-man safety rule," which he failed to follow, causing a safety risk to the other driver. Based on my findings, including my credibility determinations, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct on June 11, 2017 constitutes Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause, and that such charges must be **SUSTAINED**.

September 30, 2017 Incident (CSV 18185-2017)

On September 30, 2017, Rivera volunteered to arrive at the County garage at 10:00 p.m. for an 11:00 p.m. pick-up of a showmobile. He failed to arrive at the scheduled time, offered no plausible or justifiable reason for arriving late, and did not complete the assigned task due to his tardiness. Rivera's arriving at the job site an hour late also impacted his co-worker's ability to complete his work, it caused a delay in the delivery of the showmobiles, and it impacted the work assignments the following day. Therefore, based on my findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct on September 30, 2017 constitutes Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause, and that such charges must be **SUSTAINED**.

October 2, 2017 Incident (CSV 18165-2017)

On October 2, 2017, Rivera, together with his co-workers, returned to the job site fifteen minutes late. Discipline was not sought for this fifteen-minute delay, however, Rivera delayed his return to work even longer. He remained sitting in the truck, on a personal phone call, for another ten minutes before Rivera's supervisor directed him to exit his truck and return to work. Rivera ignored this instruction, and remained on the phone for another ten minutes before returning to work. Based on my factual and credibility findings, I **CONCLUDE** that respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct on October 2, 2017 constitutes Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause, and that such charges must be **SUSTAINED**.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W.N.Y. v. Bock, 38 N.J. 500 (1962). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 1996 N.J. AGEN LEXIS 467 (April 16, 1996). Pursuant to Bock, concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24

Here, respondent maintains that appellant should receive discipline greater than that issued pursuant to the FNDAs, given his disciplinary history and his record of not being where he is scheduled to be and doing what is expected of him. Appellant argues that the twenty-day suspensions are excessive, particularly since they were

issued at around the same time and Rivera had no opportunity to correct his behavior before being disciplined with the second twenty-day suspension. Rivera argues that he caused no actual harm when he failed to deliver the showmobile on the evening of September 30, 2017, and the September 30 and October 2 incidences should be treated as one since they occurred so close in time and the PNDAs for both were issued on the same day. I do not agree with this position. Rivera was charged with two separate infractions on September 30 and October 2, and the fact that they occurred within two days of each other should not mitigate what would otherwise be considered an appropriate discipline for each offense.

Given Rivera's past disciplinary history and the nature of these offenses, I **CONCLUDE** that the misconduct warrants progressive discipline.

In light of appellant's prior disciplinary history over the past five years, the fact that Rivera has already been disciplined for similar infractions—i.e., failing to appear for overtime assignments and for failing to work—and because Rivera was subject to discipline on four separate occasions in 2017, I **CONCLUDE** that the ten-day suspension is appropriate and proportionate to the offense that occurred on June 11, 2017. In light of the above, I also **CONCLUDE** that a fifteen-day, rather than a twenty-day, suspension is more appropriate and proportionate in connection with the September 30, 2017 incident. Finally, given the aforementioned discipline and Rivera's documented history of failing to perform his job duties and "refusing to do work," I **CONCLUDE** that a twenty-day suspension is appropriate to the offense that occurred on October 2, 2017.

ORDER

It is **ORDERED** that the charges of Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in connection with the June 11, 2017 incident (CSV 12873-17) are **AFFIRMED**.

It is **ORDERED** that the ten-day suspension imposed by the appointing authority pursuant to the June 11, 2017 incident (CSV 12873-17) is **AFFIRMED**.

It is **ORDERED** that the charges of Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in connection with the September 30, 2017 incident (CSV 18185-17) are **AFFIRMED**.

It is **ORDERED** that the twenty-day suspension imposed by the appointing authority pursuant to the September 30, 2017 incident (CSV 18185-17) is **MODIFIED**, and it is further **ORDERED** that Rivera be suspended for fifteen days, and receive the return of appropriate benefits, in connection with the September 30, 2017 incident.

It is **ORDERED** that the charges of Conduct Unbecoming a Public Employee, Neglect of Duty, Insubordination, and Other Sufficient Cause in connection with the October 2, 2017 incident (CSV 18165-17) are **AFFIRMED**.

It is **ORDERED** that the twenty-day suspension imposed by the appointing authority pursuant to the October 2, 2017 incident (CSV 18165-17) is **AFFIRMED**.

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

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

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

6/26/18
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: 6/26/18

Date Mailed to Parties: 6/26/18

jb

APPENDIX

WITNESSES

June 11, 2017 Incident (CSV 12873-2017)

Appellant:

Juan Rivera

Respondent:

Wally Wolfe

Robert A. Spinello

September 30, 2017 Incident (CSV 18185-2017)

Appellant:

Juan Rivera

Respondent:

John Saar

October 2, 2017 Incident (CSV 18165-2017)

Appellant:

Juan Rivera

Respondent:

Juan Rafael Vazquez

EXHIBITS

June 11, 2017 Incident (CSV 12873-2017)

For Appellant:

None

For Respondent:

R-1A PNDA dated June 28, 2017

R-2A Memorandum from Wally Wolfe to Director D'Alessandro dated June 13, 2017

R-3A Memorandum from Wally Wolfe dated June 10, 2015

R-4A Photograph of County vehicle

R-5A Overtime Sheet for 8 hours of overtime

R-6A Overtime Sheet for 4 hours of overtime

R-7A FNDA dated August 10, 2017 (received after the hearing)

September 30, 2017 Incident (CSV 18185-2017)

For Appellant:

None

For Respondent:

R-1B PNDA dated October 5, 2017 (for September 30 incident)

R-2B Information Request for Use of County Show Mobile

R-3B Overtime Sheet (for September 30 overtime hours)

R-4B FNDA dated November 30, 2017 (received after the hearing)

October 2, 2017 Incident (CSV 18165-2017)

For Appellant:

None

For Respondent:

R-1C PNDA dated October 5, 2017 (for October 2, 2017 incident)

R-2C FNDA dated November 30, 2017 (received after the hearing)

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Janette Rodriguez
Middlesex County Board of Social Services

CSC DKT. NO. 2018-2150
OAL DKT. NO. CSV 02390-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02390-18

AGENCY DKT. NO. 2018-2150

IN THE MATTER OF JANETTE RODRIGUEZ, MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES.

Julia Barocas, CWA National Staff Representative, for appellant, Janette Rodriguez pursuant to N.J.A.C. 1:1-5.4(a)(6)

Arthur R. Thibault, Jr., Esq., for respondent, Middlesex County Board of Social Services (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: June 5, 2018 Decided: July 5, 2018

BEFORE **DAVID M. FRITCH**, ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law ("OAL") on February 13, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On June 5, 2018, the parties filed a fully executed Settlement Agreement in this matter. The Agreement is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

July 5, 2018
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: 7/5/18

Date Mailed to Parties: 7/5/18

/dw

J-1

SETTLEMENT AGREEMENT AND RELEASE

JANETTE RODRIGUEZ, on her own behalf and on behalf of her heirs, executors, administrators, and assigns (hereinafter collectively referred to as "Janette Rodriguez" or "Rodriguez"), and the **MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES**, on its own behalf and on behalf of its successors, assigns, departments, elected and appointed officials, employees, agents, representatives, attorneys, and insurance carriers (hereinafter collectively referred to as "Board"), have reached the within Settlement Agreement and Release (hereinafter "Agreement") in final settlement of any and all disputes between and among them from the beginning of time until the present.

NOW THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, the parties hereby agree as follows:

1. **Janette Rodriguez**, on her own behalf and on behalf of her heirs, executors, administrators, successors and assigns hereby releases and forever discharges the Board, and all related entities, its successors, assigns, departments, and its appointed officials, employees, agents, representatives, attorneys, and insurance carriers, including but not limited to their heirs, executors, administrators, successors and assigns, and the estates and/or heirs thereof from any and all claims, demands, damages, and causes of action, known and unknown, relating to or arising out of her employment or any other alleged conduct of the **Board**, and resulting from anything which has happened from the beginning of time up to the date **Rodriguez** executes this Agreement, including claims for attorneys' fees and cost of suit.

Without limiting the foregoing provision in any way, Rodriguez releases all claims, benefits, demands, damages, and causes of action relating to or arising out of her employment or any other conduct of the Board, including, but not limited to, all claims, benefits, demands, and

damages arising under Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. § 1981, et. seq.; the Civil Rights Statutes contained in 42 U.S.C. §§ 1983, 1985, and 1986 and any related laws; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq.; the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et. seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Rehabilitation Act of 1973, the False Claims Act, 31 U.S.C. § 3729, et seq.; the Occupational Safety and Health Act, 29 U.S.C. §651, et seq.,; and any other Federal, State or local laws, regulations, collective negotiations agreement, or ordinance; or claims of quasi-contract, tort, negligence, intentional act, civil conspiracy, harassment, fraud, defamation, intentional and/or negligent infliction of emotional distress; or any common law claim; or any claim for punitive damages, and any other duty or obligation of any kind or description to the fullest extent permissible by law. This Release waives any and all claims for discovery, whether asserted or unasserted, relating to materials or events that predate the execution of this Agreement. This Release shall apply to all known, unknown, unsuspected, and unanticipated claims, liens, injuries, and any contractual benefits and wages from the beginning of time up to and including the day of the date of this Agreement.

Janette Rodriguez represents that as of the date she executes this Agreement, she has not filed any charge, complaint, claim, or action with any court, organization, governmental entity, or administrative agency, or directed or authorized such charge, complaint, claim, or action to be filed on her behalf against the Board, except the appeal referred to in paragraphs 2 and 5 in this Agreement and any claim, if any, for worker's compensation benefits. Rodriguez does not hereby waive (1) her right to enforce the terms of this Agreement; (2) the right to file any

unwaivable charge or complaint (although Rodriguez does waive and release any right to recover damages or obtain reinstatement in connection with any such charge or complaint relating to anything which has happened up to the date she signs this Agreement); and (3) rights or claims that cannot lawfully be released.

2. In consideration of the above Release, the Board agrees to settle the Final Notice of Disciplinary Action dated January 19, 2018 as follows:

a. The Final Notice of Disciplinary Action will be amended to reflect that Rodriguez resigned her employment with the Board effective January 19, 2018;

b. Rodriguez will receive compensation equal to two-weeks of pay at her January 2018 rate of pay, with ordinary withholdings and deductions, except pension contributions; and

c. Rodriguez waives all other claims against the Board with regard to this matter, including any award of counsel fees or other monetary relief.

3. In consideration of the terms of this Agreement, Rodriguez acknowledges that she is not owed any further monies or benefits from the Board, whether by way of collective bargaining agreement, Board policy, or otherwise, and that she specifically waives any claim for further benefits or monies, and agrees that the Board is not obligated to make any further payment or provide any further benefit to Rodriguez.

4. In further consideration of this Agreement, Rodriguez agrees that she will not apply for or otherwise seek employment with the Board or any of its departments, affiliates or subdivisions and agrees that neither the Board nor any of its departments, affiliates or subdivisions has an obligation, whether arising under the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq., under contract or policy, or otherwise, to hire or employ her in the future.

5. In accepting this Settlement, Rodriguez acknowledges that she is waiving her right to proceed to a hearing on her appeal to the New Jersey Civil Service Commission pending at the Office of Administrative Law under Docket No. CSV 2390-2018S. Rodriguez understands that this Agreement is contingent upon the approval of the Civil Service Commission and further understands that, once approved by the Civil Service Commission, the aforementioned appeal will be deemed resolved and the matter closed. Upon approval by the Civil Service Commission, the payment referred to in paragraph 2.b. above will be made to Rodriguez.

6. Upon the request of any prospective employer seeking a reference about Rodriguez, consistent with Board policy on references, the Board agrees that it will provide only her dates of employment, her last held title, that she resigned, and her salary, if requested.

7. The parties agree to continue to explore the removal, if possible, of the PSE&G credit from Rodriguez's bill that was posted thereto in or about November, 2017. The inability or impossibility of removal of the credit shall not impact settlement of this matter however. This exploration shall survive past the date of this agreement.

8. This Agreement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement.

8. If any of the provisions, terms, clauses, or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum, such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed

severable, such that all other provisions, terms, clauses, and waivers and releases of claims and rights contained in this Agreement shall remain valid and binding upon all parties.

10. This Agreement shall inure to the benefit of, and may be enforced by, the parties hereto and all of their respective heirs, legal representatives, successors and assigns.

11. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement. The parties further agree that this Agreement shall not be filed with any court except in an action to enforce or challenge its terms.

12. Janette Rodriguez acknowledges that she has had ample time to consult with her Union, CWA Local #1032, throughout the negotiations that preceded her execution of this Agreement; that she has been represented by her Union during the entirety of this matter; that she has carefully read and fully understands all of the provisions of this Agreement, including the Release; that she is voluntarily executing this Agreement without coercion or duress and in consultation with her Union; that she has had adequate time to review this Agreement and the release contained in this Agreement; and that she understands and acknowledges that she is waiving any right to proceed to a hearing at the Office of Administrative Law by signing this Agreement.

13. The parties acknowledge that this Agreement is a joint product and shall not be construed for or against any party on the ground of sole authorship. This Settlement may be executed in multiple originals, each of which shall be considered an original instrument, but all of which shall constitute one (1) agreement, and shall bind the parties hereto and their successors, heirs, assigns, and legal representatives.

14. CWA Local #1032 hereby expressly agrees that this settlement between the Board and Rodriguez shall not be deemed a precedent or be considered a past practice and shall have no effect on future cases, be it through arbitration or otherwise, and that the contents of this Agreement shall be confidential and non-evidential in any future matter involving the Board and CWA Local #1032 and/or one of its bargaining unit members.

Date: 5-30-18

JANETTE RODRIGUEZ

ACKNOWLEDGEMENT

STATE OF NEW JERSEY :
COUNTY OF OCEAN ss.:

I certify that on 5/30, 2018, Janette Rodriguez personally came before me and acknowledged under oath to my satisfaction, that she:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

Notary Public of the State of New Jersey

CHARLENE BRAUN
ID # 2377935
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires September 12, 2018

MIDDLESEX COUNTY BOARD OF SOCIAL SERVCES

By:

Print Name: Angela B. Mackaronis

Title: Director

Date: 5/30/18

CWA LOCAL #1032
As to paragraph 13

By: _____

Print Name: Julia Bruccoli

Title: National Staff Representative

Date: 5/30/2018

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Jessica Stewart
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NOS. 2018-988, 2018-987 & 2018-942
OAL DKT. NOS. CSV 15137-17, 15138-17 & 15139-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. CSV 15137-17, CSV 15138-17 AND CSV 15139-17
AGENCY DKT. NOS. 2018-988, 2018-987 AND 2018-942

IN THE MATTER OF JESSICA STEWART, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant, Jessica Stewart (Nash Law Firm, LLC, attorneys)

Aaron J. Creuz, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 8, 2018 Decided: June 14, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeals of Jessica Stewart from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matters were transmitted to the Office of Administrative Law for determination as

contested cases on October 13, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein. (J-1).

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 14, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 6.20.18

Date Mailed to Parties: 6.20.18

tat/lam

LIST OF EXHIBITS

J-1 Settlement Agreement

JUN 08 2018

OAL DKT. NO. CSV 15137-2017, CSV 15138-2017, and CSV 15139-2017
CSC DKT. NO. 2018-988, 2018-987, and 2018-942
SETTLEMENT AGREEMENT

J-1

JESSICA STEWART
v.
DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. A **Final** Notice of Disciplinary Action dated September 18, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(4) Chronic or excessive absenteeism or lateness – removal effective September 22, 2017.
2. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee – removal effective September 22, 2017.
3. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective September 22, 2017.
4. Admin. Order 4:08 A-2.7 Absent from work as scheduled without permission but with giving proper notice of intended absence – removal effective September 22, 2017.
5. Admin. Order 4:08 A-5.3 Unreasonable failure to report delay in reporting to work as scheduled – removal effective September 22, 2017.
6. Admin. Order 4:08 A-8.3 Unreasonable excuse for lateness more than fifteen (15) minutes – removal effective September 22, 2017.

7. Admin. Order 4:08 A-9.1 Abuse of sick leave – removal effective September 22, 2017.
8. Admin. Order 4:08 E-1.5 Violation of a rule, regulation, police, procedure, order or administrative decision – removal effective September 22, 2017.

B. A **Final** Notice of Disciplinary Action dated September 18, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(4) Chronic or excessive absenteeism or lateness – removal effective September 22, 2017.
2. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee – removal effective September 22, 2017.
3. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective September 22, 2017.
4. Admin. Order 4:08 A-4.4 Chronic or excessive absenteeism from work without pay – removal effective September 22, 2017.
5. Admin. Order 4:08 A-5.4 Unreasonable failure to report delay in reporting to work as scheduled – removal effective September 22, 2017.
6. Admin. Order 4:08 A-8.4 Unreasonable excuse for lateness more than fifteen (15) minutes – removal effective September 22, 2017.
7. Admin. Order 4:08 E-1.6 Violation of a rule, regulation, policy, procedure, order or administrative decision – removal effective September 22, 2017.

C. A **Final** Notice of Disciplinary Action dated September 18, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(4) Chronic or excessive absenteeism or lateness – removal effective September 22, 2017.
2. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee – removal effective September 22, 2017.

3. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause – removal effective September 22, 2017.
4. Admin. Order 4:08 A-2.7 Absent from work as scheduled without permission but with giving proper notice of intended absence – removal effective September 22, 2017.
5. Admin. Order 4:08 A-4.2 Chronic or excessive absenteeism from work without pay – removal effective September 22, 2017.
6. Admin. Order 4:08 E-1.4 Violation of a rule, regulation, policy, procedure, order or administrative decision – removal effective September 22, 2017.

D. The parties have agreed to the following:

1. The grievant withdraws her appeals and request for a hearing with OAL Docket No: CSV 15137-2017, 15138-2017, and 15139-2017.
2. The employee shall be reinstated to the position of Practical Nurse. Reinstatement of the Employee is contingent upon her first successfully clearing any and all Department of Human Service's (re)hiring prerequisites, including, but not limited to, all background checks, fingerprinting, driver's license checks, etc.
3. The three Final Notices of Disciplinary Action dated September 18, 2017 will be modified as follows:
    a. Removal modified to reinstatement with no back pay.
4. The grievant will not receive any back pay or attorney's fees from the appointing authority.
5. Any other days from the time of last suspension day until return to work shall be recorded as Approved Leave of Absence Without Pay. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer. Grievant is not entitled to any accrued leave time while on Leave of Absence Without Pay.
6. At the date of the signing of this agreement, there are no additional actions pending against Jessica Stewart by Ancora Psychiatric Hospital.

E. Department of Human Services shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of Jessica Stewart's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver

includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6-8-18
DATE

Jessica Stewart

6-8-18
DATE

ON BEHALF OF Appellant

6-4-18
DATE

ON BEHALF OF Respondent

JUN 08 2018

CERTIFICATION

I, Jessica Stewart, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6-8-18
DATE

Jessica Stewart

Angiulo, Nicholas

From: Aaron Creuz <Aaron.Creuz@law.njoag.gov>
Sent: Thursday, July 19, 2018 2:01 PM
To: Angiulo, Nicholas; 'wnash@thenashlawfirm.com'
Cc: Messina, JoAnn
Subject: RE: IMO Jessica Stewart, Department of Human Services, Ancora Psychiatric Hospital - CSC Docket Nos. 2018-942; 2018-987; 2018-988

Good afternoon,

Thank you for your patience. We have agreed to the following language to finalize the settlement agreement:

"In the event that Appellant fails to complete all requirements imposed by this agreement, Appellant's removal shall be reinstated and this settlement agreement shall be null and void. The Respondent will issue the Appellant a Preliminary Notice of Disciplinary Action detailing the grounds upon which Appellant has failed to qualify for rehiring."

Please let us know if this is sufficient and if you have any questions.

Thank you,

Aaron J. Creuz, Deputy Attorney General
Department of Law and Public Safety, Division of Law
Employment Counseling & Labor Section
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112
Phone: (609) 376-2960
Fax: (609) 633-7434
Aaron.Creuz@law.njoag.gov

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, July 16, 2018 2:34 PM
To: Aaron Creuz <Aaron.Creuz@law.njoag.gov>; Aaron Creuz <Aaron.Creuz@law.njoag.gov>; 'wnash@thenashlawfirm.com' <wnash@thenashlawfirm.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: RE: IMO Jessica Stewart, Department of Human Services, Ancora Psychiatric Hospital - CSC Docket Nos. 2018-942; 2018-987; 2018-988

Mr. Nash and DAG Creuz:

I have not received a reply to my below e-mail.

Please advise as soon as possible.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Wednesday, June 20, 2018 3:05 PM
To: 'Aaron Creuz' <Aaron.Creuz@law.njoag.gov>; 'Aaron.Creuz@lps.state.nj.us' <Aaron.Creuz@lps.state.nj.us>; 'wnash@thenashlawfirm.com' <wnash@thenashlawfirm.com>
Cc: Messina, JoAnn <joann.messina@csc.nj.gov>
Subject: IMO Jessica Stewart, Department of Human Services, Ancora Psychiatric Hospital - CSC Docket Nos. 2018-942; 2018-987; 2018-988
Importance: High

Mr. Nash and DAG Creuz:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Jessica Stewart from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Ms. Stewart is to be reinstated. However, that reinstatement is "contingent upon her first successfully clearing any and all Department of Human Services (re)hiring prerequisites . . . ". The Civil Service Commission will not acknowledge a settlement where contingencies are not completely accounted for. In this matter, the settlement does not indicate what will happen should Ms. Stewart fail to complete all the referred to prerequisites. For example, will she then be entitled to reinstate her appeals of her removals or will she be issued new disciplinary action, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.

8-1-18

A-1

STATE OF NEW JERSEY

In the Matter of Christina Walker
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-951
OAL DKT. NO. CSV 15140-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 1, 2018 BW

The Civil Service Commission, at its meeting of August 1, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15140-17

AGENCY DKT. NO. 2018-951

IN THE MATTER OF CHRISTINA WALKER, ANCORA PSYCHIATRIC HOSPITAL .

William A. Nash, Esquire, for appellant Christina Walker

Valeria Dominguez, Deputy Attorney General, for respondent, Ancora Psychiatric Hospital (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 9, 2018 Decided: July 10, 2018

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on October 13, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties appeared on July 9, 2018, for a hearing.

The parties appeared on July 9, 2018, for the scheduled hearing date and have agreed to a settlement of all issues in dispute and prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 10, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 7-10-18

Date Mailed to Parties: 7-11-18

mph

LIST OF EXHIBITS

J-1 Settlement Agreement

OAL DKT. NO. CSV 15140-2017S
AGENCY DKT. NO. 2018-951
SETTLEMENT AGREEMENT

IN THE MATTER OF
WALKER, CHRISTINA
AND
ANCORA PSYCHIATRIC
HOSPITAL, DEPARTMENT OF
HEALTH

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final Notice of Disciplinary Action** dated **September 6, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Administrative Order 4:08 E-1.7, Violation of a rule, regulation, policy, procedure, order or administrative decision, Removal, Effective January 12, 2017		
2. N.J.A.C. 4A:2-2.3(a)6, Conduct unbecoming, Removal, Effective January 12, 2017		
3. N.J.A.C. 4A:2-2.3(a)12, Other sufficient cause, Removal, Effective January 12, 2017		

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: ~~N/A.~~ (See C.)

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: **No back pay**.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: ~~N/A~~. Authorized leave of absence without pay.

4. ~~Respondent will accept a General Resignation from Appellant, pursuant to N.J.A.C. 4A:2-6.3 effective January 12, 2017. Appellant agrees not to seek or accept employment with Respondent, or any of its subsidiaries, or with any psychiatric hospital within the Department of Health, at any time in the future.~~

C. The Appellant Christina Walker withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Health agrees ~~that the following result will occur with regard to each charge listed in Paragraph A above: **The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).**~~ to Reinstate her with a 45 day suspension (time Served) for violation of E-1 (viol. of policy) other charges are hereby dismissed. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007. Respondent agrees to dismiss three pending Removal at the departmental level. *

E. Appellant waives all other claims against Respondent Department of Health with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

* #5581 (A-2.6, A-5.1, A8.3, E1.5) } Removal
# 5247 (A2.5, A1.3)
# 11928 (E1.8)

F. Except for the assessment of Christina Walker's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions. This Settlement agreement shall constitute a last chance agreement. Any future violations of attendance or policy violations shall result in Removal.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7-9-18
DATE

Christina Walker, Appellant

7-9-18
DATE

ON BEHALF OF Appellant

7-9-18
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Christina Walker, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7-9-18 — DATE

Christina Walker — Christina Walker

8-1-18

A-6

STATE OF NEW JERSEY

In the Matter of Mary Wyville
Hudson County, Department of
Family Services

CSC DKT. NO. 2018-3060
OAL DKT. NO. CSV 06719-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 3, 2018 BW

The appeal of Mary Wyville, Human Services Specialist 1, Hudson County, Department of Family Services, 10 working day suspension, on charges, was heard by Administrative Law Judge Joann LaSala Candido, who rendered her initial decision on June 29, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 1, 2018, accepted and adopted the Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission dismisses the above appeal based on appellant's failure to appear.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
44 S. Clinton Ave.
P. O. Box 312
Trenton, New Jersey 08625-0312

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. CSV 06719-18
AGENCY REF. NO. 2018-3060

MARY G. WYVILLE,
Petitioner,
v.
HUDSON COUNTY DEPARTMENT OF FAMILY SERVICES
Respondent.

Mary G. Wyville, petitioner, failed to appear

John A. Smith, Esq. on behalf of respondent (Office of the County Counsel, Hudson County Department of Law)

Record Closed: June 28, 2018 Decided: June 29, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

Petitioner, Mary Wyville appeals from a 10 working day suspension with the Hudson County Department of Family Services. The matter was transmitted to the Office of Administrative Law on May 10, 2018, for determination as a contested case.

A telephone prehearing was scheduled for May 31, 2018. Notices were sent to the parties on May 16, 2018. The Notice requested that petitioner contact OAL to provide a telephone number where she can be reached for the call. Petitioner failed to provide a telephone number prior to the conference. On June 5, 2018, an in person prehearing was scheduled for June 27, 2018 at 1:30p.m. The notice clearly stated:

> "If you do not attend the prehearing conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party."

Petitioner failed to appear for the in person prehearing.

Accordingly, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

June 28, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties:

ljb

A-2

STATE OF NEW JERSEY

In the Matter of Albert Alvarado
City of Vineland, Department of
Public Works

CSC DKT. NO. 2016-3504
OAL DKT. NO. CSV 05861-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 17, 2018 BW

The appeal of Albert Alvarado, Laborer 1, City of Vineland, Department of Public Works, removal effective December 2, 2015, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on July 11, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 15, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Albert Alvarado.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05861-16
AGENCY DKT. NO. 2016-3504

IN THE MATTER OF ALBERT ALVARADO, CITY OF VINELAND, DEPARTMENT OF PUBLIC WORKS.

Kevin D. Jarvis, Esq., for appellant, Albert Alvarado (O'Brien, Belland & Bushinsky, LLC, attorneys)

Michael E. Benson, Esq., for respondent, City of Vineland, Department of Public Works (Buonadonna & Benson, attorneys)

Record Closed: May 30, 2018 Decided: July 11, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Albert Alvarado (appellant, Alvarado) appeals the removal from his job as a Laborer 1 by the City of Vineland (appointing authority, Vineland) for violations of N.J.A.C. 4A:2-2.3(a)(5) (conviction of a crime); N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause), specifically, interfering with the duties of a police officer; refusing the lawful order of a police officer; and based on City Policy 3140 Conduct: (1) Neglect of Duty; (7) Disorderly Conduct; (8)

Conviction of a Crime; (9) Violation of a Statute, Rule or Regulation Relating to Public Employment; (12) Conduct Unbecoming a Public Employee; (15) Failure to Follow Work Rules; (16) Failure to Follow Safety Rules; (18) Putting Life or Self, Co-Workers or Public in Danger. The charges arise from appellant's actions while on duty on July 17, 2015.

PROCEDURAL HISTORY

On December 2, 2015, Vineland served on appellant a Preliminary Notice of Disciplinary Action for removal of appellant effective December 1, 2015. On February 12, 2016, a departmental hearing was held. Vineland issued a Final Notice of Disciplinary Action sustaining the charges on March 18, 2016. Appellant filed an appeal with the Civil Service Commission on or about March 30, 2016. The matter was filed with the Office of Administrative Law (OAL) as a contested case on April 15, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on June 15, 2017, and September 30, 2017. The record closed on May 30, 2018, after the parties submitted post hearing briefs.

FACTUAL DISCUSSION

The following facts are not in dispute in this matter and as such I **FIND** them as **FACT**:

Appellant was employed as a laborer by Vineland. On July 17, 2015, he was working on a road crew repairing pot holes at the intersection of eastbound Landis Avenue and southbound Mill Road at approximately 1:30 pm with another laborer, Kyle Suprun. Another crew was working on eastbound Landis Avenue doing sink hole repair under the supervision of then Acting Director of Public Works, Joseph DiCriscio. There was no signage relating to either work site. Vineland Police Sergeant Baron McCoy (now deceased) and then Officer Nick Dounoulis (now Sergeant) were both members of the Traffic Unit. On July 17, 2015, while returning to the police department from lunch, Dounoulis and McCoy initially observed the road crew of DiCriscio and advised him of the signage problem. DiCriscio advised that they had just finished the street repair and complied with the officers' instructions to wrap up the work site without incident. As the

officers continued eastbound on Landis Avenue, they encountered the other road crew at the intersection of Landis and Mill Road. An encounter ensued between the officers and appellant which resulted in appellant being arrested and charged with Obstructing Highways and Other Public Passages, N.J.S.A. 2C:33-7B(1), and Obstructing Administration of Law, N.J.S.A. 2C:29-1. A municipal court trial was conducted on November 16, 2015, and appellant was convicted of violating the charge under 2C:33-7B(1) and was fined. During the hearing before this tribunal, appellant was ordered to sequester his witness, Kyle Suprun. Although the witness was not in the court room on the first hearing day, appellant secretly recorded the proceedings and shared the testimony with Mr. Suprun who had not yet testified. When these circumstances were disclosed and after counsel had an opportunity to brief the issue, I ordered that Mr. Suprun's testimony be barred.

Testimony

Lieutenant John McCann testified on behalf of Vineland. He is a twenty-two-year veteran with Vineland Police Department (VPD) and served as training lieutenant for a year and a half on July 17, 2015. On that date, McCann responded to the scene of appellant's arrest to investigate a complaint filed by Suprun against McCoy. He prepared a supplemental report. (R-1.) When McCann arrived at the scene, no one was present. He went to a nearby convenience store and was approached by an individual who identified himself as Joe Kubiak. Mr. Kubiak advised McCann that he observed the road crew site at the intersection of Landis and Mill Road and also observed a police officer and road crew member yelling at each other. Mr. Kubiak observed appellant directing traffic at the site in a safety shirt and a whistle. Appellant waived Mr. Kubiak through the intersection and nearly caused an accident. McCann is familiar with the intersection of Landis Avenue and Mill Road and explained that it is a high volume intersection that has been the location of many serious motor vehicle accidents.

Joseph DiCriscio next testified on behalf of Vineland. He has since retired after working for Vineland for forty-four years. On July 17, 2015, he was serving as Acting Director of the Public Works Department and had been repairing sink holes with a small crew. Between 1:00 and 1:30 pm, DiCriscio's crew were working in the outside eastbound

lane of Landis Avenue when they were visited by Seargent McCoy and Officer Dounoulis. DiCriscio was advised that the work site was without any signage and he agreed to break down the work site within five to ten minutes. This work site was not in an intersection and DiCriscio did not consider it a traffic obstruction. He complied with the police directions and the site was broken down within ten minutes. He was not aware at the time that appellant's work crew was approximately 300 feet ahead of them.

While heading to another job site with his crew, DiCriscio arrived at appellants job site and noticed the same officer interacting with appellant and Suprun. Appellant was noticeably angry and was pacing by the police car repeating "This is bullshit." McCoy told appellant to remove the traffic cones that were in the street and move the dump truck that was blocking the intersection off of the road. Based on the location of the work site and the dump truck, vehicles were unable to make a right from eastbound Landis Avenue onto Mill Road. The intersection in question is very busy. Appellant had a whistle around his neck and was directing traffic. When McCoy instructed appellant to remove the traffic cones, he refused. DiCriscio also instructed appellant to remove the cones but he may not have heard him because appellant was angry. McCoy then got out of the police vehicle and threw the cones off of the roadway onto the curb approximately twenty feet away. Appellant went to the center of the roadway and started taking photos. McCoy told him several times to get off of the roadway and when he refused, appellant was arrested. Dicriscio noted that appellant was somewhat out of control and was not listening to the police but he did not feel that appellant's work site was a safety concern.

Sergeant Nick Dounoulis next testified on Vinelands behalf. He has been employed with VPD for seventeen years, five as a special police officer and twelve as a full-time police officer. On July 17, 2015, he was working under McCoy in the Traffic Unit. The Traffic Unit's primary function is to ensure the safety of the roadway. He has received training and holds certificates in traffic safety. (R-2.) McCoy had also taken traffic safety courses and was the VPD Chaplain and pastor for his church. Dounoulis worked directly with McCoy for seven years and had never known him to use obscene language and never heard McCoy swear.

Part of the Traffic Unit's duties is to check construction sites. On July 17, 2015, he and McCoy were returning to the police department after having lunch and first come upon DiCriscio's work site. McCoy told DiCriscio that his work site was not set up properly because there were no advance warning signs of the road work and DiCriscio agreed to break down the work site without any incident. The officers could not see appellant's work site from DiCriscio's. After they left DiCriscio's work site, they came upon appellant's work site. There were no advance warning signs and appellant was attempting to direct traffic in an unsafe manner. The intersection of Landis Avenue and Mill Road is a very high traffic area with heavy commercial traffic. There was more congestion at appellant's work site than at DiCriscio's. Appellant's dump truck was partially into the intersection and blocking one lane on Landis Avenue and Mill Road. McCoy felt it necessary to intervene to remove the dangerous condition. He has shut down many work sites and has never before or since been met with non-compliance. He first spoke to Suprun and advised him they needed to shut down the job site. Suprun became defensive and explained that he was doing his job. Appellant involved himself in that conversation and started yelling, swearing and got out of hand. Appellant stated "This is bullshit" several times. McCoy gave appellant three of four opportunities to comply with his directions and told appellant that if he did not comply, he would be arrested. Appellant did not follow McCoy's directions. Instead he walked into the intersection and started taking photos. McCoy arrested appellant while he was standing in the box of the intersection. Appellant was not charged with having an improper work site. The entire incident lasted about ten minutes.

Albert Alvarado, appellant, testified on his own behalf. He was employed as a laborer and was primarily repairing potholes on the streets of Vineland. He has received training for his job and has completed safety courses which include the use of cones and signage requirements as well as the use of hand signals for directing traffic. On July 17, 2015, appellant was instructed by his supervisor to fill potholes along Landis Avenue with his co-worker Kyle Suprun. They started working at the intersection of Landis and Mill Road around 1:30 pm and set up a short taper of cones to block one lane of travel along Landis Avenue. No advance warning signage was utilized and the work was conducted in unison with the traffic lights at the intersection. By the time the police arrived at the scene, they had already completed filling the potholes at the

location. McCoy immediately started yelling at them and asked where the signs were. Appellant explained to McCoy that they did not need signs. McCoy threatened to shut them down and appellant suggested to the officer that he was out of control and unprofessional. DiCriscio was present when appellant was speaking to McCoy. He did not remove the cones when instructed by McCoy because they police vehicle was still at the scene and it would have been unsafe without the cones. Appellant feels he was arrested for taking photos. He admits that he had a whistle for safety but did not attempt to direct traffic. He asserts that he did not argue with the officer or raise his voice and did not make any statements to provoke the officers. He did not curse or yell at McCoy.

Prior to conducting a legal analysis and making conclusions, it is necessary to address the arguments of the parties regarding the credibility of the testimony. "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . trier of fact, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact-finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521–22 (1950); see, D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

The present matter revolves entirely around what appellant said and did when the police arrived at his work site. Although McCoy is now deceased it is clear from the other

witnesses that testified that appellant had a heated verbal confrontation with McCoy. Both DiCriscio and Dounoulis testified that appellant was yelling and both recall him using the phrase "this is bullshit" several times. This is also corroborated by the statements made to McCann by the individual he spoke to in the convenience store, Mr. Kubiak, who indicated that appellant was yelling. Appellant, on the other hand asserts that he did not argue with the officer or raise his voice and did not make any statements to provoke the officers. He did not curse or yell at McCoy. I deem appellant's version of the incident is not credible. Not only does his testimony not jive with the others in this case, he also was convicted of violating the charge under 2C:33-7B(1) and was fined in municipal court. Furthermore, appellant's credibility is tainted by his attempt to influence his witness by recording an entire day of testimony and then playing that testimony for his witness. Such action suggests that appellant is inclined to do or say anything to support his version of the incident.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following additional **FACTS**: Appellant had a heated verbal confrontation with McCoy and stated "this is bullshit" several times. McCoy gave appellant three of four opportunities to comply with his directions and told appellant that if he did not comply, he would be arrested. Appellant did not follow McCoy's directions, instead he walked into the intersection and started taking photos. McCoy arrested appellant while he was standing in the box of the intersection. Appellant was not charged with having an improper work site. Appellant was angry, out of control and was not listening to the police.

LEGAL ANALYSIS AND CONCLUSIONS

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on

appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The respondent has sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(5) (conviction of a crime); N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee); and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause), specifically, interfering with the duties of a police officer; refusing the lawful order of a police officer; and based on City Policy 3140 Conduct: (1) Neglect of Duty; (7) Disorderly Conduct; (8) Conviction of a Crime; (9) Violation of a Statute, Rule or Regulation Relating to Public Employment; (12) Conduct Unbecoming a Public Employee; (15) Failure to Follow Work Rules; (16) Failure to Follow Safety Rules; (18) Putting Life or Self, Co-Workers or Public in Danger.

With regard to the charge of conviction of a crime, appellant was convicted of obstructing highways and other public passages, a petty disorderly offense. He was charged with violating both N.J.A.C. 4A:2-2.3(a)(5) and City Policy 3140(8). Appellant's petty disorderly persons offense is not "a conviction of a criminal act under N.J.A.C. 4A:2-2.3(a)(5) as disorderly persons offenses are considered petty offenses and are not crimes within the meaning of the Constitution of the State. See, N.J.S.A. 2C:1-4b. Accordingly, I **CONCLUDE** that the appointing authority has not met its burden in demonstrating support to sustain a charge of conviction of a crime pursuant to N.J.A.C. 4A:2-2.3(a)(5). Therefore, the charge of violation of N.J.A.C. 4A:2-2.3(a)(5) is hereby **DISMISSED**. However, the City's Conduct Policy 3140(8) provides that discipline may be given for "conviction of any criminal act or offense." A forfeiture of public office under N.J.S.A. 2C:51-2 does not require a conviction of a crime, rather the conviction of an "offense" is sufficient. James Slater v. Sheriff's Office of Bergen County, OAL Dkt. No. 7465-91. N.J.S.A. 2C:1-14(k) defines an "offense" as a crime, disorderly persons offense or petty disorderly persons offense. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of conviction of any criminal act or offense pursuant to the City's Conduct Policy 3140(8). The charge of violation of the City's Conduct Policy 3140(8) is hereby **SUSTAINED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). To the extent that the appellant is charged with

violation of the City's Conduct Policy 3140(12), which addresses unbecoming conduct, consideration of such violation will be addressed in concert with the current analysis.

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atlantic City, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. In re Emmons, 63 N.J. Super. at 140.

In the present matter, the record reflects that appellant had a heated verbal confrontation with McCoy and stated "this is bullshit" several times in the presence of the public. Appellant was angry, out of control, and was not listening to the police. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of conduct unbecoming a public employee. Charges of violations of N.J.A.C. 4A:2-2.3(a)(6) and the City's Conduct Policy 3140(12) are hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Specifically, appellant is charged with violations of interfering with the duties of a police officer; refusing the lawful order of a police officer; and based on City Policy 3140 Conduct: (1) Neglect of Duty; (7) Disorderly Conduct; (8) Conviction of a Crime; (9) Violation of a Statute, Rule or

Regulation Relating to Public Employment; (12) Conduct Unbecoming a Public Employee; (15) Failure to Follow Work Rules; (16) Failure to Follow Safety Rules; (18) Putting Life or Self, Co-Workers or Public in Danger.

Appellant's conduct was such that he violated this standard of good behavior. The City's Conduct Policy concerning Failure to Follow Work Rules, Failure to Follow Safety Rules, Neglect of Duty and Putting Life or Self, Co-Workers or Public in Danger were all implicated during appellant's confrontation with the VPD. Appellant, as a public employee, has an obligation to obey the law while performing his job. That includes following the directions of police officers within their jurisdiction. He refused to take down the work site after the VPD determined it to be unsafe and a danger to the traveling public in violation of appellants duty to follow the commands of the VPD and his supervisor, Joseph DiCriscio. As such, I **CONCLUDE** that appellant's actions fit this charge. Charges of violations of N.J.A.C. 4A:2-2.3(a)(12) and interfering with the duties of a police officer; refusing the lawful order of a police officer; and based on City Policy 3140 Conduct: (1) Neglect of Duty; (7) Disorderly Conduct; (8) Conviction of a Crime; (9) Violation of a Statute, Rule or Regulation Relating to Public Employment; (12) Conduct Unbecoming a Public Employee; (15) Failure to Follow Work Rules; (16) Failure to Follow Safety Rules; (18) Putting Life or Self, Co-Workers or Public in Danger are hereby **SUSTAINED**.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J.

Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

As set forth is appellant's disciplinary record, attached to Vineland's post hearing submission and now moved into evidence as B-1 through B-8, appellant has exhibited insubordinate, disobedient, vulgar and threatening conduct during his employment. On September 25, 2015, appellant created a disturbance to the point of upsetting the City Personnel Manager and staff uneasy and uncomfortable. Appellant was suspended for five days without pay which was reduced to one day if he agreed to take an anger management class. (B-1.) Appellant did not engage in the anger management course and the five day suspension remained. (B-2.) On September 16, 2015, appellant falsely claimed to be on light duty and refused to work. He was sent home without pay and disciplined with a reprimand. (B-3.) On June 11, 2015, appellant was given a reprimand for disobedient and insubordinate behavior towards a supervisor by refusing to perform weed waking. Instead, appellant said to the supervisor to "get some fucking goats." (B-4.)

On April 23, 2010, appellant was suspended indefinitely without pay for having an argument with a City contracted doctor when the doctor refused to prescribe him Percocet. Appellant became enraged and disrespectful. (B-6.) Following his April 2010 suspension, appellant harassed Public Works employees demanding his return to work and irately yelled and cursed at staff. (B-5.) As far back as 1982, appellant engaged in insubordinate and disrespectful conduct towards authority by cursing at a Forman (B-7) and engaging in arguments at work. (B-8.) After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein and in light of the seriousness of the offense and in consideration of appellant's prior disciplinary record, I **CONCLUDE** that the removal of the appellant is appropriate.

ORDER

Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**, as set forth above.

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

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

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

July 11, 2018
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: July 11, 2018

Date Mailed to Parties: July 11, 2018

/dm

APPENDIX

LIST OF WITNESSES

For Appellant:

Albert Alvarado

For Respondent:

Lieutenant John McCann
Joseph DiCriscio
Sergeant Nick Dounoulis

LIST OF EXHIBITS

Joint Exhibits:

J-1 Final Notice of Disciplinary Action, dated February 12, 2016
J-2 Preliminary Notice of Disciplinary Action, dated December 2, 2015

For Appellant:

P-1 Google Maps of Area
P-2 Photos of cones
P-3 Appellant's safety course completion records
P-4 Work Zone Slides
P-5 Statement of Joseph DiCriscio
P-6 Articles of other incidents

For Respondent:

R-1 McCann Supplemental report, dated July 17, 2015

R-2 Work Zone safety certificate of Nicholaos Dounoulis, dated April 12, 2013

R-3 McCoy incident report, dated July 17, 2015

R-4 a-d Google Photos

R-5 Complaint against appellant, dated July 17, 2015

R-6 Transcript of Municipal Court Docket, dated December 15, 2015

B-1 - B-8 Disciplinary History of Appellant

5-15-18

A-1

STATE OF NEW JERSEY

In the Matter of Silas Cardoza
Middlesex County, Department of Corrections

CSR DKT. NO. 2018-1990
OAL DKT. NO. CSV 01521-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlements in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 01521-18

AGENCY DKT. NO. n/a

IN THE MATTER OF
SILAS CARDOZA, MIDDLESEX COUNTY
(DEPARTMENT OF CORRECTIONS).

Peter B. Paris, Esq., for appellant (Law Office of David Beckett, attorneys)

Benjamin Leibowitz, Senior Deputy County Counsel, for respondent Middlesex County (Thomas F. Kelso, County Counsel)

Record Closed: July 18, 2018 Decided: July 19, 2018

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

This matter, concerning whether appellant engaged in the alleged conduct sufficient to sustain the charges, and if so, what penalty is appropriate, was transmitted to the Office of Administrative Law on January 25, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Appellant waived the provisions of N.J.S.A. 40A:14-201 from April 16, 2018, until the scheduled start of the evidentiary hearing on July 18, 2018. The parties settled this matter on July 18, 2018, and have filed a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement, attached hereto as Exhibit J-1.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 19, 2018
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: 7-20-18

Date Mailed to Parties: 7-20-18

nd

APPENDIX

EXHIBITS

Jointly Submitted

J-1 Settlement Agreement

Silas Cardozo and Middlesex County
DIct No: CSR 1521-2018 5

SETTLEMENT AGREEMENT

The Parties have reached a settlement agreement in the above captioned matter under the following terms:

1. Appellant Silas Cardozo agrees to plead guilty to Charges 1 (other sufficient cause: unauthorized use of force) and Charge 2 (neglect of duty: unsupervised handcuffed inmate).

2. The County agrees to dismiss Charge 3 (conduct unbecoming).

3. The County agrees to reduce the removal to a 90-day suspension without pay and to reinstate Appellant effective July ~~25~~ 22, 2018.

4. The 90-day suspension was served from Dec 12, 2017 through April 13, 2018. Appellant will be considered to be on unpaid

administrative leave from April 14, 2018 through July ~~22~~ 21, 2018.

5. The parties agree that Appellant waives any back pay or other ~~benefits.~~ reimbursement for benefits.

6. The Appellant will be subject to a "last chance agreement" under which ~~the county~~ removal shall be the penalty if Appellant is found guilty of engaging in the same or similar conduct to which he has pled guilty in this matter. Appellant retains the right to contest such allegations pursuant to Civil Service Rules and appeals. This "last chance agreement" shall be in effect from July 18, 2018 through July 18, 2020.

Dated: July 18, 2018

Silas Cardozo

Captain Robert Gucci
Middlesex County

X-15-17

A-3

STATE OF NEW JERSEY

In the Matter of Erica Davis-Smith
Mercer County,
Department of Public Safety

CSC DKT. NO. 2013-3349
OAL DKT. NO. CSV 16665-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 17, 2018 BW

The appeal of Erica Davis-Smith, County Correction Officer, Mercer County, Department of Public Safety, removal effective November 15, 2012, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on July 17, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 15, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. However, the Commission modifies the removal to a resignation in good standing.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF ERICA DAVIS-SMITH, MERCER COUNTY DEPARTMENT OF PUBLIC SAFETY.

OAL DKT. NO. CSR 16665-16

CSC DKT # 2013-3349

Jason LeBoeuf, Esq., for appellant Erica Davis-Smith

Kristina E. Chubenko, Assistant County Counsel, for respondent Mercer County Department of Public Safety (Arthur R. Sypek, Jr., County Counsel)

Record Closed: June 26, 2018 Decided: July 17, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

Erica Davis-Smith was employed by the Mercer County Department of Public Safety/Corrections as a County Corrections Officer. She began her employment on August 19, 2002, and on April 23, 2012, she suffered an injury at work and was placed on workers' compensation. She was seen several times by Dr. Hornstein. On July 2, 2012, Dr. Hornstein referred her for a Functional Capacity Examination (FCE). This examination was conducted on July 5, 2012, by Kinematic Consultants, Inc. (Kinematic). The FCE report advised that the examinee had demonstrated ability for light-medium category work, with restrictions on activities. On July 16, 2002, Dr. Hornstein concluded that the appellant had reached maximum medical improvement (MMI). On November 21, 2012, the County issued a Preliminary Notice of Disciplinary

Action, advising Ms. Davis-Smith that she was to be removed from her position due to her inability to perform duties. N.J.A.C. 4A:2-2.3(a)3. On May 23, 2013, the appointing authority issued a Final Notice of Disciplinary Action, removing Ms. Davis-Smith from her position, effective as of November 16, 2012, due to her inability to perform her duties. Ms. Davis-Smith filed an appeal of the appointing authority's action with the Civil Service Commission and the New Jersey Office of Administrative Law (OAL). The parties are unclear as to precisely why that appeal was not initially docketed and why for some reason the contested case was not filed at the OAL until November 2, 2016. The case was initially assigned to Hon. Laura Sanders, Chief ALJ, and when Judge Sanders left the OAL, it was reassigned to Hon. Patricia Kerins, ALJ. Early attempts to schedule the case for hearing apparently were unsuccessful due to witness availability issues. On March 23, 2013, the respondent filed a motion for summary decision, as permitted by N.J.A.C. 1:1-12.5. Ms. Davis-Smith filed a response on April 27, 2018. The County replied on May 1, 2018. Due to the heavy calendar of cases pending before Judge Kerins, the matter was transferred to this administrative law judge, sitting on recall. Oral argument was conducted by telephone conference on June 26, 2018.

Essentially, the appointing authority seeks summary decision based on the allegedly undisputed fact that as of the date of the Preliminary and, most significantly, the Final Notices, Ms. Davis-Smith was undisputedly incapable of performing all of the required duties of a corrections officer, as they are detailed in a job specification entered into evidence for the motion. In response, Ms. Davis-Smith, while not denying that as of those dates she had not been cleared to perform all duties of the position, nevertheless offers additional facts which she believes indicate that the County acted prematurely when it declared her at maximum medical improvement and then concluded that she was unable to perform her duties. According to a Certification filed by Ms. Davis-Smith in response to the motion, when she was advised that she had failed the FCE and was told that surgery would not help her to fully recover, she sought a second opinion from a specialist, an orthopedist at Mercer-Bucks Orthopaedics, who advised her that she had torn the medial meniscus in her left knee and that, despite what she says was Dr. Hornstein's advice that her problem could not be corrected, surgery could be performed to correct the injury. Surgery was performed in January 2013. Following rehabilitation,

she underwent another FCE in October 2013, which cleared her for "medium-heavy" work. Despite this, she was not returned to her position. According to her Certification, her treating physician informed the County that she was able to resume work on October 18, 2013, without restrictions.

The circumstances under which Ms. Davis-Smith underwent this second FCE were the subject of some discussion in both the briefs and the oral argument. As part of her submission in opposition to the motion, Ms. Davis-Smith included a Settlement Agreement and General Release, a document which was signed on October 9, 2013, by both parties. In this Agreement, the parties agreed that Ms. Davis-Smith had been on unpaid leave since November 2012, due to her admitted inability to perform the duties and that they would like to amicably resolve the matter. It was agreed that she would undergo a functional capacity examination on October 10, 2013. The purpose was to determine whether she was physically able to fully perform the essential job functions with no restrictions for the position of corrections officer. If Kinematic determined that she could fully perform the physical demands, specifically, "(heavy category work) with no restrictions or limitations," she would be returned to work following a return-to-work physical and drug screen. She would then withdraw the appeal pending before the OAL. However, if the determination were that she could not fully perform the physical demands without restriction the parties would proceed with the matter pending before the OAL.

The County takes the position that it is inappropriate to make any reference to this settlement agreement in connection with the determination of the motion for summary decision. It notes that settlement discussions are generally not admissible evidence, as "Offers of settlement, proposals of adjustment and proposed stipulations shall not constitute an admission and shall not be admissible." N.J.A.C. 1:1-15.5. Alternatively, even if one were to consider the results of this second FCE to be relevant, the results did not clear Ms. Davis-Smith for the performance of all of the duties of a corrections officer and therefore the provision that would require her to be returned to that position did not become operable. All that said, the County's primary position is that the only really relevant fact is that, as of the date of the removal, Ms. Davis-Smith

was unable to perform all of the duties of her position, a fact which Ms. Davis-Smith does not deny. The County cites what it argues is an analogous case, In the Matter of Kamal Abdelall, Bayonne Housing Authority, \http://njlaw.rutgers.edu/collections/oal/final/csv12994-11.pdf, where a laborer had been injured on the job in February 2011. An FCE was performed on June 9, 2011, and on July 14, 2011, the orthopedic doctor placed the appellant at MMI, with permanent restrictions for light/medium category work with occasional lifting up to thirty-five pounds. The Housing Authority issued a Preliminary and a Final Notice of Disciplinary Action and removed Abdelall for inability to perform duties, effective as of August 5, 2011. Eighteen days later, on August 23, 2011, the appellant's personal physician determined that he was able to return to full duty with no restrictions. Concluding that the effective date of removal had already occurred prior to the date on which the personal physician had cleared the appellant to return to full duty with no restrictions, the administrative law judge upheld the removal. The sole issue was whether the appellant was fit for duty as of the date of removal. As a result, the physician's clearance permitting a return-to-work after the date of removal was irrelevant. The Civil Service Commission adopted the judge's decision, nevertheless noting that the removal did not constitute a disciplinary action and that the termination should be changed to a resignation in good standing, citing Newark v. Bellezza, 159 N.J. Super. 123, 128 (App. Div. 1978).

In opposing this motion, appellant first argues that the County has relied solely upon hearsay evidence in support of its motion. She argues that in respect to the determination of the motion for summary decision, reliance upon hearsay is inappropriate, as the judge is required to makes credibility determinations to determine the appropriate weight to give to the hearsay evidence. As an ultimate finding must be based upon competent evidence and not based solely on hearsay, N.J.A.C. 1:1-15.5 (a) and (b), it would be inappropriate to grant summary decision in this case, where no such competent evidence has been offered in respect to the motion.[1] In particular, counsel

[1] First, evidence submitted in support of a motion for summary judgment must be admissible. Sellers v. Schonfeld, 270 N.J. Super. 424, 427, 637 A.2d 529 (App. Div. 1993). Compare R. 1:6-6 (the facts asserted in an affidavit in support of a motion must be "admissible in evidence"). [Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995) (Pressler, J.A.D.)]

for Ms. Davis-Smith notes the County relies upon a "blanket statement" that it does not have light duty positions at the Corrections Center. That statement is contained in a Certification provided by Ollie Young, an Assistant Personnel Director with the County of Mercer since 2008. Young also notes that "corrections officers are required to be capable of performing heavy category work with no restrictions." Noting that the standard for determining motions for summary decision requires that all reasonable inferences arising from the evidence must be accorded to the party opposing the motion, counsel notes that an examination of the job specification provided in the record does not include any reference to there being no light duty available for corrections officers. The absence of any such limitation in the job specification allows the inference that light duty is permissible. As the only evidence refuting this is Young's hearsay statement, there is a material dispute of fact as to light duty that might have been offered to Ms. Davis-Smith during the time when her ability to perform all of the heavy-duty functions of the position was restricted. Additionally, assessment of the credibility of Young's assertion as to the lack of light duty requires that a plenary hearing be held.

In addition, Ms. Davis-Smith asserts that she was inexplicably determined to be at maximum medical improvement and a premature FCE was scheduled while she was still healing from a workplace injury. Given the opportunity to heal and the surgical intervention in January 2013, she was able to demonstrate in October 2013 that she was able to perform the duties of her position. To this point, counsel notes that the report on that second FCE provided that she could perform "Medium-Heavy category work (occasional lift and work up to 75 lbs.)." As for the County's reliance upon Abdelall, counsel argues that that determination was only made after an evidentiary hearing.

Summary Decision

N.J.A.C. 1:1-12.5 provides that a party may move for summary decision. The procedure is set forth in N.J.A.C. 1:1-12.5(b),

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may

> be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

The summary decision motion is the administrative law equivalent of the Judiciary's summary judgment motion. The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986)(Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill at 530. Brill

concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson at 477 U.S. 251-52, 106 S. Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

Discussion

The appointing authority determined that Ms. Davis-Smith was to be removed from her position because she could not perform the full duties for which a corrections officer is responsible. This decision was made after she suffered a knee injury and an FCE determined that she was restricted to "light-medium category work." As her counsel agreed during oral argument, at no point after that FCE was issued, through the dates upon which the Preliminary and Final Notices of Disciplinary Action were issued, was Ms. Davis-Smith cleared for full duty. There is simply no factual dispute regarding this. While the appellant disputes that she should have been sent for the FCE when Dr. Hornstein ordered it in July 2012, she does not contend that she was capable of performing all of the duties for which a corrections officer might be responsible, either in July 2012 or anytime thereafter, until she was, as she asserts, cleared in October 2013. While she had surgery on the knee in January 2013, she does not contend that the surgery resulted in an immediate resolution of her problems such that she then became

capable of performing even heavy category work at any time after this surgical procedure until that October FCE cleared her for "Medium-Heavy" work.

The County contends that the only relevant issue is whether the appellant was capable of performing all of the duties of the position as of the data of her removal, at which date she was admittedly not so capable. Therefore, the motion for summary decision must be granted. As for the October FCE, it is irrelevant to the determination of this case, as her removal had already occurred at a time when she unquestionably was unable to perform all of the duties of a corrections officer. However, the County notes that even if it were relevant, the wording of the October 2013, FCE does not actually clear Davis-Smith for heavy-duty work without restriction. The FCE report categorizes the work that Davis-Smith could perform as "Medium-Heavy category work (occasional lift and work up to 75 lbs.) with precautions" and with recommendations concerning allowing changes in activity during periods of prolonged or repetitive in the range left knee flexion or moderate weight-bearing due to her "demonstrated gait movement," and provides that certain activities are not recommended, including "running to codes, involvement with altercations, restraining unruly individuals" and "activities requiring pivoting on the LLE." Thus, even if one word to read all of this in the most favorable light possible toward Ms. Davis-Smith, the County offers that this report does not demonstrate that Davis-Smith met the standard for return-to-work established in the settlement agreement, which required that she be capable of performing "(heavy category work) with no restrictions or limitations."

Ms. Davis-Smith questions the County's assertion in Ollie Young's Certification that "the County does not have light duty positions at the correction center." Presumably, if light duty was available, then Davis-Smith could have possibly been returned to work long before the Preliminary Notice was issued, even though she could not have performed all of the duties for which a corrections officer might be liable. There is no indication in the record that she made a request for such accommodation, and Ms. Smith-Davis does not mention any such request in her Certification. While it is true that Young's certification is hearsay, Young was the assistant personnel director for the County and presumably in a position to know whether the County offered light duty

positions at the Correction Center.[2] He could certainly testify to this fact at a hearing. In response to this claim, Davis-Smith offers no evidence to the contrary. She provides no indication that there are any facts indicating that the County does in fact offer light duty at this institution. She only offers that the Civil Service job specification, provided as evidence by the County, does not say that light duty is not available. While it is correct that there is no such statement in the job specification, there appears no warrant to imply the availability of light duty merely from the absence of any reference to it, positively or negatively, in the four corners of the written job description. More importantly, counsel for the County notes that the availability of light duty has been determined by the Public Employee Relations Commission (PERC) to be a management prerogative. In the context of a correctional facility, the fact that management may have determined not to offer light duty as an exercise of that prerogative seems understandable. Be that as it may, Young's certification that no light duty positions were available at the Correction Center is not opposed by any evidence whatsoever on the part of the appellant. Thus, she has not demonstrated any basis for concluding that the existence of light duty constitutes a genuine dispute of material fact. And, the appellant does not claim that she was capable of performing all of the tasks set forth in the job specification. Indeed, she agrees that she could not do so as of the time of her termination.

As for the Settlement Agreement and the second FCE, it is true that while the appeal of the termination was pending, the parties entered into an agreement that provided for this FCE and also for what would occur following the receipt of the report on the outcome of the FCE. This agreement offered the appellant the possibility of a return to her position if she was found capable of "fully" performing "the essential job functions with no restrictions." Once the FCE results were issued, the parties had to decide how to respond to them. The County did not advise Ms. Davis-Smith that it

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[2] As the County notes, the determination of whether to have any light duty is a management prerogative. The Public Employee Relations Commission has so held.

> The City has a non-negotiable managerial prerogative to determine whether it wishes to maintain a light duty policy. [South Brunswick Tp., P.E.R.C. No. 2001-035, 27 NJPER 40 (¶32021 2000).]

understood her to have met the standard set in the Agreement and that she should return to work.[3] Thus, it must be understood that as far as the County was concerned, she had failed to meet the test set forth in the Agreement and as such, as the Agreement stated, the matter pending at the OAL (this case) "shall proceed." As for Davis-Smith, if she believed that the results of the October FCE were such that she met the test, then, from her perspective, the County's failure to return her to her position could be seen as constituting a violation of the settlement agreement, allowing her to proceed with action to enforce that agreement. Such action presumably would have been by means of a motion to enforce the settlement, compelling the County to return Ms. Davis-Smith to her position based upon the terms of the settlement agreement. Given that there was a pending case before the Civil Service Commission regarding her employment status with the County, that motion could presumably have been made in the pending case. And if it was determined that she did meet the test, presumably an order would have emerged ordering the County to return her to her position. If it did not do so, presumably an action could have been brought in the Superior Court to compel the County to comply with the Civil Service Commission's order for her return. As agreed by her counsel, no such proceedings were instituted after the FCE results were received and the County did not return her to her position. As such, this case will determine whether the County's action terminating Ms. Davis-Smith as of November 2012, was valid.

Based upon the record provided for this motion for summary decision, I **FIND** that it is undisputed that following her injury in April 2012, she was placed on workers' compensation. As of that date, the appellant was unable to perform all of the essential requirements of the position of County Corrections Officer as set forth in the Civil Service job specification. An FCE was performed In July 2012, and the report provided that she could not do "heavy" category work. She was declared at MMI by Doctor Hornstein in July 2012. After obtaining a second opinion, she had surgery in January

[3] Indeed, it must be said that the wording of the second FCE does not appear to completely clear Ms. Davis-Smith to perform all duties that she might be expected to be capable to perform as a corrections officer, as it notes the need for "precautions" and recommends against her performing a number of tasks that might be expected to arise in prison settings, such as "running to codes, involvement with altercations, restraining unruly individuals" and "activities requiring pivoting on the LLE."

2013. She underwent rehabilitation and in October 2013, following entry into a settlement agreement with the County, she underwent a second FCE. After the report of that examination was received she was not returned to her position.

I **FIND** that Ms. Davis-Smith does not dispute that she was not cleared for the performance of heavy category work until, giving her the benefit of the doubt, October 2013, and, as such, prior to that time she had not been cleared for the performance of all of the essential duties of the position. I **FIND** that there is no evidence in the record to refute the appointing authority's assertion that there is no light duty available in the Corrections Center. While the appointing authority's proof is a Certification, and thus hearsay, it was authored by someone who, due to the position that person holds in the County's personnel department, was quite likely to know if the County had permitted such light duty as an exercise of its managerial prerogative and as such if such work was available, and the assertion therefore has a reasonable indicium of reliability. Additionally, the facts asserted through this certification would be admissible at hearing, and the author of the document would, no doubt, be competent to testify on this subject. In addition, I **FIND** that the Civil Service job specification is silent as to any reference to light duty for one in this position. Given this, and considering the nature of the setting in which this position operates, that is, in a correctional facility, if Ms. Davis-Smith were to demonstrate the existence of a genuine dispute of material fact as to the existence of light duty in opposition to the movant's position, she would have to offer something more concrete than the mere absence of any reference, one way or the other, to light duty in the job description. She offers no evidence that the County has determined to allow light duty, that it has been allowed for other employees during any relevant period of time, that there is any legal duty on the part of this correctional facility to permit light duty, or that the claim made by the assistant personnel director is incorrect. Nor does she claim to have sought light duty. As such, I **FIND** that light duty did not exist in this facility. And, while it is of course the case that at any given time a corrections officer may not be called upon to perform all duties relevant to the position, or more, specifically to undertake "heavy" duties, in the absence of specific "light duty" assignments provided with the understanding that personnel so assigned will not under any circumstances be required to also undertake duties that are not "light," an employee

incapable of performing all of the essential duties incumbent on a corrections officer is not capable of performing that position.

I **CONCLUDE** that Ms. Smith-Davis was incapable of performing the duties of her position at the time of her termination. And to be clear, I **CONCLUDE** that this inability was existent from the date of her accident on through both on the date that the appointing authority deemed the effective date of removal, November 16, 2012, as well as the much later date on which the Final Notice was issued, May 23, 2013, a date itself nearly five months earlier than the issuance of the results of the second FCE, which, as noted, are, on its face, limited by the need for precautions and recommended restrictions.

ORDER

IT IS HEREBY ORDERED that the motion for summary decision is **GRANTED**. The appeal from Ms. Davis-Smith's separation from her position must fail. However, as the reason for this separation was her inability to perform her job due to physical injury and not as the result of any conduct or action that is properly worthy of discipline, in accord with prior decisions, her termination is hereby **changed to a resignation in good standing.**

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

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

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

July 17, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 7-17-18

Date Mailed to Parties: 7-17-18

mph

EXHIBITS:

For appellant:

P-1 Certification of Erica Davis-Smith, with attached Exhibits A through C

For respondent:

R-1 Certification of Ollie Young, with attached Exhibits A through J

A-4

STATE OF NEW JERSEY

In the Matter of Elvis Lugardo,
City of Newark Police Department

CSC DKT. NO. 2016-4142
OAL DKT. NO. CSV 08254-16

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 17, 2018 BW

The appeal of Elvis Lugardo, Police Officer, 60 working day suspension, on charges, was heard by Administrative Law Judge Jude-Anthony Tiscornia, who rendered his initial decision on July 12, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on August 15, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 60 working day suspension to a 30 working day suspension.

Since the penalty has been modified, Lugardo is entitled to 30 days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although Lugardo's penalty was modified by the Commission, charges were sustained and major discipline was imposed. Thus, Lugardo did not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as he failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining Elvis Lugardo was justified. The Commission therefore modifies Elvis Lugardo's 60 working day suspension to a 30 working day suspension. The Commission further orders that Elvis Lugardo be granted 30 days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of Lugardo to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 08254-16
AGENCY DKT. NO. 2016-4142

IN THE MATTER OF ELVIS LUGARDO,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Esq., for appellant (Fusco & Macaluso, attorneys)

Joyce Clayborne, Esq., for respondent, Assistant Corporation Counsel (Kenyatta Stewart, Esq. Acting Corporation Counsel, City of Newark)

Record Closed: June 18, 2018 Decided: July 12, 2018

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Elvis Lugardo (Lugardo/appellant) appeals sixty-day suspension due to conduct unbecoming a public employee and related charges stemming from the alleged misuse of a City of Newark Police Department form for personal business.

ISSUE

Does appellant's act of drafting an agreement on a Newark Police Department form, known as a "1001 Form," constitute a misuse of Department property? Does appellant's act of

presenting said agreement to a Bellville Board of Education employee in order to establish residency for a minor child constitute an abuse of power? Does aforementioned conduct support a sixty-day suspension?

PROCEDURAL HISTORY

Appellant was served With a Preliminary Notice of Disciplinary Action (PNDA) seeking removal on February 18, 2016.

Appellant was served with a Final Notice of Disciplinary Action seeking a sixty-day suspension on May 3, 2016. (R-1.) Included in the Sustained Charges were the following:

Charge I: Violation of Newark Police Department Rules and Regulations, Chapter 3:1.1; Conduct in Public and Private;

Charge I-B: Violation of Civil Service Rules 4A:2-2.3(a)(6): Conduct unbecoming a public employee;

Charge III: Neglect of Duty;

Charge IV: Violation of Newark Police Department Rules and Regulations, Chapter 17:1.18 – Division Stationary Restriction – Police officers shall not use Division Stationary for their private correspondence.

FINDINGS OF FACT

Having had an opportunity to consider all the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

Appellant is a sixteen-year veteran of the Newark Police Department (department). In 2016, appellant was in his office at a Newark Police precinct. He was

notified by the desk sergeant that Mrs. Caban (Caban) had come into the precinct seeking help and guidance regarding her teenaged daughter. Lugardo was asked to come down to assist. Appellant met with the mother who informed Lugardo that her daughter was a chronic runaway and may be engaging in prostitution. As the conversation progressed, the mother asked Lugardo if he and his wife would take the daughter in to live with them at their home in Belleville and enroll her in high school there. After discussing the issue with his wife, Lugardo agreed to taking in the daughter.

On February 9, 2016, Lugardo used a City of Newark Police Department Administrative Submission Form, commonly referred to as a "1001 form" to draft what purports to be some sort of a contractual agreement between himself, his wife, and the mother of the child. (R-2.) The purpose of the agreement was for Lugardo to establish some sort of guardianship over the child. Lugardo had this agreement notarized at a local bank. Lugardo signs the agreement as "Legal Guardian."

Lugardo traveled in uniform to the administrative office of Bellville High School and presented this letter/agreement to David Rubin, Director of Safety Services for Belleville Public Schools. David Rubin, a former law enforcement officer, testified that he recognized the document as an official City of Newark Police Department administrative form.

Rubin testified that the body of the document was a notarized agreement purporting to hand custody and guardianship rights of the child over to Lugardo.

Lugardo asked Rubin if this document would be sufficient to enroll the child in school. Rubin informed Lugardo that he could not accept a letter written on an official Newark police report form as a means by which to establish residency for the child and further informed Lugardo that legal custody of a child could only be accomplished through the court system. Lugardo explained that the youth in question was a member of his Newark Explorers group and that he was approached by Caban and asked to take custody of the child. Rubin advised Lugardo to consult with the Legal Affairs office at the Newark Police Department for guidance.

Lugo then proceeded to his precinct and presented the document to the legal affairs office. The document was reviewed by Detective Eusnelys Tellez who retained the document for further review and advised Lugardo he would be contacted regarding the document. The following disciplinary proceeding resulted.

I **FIND** appellant drafted a personal agreement on a Newark Police Department 1001 form and attempted to use that document to enroll a minor in Belleville High School without having the authority or permission of the Department to do so. I **CONCLUDE** appellant's acts constitute a misuse of Department property.

Respondent City of Newark argues that when Lugardo showed up at Belleville high school in uniform with what appeared to be an official police document in hand, he gave the impression that he was acting in some sort of official capacity. I **FIND** Lugardo's display of a purportedly official police document while in uniform constitutes a misuse of official authority as Lugardo's actions may be wrongfully perceived by a layman as being performed under color of law.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof," N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958.) Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Perrone, 5 N.J. 514, 522 (1950).

The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him/her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Bock, 38 N.J. 500.

This case is particularly sensitive because it involves law enforcement officials.

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public . . . .
>
> [Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).]

Conduct Unbecoming a Public Employee

"Unbecoming conduct" is broadly defined as "'any conduct which adversely affects the morale or efficiency of the [governmental unit] [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citations omitted); In re Nicosia, A-5285-04T5 (App. Div. May 17, 2007), <http://njlaw.rutgers.edu/collections/courts/>. The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "conduct unbecoming" has been described as that "which adversely affects the morale or efficiency" of the public entity or tends "to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." Emmons, 63 N.J. Super. at 140 (citation omitted); see Karins, 152 N.J. 532.

In the case at bar, it is undisputed that appellant improperly utilized a Newark Police Department 1001 form by drafting a custody agreement on it. While this alone is certainly improper conduct worthy of an admonishment I **CONCLUDE** appellant's attempt to use this document to enroll a minor in a high school, presumably under color of law, falls far below the standard of conduct expected from a public employee, especially a law enforcement officer. I further **CONCLUDE** that appellant exhibited conduct unbecoming a public employee.

Neglect of Duty

Neglect of duty is one of the grounds for disciplinary action in a civil service matter under N.J.A.C. 4A:2-2.3(7). Although not defined by the regulation, it generally means that a person is not performing his or her job. The person may have failed to

perform an act that the job requires or may have been negligent in the discharge of a duty.. The duty may arise by specific statute or from the very nature of the job itself.

In the case at bar, appellant neglected to properly notify his superiors of his intent to temporarily house a minor child who he came to know through his involvement with the Explorer's program. Lugardo testified that he filled out the 1001 form in order to apprise the department of his intended actions. He bolsters this position by stating that he actually did submit the form to the legal affairs department at his precinct. This testimony is rebutted by the undisputed fact that he presented the form to Bellville Highschool in an attempt to enroll a minor in the school and only submitted the form to legal affairs after being advised to do so by an official at Belleville High School. Further, the legal affairs office at the precinct is not appellant's supervisor, so I therefore **CONCLUDE** that appellant's act of submitting the form to the legal affairs office does not constitute adequate notice to his superiors. I **CONCLUDE** appellant neglected his duty as a police office.

Use of Division Stationary for Private Correspondence

In the case at bar, it is undisputed that appellant misused a Newark Police 1001 form and did so for personal reasons. While the 1001 form may be considered more of an internal document than stationary, the name of the office (Newark Police Department) is clearly visible on the form and any laymen presented with the form may be under the impression that they are being presented with some sort of official Newark Police Department document. I **FIND** appellant's misuse of the 1001 form violates the spirit of the above-referenced regulation prohibiting the use of Division Stationary for private use.

Appropriateness of Penalty

It is well-established that the employee's past record and any mitigating circumstances may be reviewed in assessing a penalty. See Bock, 38 N.J. 500. The severity of the infractions must also be balanced against "whether removal or something less is appropriate under the circumstances." In re Figueroa, CSV 3819-01, Initial

Decision (October 10, 2003), http://njlaw.rutgers.edu/collections/oal/; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be "bypassed when an employee engages in severe misconduct," especially where the offense involves "public safety" and risks "harm to persons or property." In re Herman, 192 N.J. 19, 33-34 (2007). In assessing penalties, "[t]he overriding concern" is the "public good." George v. N. Princeton Developmental Ctr., 49 N.J.A.R.2d (CSV) 463, 465.

"[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (May 23, 2005), http://njlaw.rutgers.edu/collections/oal/; see Henry, 81 N.J. at 571. Counseling, warnings, meetings, etc., do not constitute discipline under merit system rules. See N.J.A.C. 4A:2-2.2 and N.J.A.C. 4A:2-3.1. Here, as the charges resulted from offenses occurring from August to September of 2010, "it was incumbent upon [respondent] to follow the concept of progressive discipline" and advise appellant that "failure to change [her] behavior could result in termination from employment." Glenn, CSV 5051-03.

Appellant has a history of mostly minor disciplinary infractions and one major infraction, which resulted in a five-month suspension in 2007. The case at bar is to be the second major disciplinary action against him. Nonetheless, it is undisputed that appellant's actions at the heart of this disciplinary proceeding were entirely altruistic in nature as appellant had no prospect of pecuniary gain of any kind. Appellant believed he was acting in the best interest of the minor child and the community at large, though his actions were misguided and uninformed.

Based on the forgoing, I **CONCLUDE** the penalty should be reduced from sixty days to thirty days.

ORDER

It is **ORDERED** that appellant, Elvis Lugardo, be given a suspension of thirty days.

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

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

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

July 12, 2018

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Elvis Lugardo

Danielle Caban

Julia Lugardo

For Respondent:

David Rubin

Detective Eusnelys Tellez

Sergeant Jack Clarkin

Lieutenant Wilbur Cole

Captain Derek Glenn

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 FNDA

R-2 Form 1001

X-15-17

A-1

STATE OF NEW JERSEY

In the Matter of David Martinez
Hudson County, Department of Family Services

CSC DKT. NO. 2018-1495
OAL DKT. NO. CSV 18496-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18496-17

AGENCY DKT. NO. 2018-1495

IN THE MATTER OF DAVID MARTINEZ, HUDSON COUNTY, DEPARTMENT OF FAMILY SERVICES.

Terry Woodrow, Union Representative, (AFSCME) for appellant, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Nidara Y. Rourk, Esq., Assistant County Counsel for respondent pursuant to N.J.A.C. 1:1-5.4.(a)(8) (Donato J. Battista, County Counsel, attorney)

Record Closed: July 23, 2018 Decided: July 24, 2018

BEFORE **ELLEN S. BASS,** ALJ:

On December 19, 2017, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The parties agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

July 24, 2018
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/sej

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this day of June, 2018 between the County of Hudson (hereinafter referred to as the "County") and David Martinez (hereinafter referred to as the "David Martinez" or "Employee")

WHEREAS, the Employee has been employed within the Hudson County Department of Family Services for eleven (11) years and

WHEREAS, On October 19, 2017, the County issued a Preliminary Notice of Disciplinary Action (hereinafter referred to as the "Disciplinary Action" or "PNDA") to Employee, alleging a violation of N.J.A.C. 4A:2-2.3 (4) Chronic or Excessive Absenteeism or Lateness; N.J.A.C. 4A:2-2.3 (2) Insubordination; N.J.A.C. 4A:2-2.3 (7) Neglect of Duty; N.J.A.C. 4A:2-2.3 (12) Other Sufficient Cause; which is deemed incorporated herein as if set forth at length;

WHEREAS, On November 1, 2017, the County convened a departmental hearing, with a hearing officer, to consider the above referenced charges and evidence related to same. On November 6, 2017, the hearing officer issued a written opinion sustaining the charges alleged in the PNDA and ordered a one hundred and twenty (120) day suspension; which is deemed incorporated herein as if set forth at length. Thereafter, Employee filed a timely appeal to the Office of Administrative Law;

WHEREAS, the County and Employee desire to resolve all outstanding issues with respect to the aforementioned Disciplinary Action;

NOW, THEREFORE, in consideration of the premises and conditions set forth herein, the County and Employee agree as follows:

1. **AGREEMENT**

a. Employee will withdraw the appeal filed before the Office of Administrative Law;

b. The County will reduce Employee's suspension of record to from hundred twenty (120) working days to one hundred (100) working days;

c. Employee agrees that the additional twenty (20) working days of suspension already served shall be treated as an unpaid leave.

COMPLETE RELEASE AND COVENANT NOT TO SUE

In further consideration of the settlement hereinabove, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that they have not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement related to this matter. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of

any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other

things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare. The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

x. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

xi. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. **NO DISPARAGING STATEMENTS.**

Releasor agrees that she will not make any statement(s) that has, have, or can be expected to have the affect of disparaging the County or any of its employees.

4. **NON ADMISSION OF LIABILITY.**

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by Releasor, except as expressly provided in Paragraph 1 herein, or by the County, by whom any such liability is expressly denied.

5. **INDEMNIFICATION.**

If Releasor violates this Agreement in any way, Releasor agrees to pay in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the opposing party as a result of such violation, including reasonable attorney's fees.

6. **CONSULTATION WITH ATTORNEY.**

Releasor has consulted with his/her attorney and /or Union Representative with respect to this Agreement and has reviewed with his/her Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

7. **REASONABLE PERIOD OF TIME.**

Releasor agrees that he/she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this 21 day period by signing in the space provided at the end of this Agreement.

8. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between Releasor and the County, and each of them, with respect to the subject matter and supercedes all prior agreements, understandings and/or dealings whether written or otherwise with

respect to the same subject matter. There is no agreement on the part of the County to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey. It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice.

9. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

11. **ATTESTATION.**

Releasor represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that he enters into this Agreement voluntarily, of his own will, without any pressure or coercion from any person or entity including, but not limited to, County and/or Releasees.

12. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to the County, addressed to Deputy Director Robert Martinovich, Hudson County Department of Family Services, 257 Cornelison Avenue, Jersey City, NJ 07306. This seven (7) day revocation period may not be waived by Releasor

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, executed the foregoing Agreement this 27 day of JUNE, 2018.

EMPLOYEE
David Martinez
Date:

Sworn and Subscribed to before me
this 27 day of June, 2018.

Notary Public of the
State of New Jersey

ALICIA GOGLUCCI
NOTARY PUBLIC OF NEW JERSEY
Comm. # 50062926
Commission Expires 6/22/2022

COUNTY OF HUDSON
By: Robert Martinovich – Deputy Director
Hudson County Department of Family Services

Date:

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in the 7th recital on page 7of this Agreement.

EMPLOYEE
David Martinez

DATED: 4-27-18

A-1

STATE OF NEW JERSEY

In the Matter of Karl Johnson
Monroe Township, Department of Public Safety

CSC DKT. NO. 2017-2514
OAL DKT. NO. CSV 2552-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 2552-17
AGENCY DKT. NO. 2017-2514

IN THE MATTER OF KARL JOHNSON, MONROE TOWNSHIP DEPARTMENT OF PUBLIC SAFETY.

Thomas A. Cushane, Esq., appearing for appellant (The Cushane Law Firm, LLC, attorneys)

Michael J. DiPiero, Esq., appearing for respondent (Brown & Connery, LLP, attorneys)

Record Closed: July 19, 2018 Decided: July 24, 2018

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 22, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 24, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 7-25-18

Date Mailed to Parties: 7-25-18

/cb

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2018 JUL 19 P 4:24
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

THE CUSHANE LAW FIRM, LLC
1028 East Landis Avenue
Vineland, NJ 08360
(856) 794-2050
Attorneys for Petitioner

KARL JOHNSON

Petitioner,

v.

TOWNSHIP OF MONROE,
DEPARTMENT OF PUBLIC SAFETY

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. CSV 02552-2017 S
Agency Ref. No. 2017-2514

Administrative Action

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT ("Agreement") is entered into this 30th day of June, 2018 by and between Township of Monroe police officer Karl Johnson ("Johnson") and the Township of Monroe, Department of Public Safety ("Township").

WHEREAS, on January 6, 2017, the Township served Johnson with a Preliminary Notice of Disciplinary Action alleging: (1) Incompetency and inefficiency; (2) Inability to perform duties; and (3) violations of departmental rules and regulations regarding work expectations; and

WHEREAS, the foregoing disciplinary charges all alleged violations of various departmental rules and regulations, as well as violations of N.J.A.C. 4A:2-2.3(a)1 and N.J.A.C. 4A:2-2.3(a); and

WHEREAS, on January 18, 2017, the Township served Johnson with a Final Notice of Disciplinary Action alleging: (1) Incompetency and inefficiency (N.J.A.C. 4A:2-2.3(a)1); and (2) Inability to perform duties (N.J.A.C. 4A:2-2.3(a)2); and

WHEREAS, on February 3, 2017, Johnson filed a timely removal appeal with the New Jersey Civil Service Commission and requested that the matter be transferred to the Office of Administrative Law for plenary hearing; and

WHEREAS, Johnson's appeal was subsequently granted and docketed with this Tribunal on February 22, 2017; and

WHEREAS, on July 24, 2017, Johnson filed a Motion for Summary Decision alleging that the Township's termination of Johnson was premature; and

WHEREAS, on August 23, 2017, the Township opposed Johnson's Motion for Summary Decision; and

WHEREAS, on September 21, 2017, the Honorable Mary Ann Bogan, A.L.J., denied Johnson's summary-decision motion; and

WHEREAS, in the interests of avoiding the costs and uncertainty associated with continued litigation, Johnson and the Township desire to resolve the aforenoted disciplinary charges without trial.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, Johnson and the Township agree to the following terms as full and final settlement of the above-captioned matter:

1. **Resignation:** Johnson shall, in "good-standing" pursuant to N.J.A.C. 4A:2-6.1, resign his appointment as a Township of Monroe police officer effective January 18, 2017. All Department records related to this matter shall be maintained and or disclosed in accordance with its Internal Affairs' Policy and Procedures Manual promulgated by the Division of Criminal Justice; and

2. **Waiver of Future Employment:** Johnson shall forevermore refrain from seeking employment with the Township in any capacity; and

3. **Discharge:** Each party (the releasing party) hereby remises, releases, acquits, satisfies, and forever discharges the other party (the released party) and its heirs, successors, assigns, members, officers, directors, principals, employees, and attorneys of and from all actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, attorneys' fees, expenses, contracts, controversies, agreements, promises, variances, damages, judgments, executions, claims, and demands whatsoever, in law or in equity, whether arising by statute, at common law, or otherwise, whether arising under federal, state, foreign, or other law, which the releasing party ever had, now has, or may have or which any heir, successor, assign, member, officer, director, employee, or attorney of the releasing party hereafter can, shall, or may have against the released party or its heirs, successors, assigns, members, officers, directors, employees, or attorneys for, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this release; and

4. **Dismissal of Action:** The Township hereby dismisses and withdraws all charges against Johnson, with prejudice; and

5. **Payment and Timeliness Thereof:** In exchange for the valuable consideration offered herein the Township shall pay Johnson the gross sum of $4,000 in settlement of all of his claims, and inasmuch as this sum is not classified as back pay, no payroll deductions or taxes shall be withheld therefrom; and

6. **Pension Service Credit:** No Police and Firemen's Retirement System ("PFRS") service credit shall be afforded Johnson after the effective date of the date set forth on the FNDA served upon him on January 18, 2017; and

7. **No Admission of Liability:** By execution of this Agreement, neither party admits any liability to the other nor to the truth or falsity of any allegation, statement, communication or fact discussed, disclosed, or communicated in any manner, regarding any transaction, communication, contact, statement, or action between the parties, or in connection with this Agreement.

8. Attorneys' Fees and Costs: The parties hereby agree that they shall be solely responsible for any and all legal fees and costs respectively incurred from the beginning to the end of this matter. Each party waives any and all rights to seek legal fees and costs against the other party.

9. **Choice of Law and Forum:** This Agreement shall be construed, interpreted, and governed in accordance with the laws of the State of New Jersey. The parties hereby agree that any action to enforce or interpret this Agreement shall be brought in a court of competent jurisdiction in the State of New Jersey.

10. Entire Agreement: This Agreement, consisting of five pages, contains the sole and entire agreement between the parties hereto and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof, and is intended to fully memorialize the settlement of any and all claims and disputes between the parties. The parties respectively represent and acknowledge that prior to executing this Agreement, they obtained the advice of counsel, that they had ample time to do so, and that they had not relied upon any representation or statement not set forth in this Agreement which was or may have been made by any party hereto or by any parties' counsel or representatives with regard to the subject matter of this Agreement. The parties hereby agree that no other promises or agreements shall be binding upon the parties unless made in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

11. **Severability:** The parties agree that if any court of competent jurisdiction declares any portion of this Agreement unenforceable, the remaining portions shall remain in full force and effect.

12. **Effective Date:** This Agreement shall become effective on the date on which all parties to this Agreement have fully executed it.

13. **Purpose and Scope:** This Agreement is not intended to be used, nor shall it be used, as evidence for any other purpose in any other action, matter, or proceeding, other than to serve as evidence of the parties' compromise as set forth herein, or to enforce the terms of this Agreement.

BY SIGNING THIS SETTLEMENT AGREEMENT AND RELEASE, THE PARTIES ACKNOWLEDGE THAT:

1. THEY HAVE READ IT;

2. THEY UNDERSTAND IT AND KNOW THAT THEY ARE GIVING UP IMPORTANT RIGHTS;

3. THEY AGREE WITH EVERYTHING IN IT;

4. THEIR RESPECTIVE ATTORNEYS NEGOTIATED THIS AGREEMENT WITH THEIR FULL KNOWLEDGE AND CONSENT;

5. THEY HAVE BEEN ADVISED TO CONSULT WITH THEIR RESPECTIVE ATTORNEYS PRIOR TO EXECUTING THIS AGREEMENT, AND HAVE IN FACT DONE SO; AND

6. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY, AFTER CAREFUL CONSIDERATION.

IN WITNESS WHEREOF, Johnson and the Township have hereunto set their hands:

5/30/18
Date

Karl Johnson
Petitioner

STATE OF NEW JERSEY :
SS.
COUNTY OF Cumberland :

I certify that on this 30 day of May, 2018, Karl Johnson personally appeared before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

a. Is named in and personally signed this document; and
b. Signed, sealed, and delivered this document as his/her act and deed.

Notary Public

JENNIFER L. ATHEY
NOTARY PUBLIC
STATE OF NEW JERSEY
ID # 50075948
MISSION EXPIRES JAN. 29, 2023

6/30/18
Date

, Mayor
Township of Monroe
For the Appointing Authority

STATE OF NEW JERSEY :
SS.
COUNTY OF Gloucester :

I certify that on this 30 day of June, 2018, Daniel P. Teefy personally appeared before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

a. Is named in and personally signed this document; and
b. Signed, sealed, and delivered this document as his/her act and deed.

Notary Public

JENNIFER L HARBISON
ID #2333483
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires Dec 17, 2020

TOWNSHIP OF MONROE
COUNTY OF GLOUCESTER

Kevin W. Heydel, Business Administrator
Office of Administration
125 Virginia Avenue – Third Floor
Williamstown, NJ 08094
(856) 728-9800 x202
Fax (856) 728-1240
kheydel@monroetownshipnj.org

July 12, 2018

RECEIVED
2018 JUL 19 P 4:24
STATE OF NEW JERSEY
OFFICE OF AD. PR. LAW

Thomas A. Cushane, Esquire
The Cushane Law Firm, LLC
1028 East Landis Avenue
Vineland, NJ 08360

Re: K. Johnson v. Monroe Township - Settlement

Dear Mr. Cushane,

Enclosed please find a check in the amount of $4,000 representing the financial settlement reached in the case listed above.

If you have any question or concerns, please feel free to call or email me.

Sincerely,

Kevin W. Heydel
Business Administrator

STATE OF NEW JERSEY

In the Matter of Marlene Muldrow
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-2614
OAL DKT. NO. CSV 04631-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04631-18

AGENCY DKT. NO. 2018-2614

IN THE MATTER OF MARLENE MULDROW,
DEPARTMENT OF HEALTH SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director Employee Relations, for respondent, Department of Human Services, pursuant to N.J.A.C.1:1-5.4(a)(2)

Marc Malfara, Employee Relations Coordinator, for respondent, Ancora Psychiatric Hospital, pursuant to N.J.A.C.1:1-5.4(a)(2)

Record Closed: July 27, 2018 Decided: July 30, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 28, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

OAL DKT. NO. CSV 04631-18

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 30, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 7-30-18

Date Mailed to Parties:

nd

OAL DKT. NO. CSV 04631-18

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

J-1

RECEIVED

2018 JUL 26 P 4:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ALRB KT. NO. CSV 04631, 04633, 04634, 04635, 07206, 07207

AGENCY DKT. NO. 2018

SETTLEMENT AGREEMENT

IN THE MATTER OF

Marlene Muldrow, HST

AND

Department of Health
Ancora Psychiatric Hospital

3161
3160
2705
2703
2701
2700

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated 2/14/18 and 4/26/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A1.1, A5.3, A8.3, E1.1	5 days	2/14/18
2. A4.1, A5.4, A8.4, E1.2	10 days	2/14/18
3. A4.2, A5.5, A8.5, E1.3	20 days	2/14/18
4. A4.3, A5.6, A8.6, E1.4	Removal	2/14/18
5. A2.4 A4.4, A8.7, E1.5	Removal	2/14/18
6. A2.5, A4.5, E1.6	Removal	4/26/18

B. The Appellant Marlene Muldrow withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.	1 thru 6 above	45 day suspension, to be served for all cases and charges. 45 days will be one penalty for all cases.
2.		

OAL DKT. NO. CSV _____

3. _____
4. _____
5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 45 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: approved leave of Absence without pay

* Should the appellant be charged again for an attendance violation, the appointing authority will seek removal.

4. (Strike if not applicable) The Appellant agrees to a

~~_____ resignation in good standing~~

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

OAL DKT. NO. CSV _____

The parties acknowledge that under ~~N.J.A.C.~~ 17:1-2.18(b) and (c), no pension or seniority time ~~may be credited~~ for periods for which the employee is not paid by the ~~employer.~~

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Marlene Muldrow's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

OAL DKT. NO. CSV _____

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/25/2018 — DATE — Appellant

RcL 7-25-18 7-25-18 — DATE — Respondent

7-25-18 — DATE — ON BEHALF OF Appellant

7/25/18 — DATE — ON BEHALF OF

OAL DKT. NO. CSV _____

CERTIFICATION

I, _____, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the CIVIL SERVICE COMMISSION, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/25/2018 _____ Maria Maldonado _____
DATE NAME

SETTLEMENT AGREEMENT

Marlene Muldrow, HST
v.

Ancora Psychiatric Hospital
Department of Health

OAL Docket #s CSV-04631-2018 S, CSV-04633-2018 S, CSV-04634-2018 S, CSV-04635-2018 S, CSV-07206-2018 S, CSV - 07207-2018 S

The parties agree to the following terms and understanding:

1. To resolve the above captioned disciplines, the penalty of removal will be reduced to a 45 day suspension without pay, which will be considered time served.
2. Any time away from work not covered by the 45 day suspension will be considered an approved Leave of Absence without pay.
3. There is no back pay.
4. The appellant agrees to complete any and all processes required by Ancora Psychiatric Hospital's Human Resources Department, including a complete physical, a drug test, a criminal background check, training and any other that are deemed necessary.
5. Although it is management's expectation that this type of behavior will not occur in the future, Employee understands that if the same circumstances present themselves, removal of the employee will be sought by management.

Marlene Muldrow 7/25/2018
Appellant Date

Robert C. Miller, IV 7-25-18
Appellant's Representative Date

Mary Murphy 7-25-18
Respondent Date

A-1

STATE OF NEW JERSEY

In the Matter of Marlene Muldrow
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-2702
OAL DKT. NO. CSV 04633-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04633-18

AGENCY DKT. NO. 2018-2702

IN THE MATTER OF MARLENE MULDROW,
DEPARTMENT OF HEALTH SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director Employee Relations, for respondent, Department of Human Services, pursuant to N.J.A.C.1:1-5.4(a)(2)

Marc Malfara, Employee Relations Coordinator, for respondent, Ancora Psychiatric Hospital, pursuant to N.J.A.C.1:1-5.4(a)(2)

Record Closed: July 27, 2018 Decided: July 30, 2018

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The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 30, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 7-30-18

Date Mailed to Parties: 7-31-18

nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

J-1

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2018 JUL 26 P 4:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OAL DKT. NO. CSV 04631, 04633, 04634, 04635, 07206, 07207

AGENCY DKT. NO. 2018

SETTLEMENT AGREEMENT

IN THE MATTER OF

Marlene Muldrow, HST

AND

Department of Health
Ancora Psychiatric Hospital

3161
3160
2705
2703
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The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/14/18 and 4/26/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A1.1, A5.3, A8.3, E1.1	5 days	2/14/18
2. A4.1, A5.4, A8.4, E1.2	10 days	2/14/18
3. A4.2, A5.5, A8.5, E1.3	20 days	2/14/18
4. A4.3, A5.6, A8.6, E1.4	Removal	2/14/18
5. A2.4 A4.4, A8.7, E1.5	Removal	2/14/18
6. A2.5, A4.5, E1.6	Removal	4/26/18

B. The Appellant Marlene Muldrow withdraws ~~his~~/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. 1 thru 6 above		45 day Suspension, time served for all cases and charges. 45 days will be one penalty for all cases.
2.		

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 45 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: approved leave of Absence without pay

* Should the appellant be charged again for an attendance violation, the appointing Authority will seek removal.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that ~~under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.~~

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Marlene Muldrow's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/25/2018
DATE

Appellant

RCL ~~7-25-18~~ 7-25-18
DATE

Respondent

7-25-18
DATE

ON BEHALF OF Appellant

7/25/18
DATE

ON BEHALF OF

OAL DKT. NO. CSV _____

CERTIFICATION

I, _____, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/25/2018
DATE

Marlu Mulder
NAME

SETTLEMENT AGREEMENT

Marlene Muldrow, HST
v.

Ancora Psychiatric Hospital
Department of Health

OAL Docket #s CSV-04631-2018 S, CSV-04633-2018 S, CSV-04634-2018 S, CSV-04635-2018 S, CSV-07206-2018 S, CSV - 07207-2018 S

The parties agree to the following terms and understanding:

1. To resolve the above captioned disciplines, the penalty of removal will be reduced to a 45 day suspension without pay, which will be considered time served.
2. Any time away from work not covered by the 45 day suspension will be considered an approved Leave of Absence without pay.
3. There is no back pay.
4. The appellant agrees to complete any and all processes required by Ancora Psychiatric Hospital's Human Resources Department, including a complete physical, a drug test, a criminal background check, training and any other that are deemed necessary.
5. Although it is management's expectation that this type of behavior will not occur in the future, Employee understands that if the same circumstances present themselves, removal of the employee will be sought by management.

Marlene Muldrow 7/25/2018
Appellant Date

Robert C. Smith IV 7-25-18
Appellant's Representative Date

Mary Mell 7-25-18
Respondent Date

8.15.18

A-1

STATE OF NEW JERSEY

In the Matter of Marlene Muldrow
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-2703
OAL DKT. NO. CSV 04634-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04634-18

AGENCY DKT. NO. 2018-2703

IN THE MATTER OF MARLENE MULDROW,
DEPARTMENT OF HEALTH SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director Employee Relations, for respondent, Department of Human Services, pursuant to N.J.A.C.1:1-5.4(a)(2)

Marc Malfara, Employee Relations Coordinator, for respondent, Ancora Psychiatric Hospital, pursuant to N.J.A.C.1:1-5.4(a)(2)

Record Closed: July 27, 2018 Decided: July 30, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 28, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 30, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 7-30-18

Date Mailed to Parties: 7-31-18

nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

J-1

RECEIVED

2018 JUL 26 P 4:37

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGENCY DKT. NO. CSV 04631, 04633, 04634, 04635, 07206, 07207

SETTLEMENT AGREEMENT

IN THE MATTER OF

Marlene Muldrow, HST

AND

Department of Health
Ancora Psychiatric Hospital

3161
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The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated 2/14/18 and 4/26/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A1.1, A5.3, A8.3, E1.1	5 days	2/14/18
2. A4.1, A5.4, A8.4, E1.2	10 days	2/14/18
3. A4.2, A5.5, A8.5, E1.3	20 days	2/14/18
4. A4.3, A5.6, A8.6, E1.4	Removal	2/14/18
5. A2.4, A4.4, A8.7, E1.5	Removal	2/14/18
6. A2.5, A4.5, E1.6	Removal	4/26/18

B. The Appellant Marlene Muldrow withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. 1 thru 6 above		45 day Suspension, time served for all cases and charges. 45 days will be one penalty for all cases.
2.		

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 45 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: approved leave of Absence without pay

* Should the appellant be charged again for an attendance violation, the appointing Authority will seek removal.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that ~~under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.~~

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Marlene Muldrow's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/25/2018
DATE

Marlene Mulder
Appellant

RCL 7-25-18 7-25-18
DATE

Respondent

7-25-18
DATE

Robert C. Smith
ON BEHALF OF Appellant

7/25/18
DATE

Dawn Brown
ON BEHALF OF

OAL DKT. NO. CSV _____

CERTIFICATION

I, _____, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/25/2018
DATE

Marlu Muldrew
NAME

SETTLEMENT AGREEMENT

Marlene Muldrow, HST
v.

Ancora Psychiatric Hospital
Department of Health

OAL Docket #s CSV-04631-2018 S, CSV-04633-2018 S, CSV-04634-2018 S, CSV-04635-2018 S, CSV-07206-2018 S, CSV - 07207-2018 S

The parties agree to the following terms and understanding:

1. To resolve the above captioned disciplines, the penalty of removal will be reduced to a 45 day suspension without pay, which will be considered time served.
2. Any time away from work not covered by the 45 day suspension will be considered an approved Leave of Absence without pay.
3. There is no back pay.
4. The appellant agrees to complete any and all processes required by Ancora Psychiatric Hospital's Human Resources Department, including a complete physical, a drug test, a criminal background check, training and any other that are deemed necessary.
5. Although it is management's expectation that this type of behavior will not occur in the future, Employee understands that if the same circumstances present themselves, removal of the employee will be sought by management.

Marlene Muldrow 7/25/2018
Appellant Date

Robert C. Smith IV 7-25-18
Appellant's Representative Date

Mary Mell 7-25-18
Respondent Date

A-1

STATE OF NEW JERSEY

In the Matter of Marlene Muldrow
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-2705
OAL DKT. NO. CSV 04635-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04635-18

AGENCY DKT. NO. 2018-2705

IN THE MATTER OF MARLENE MULDROW,
DEPARTMENT OF HEALTH SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director Employee Relations, for respondent, Department of Human Services, pursuant to N.J.A.C.1:1-5.4(a)(2)

Marc Malfara, Employee Relations Coordinator, for respondent, Ancora Psychiatric Hospital, pursuant to N.J.A.C.1:1-5.4(a)(2)

Record Closed: July 27, 2018 Decided: July 30, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 28, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 30, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 7-30-18

Date Mailed to Parties: 7-31-18

nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

J-1

RECEIVED

2018 JUL 26 P 4:37

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

OAL DKT. NO. CSV 04631, 04633, 04634, 04635, 07206, 07207

AGENCY DKT. NO. 2018

SETTLEMENT AGREEMENT

IN THE MATTER OF

Marlene Muldrow, HST

AND

Department of Health
Ancora Psychiatric Hospital

3161
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2705
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The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/14/18 and 4/26/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A1.1, A5.3, A8.3, E1.1	5 days	2/14/18
2. A4.1, A5.4, A8.4, E1.2	10 days	2/14/18
3. A4.2, A5.5, A8.5, E1.3	20 days	2/14/18
4. A4.3, A5.6, A8.6, E1.4	Removal	2/14/18
5. A2.4 A4.4, A8.7, E1.5	Removal	2/14/18
6. A2.5, A4.5, E1.6	Removal	4/26/18

B. The Appellant Marlene Muldrow withdraws ~~his~~/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. 1 thru 6 above		45 day Suspension, to be served for all cases and charges. 45 days will be one penalty for all cases.
2.		

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 45 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: approved leave of Absence without pay

* Should the appellant be charged again for an attendance violations, the appointing Authority will seek removal.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under ~~N.J.A.C.~~ 17:1-2.18(b) and (c), no pension or seniority time ~~may be credited~~ for periods for which the employee is not paid by the ~~employer~~.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Marlene Muldrow's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/25/2018
DATE

Marlon Mulder
Appellant

RcL 7-25-18 7-25-18
DATE

Respondent

7-25-18
DATE

Robert C. Lattimore
ON BEHALF OF Appellant

7/25/18
DATE

Donna Brown
ON BEHALF OF

OAL DKT. NO. CSV _____

CERTIFICATION

I, _____, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/25/2018
DATE

Marlu Muldau
NAME

SETTLEMENT AGREEMENT

Marlene Muldrow, HST
v.

Ancora Psychiatric Hospital
Department of Health

OAL Docket #s CSV-04631-2018 S, CSV-04633-2018 S, CSV-04634-2018 S, CSV-04635-2018 S, CSV-07206-2018 S, CSV - 07207-2018 S

The parties agree to the following terms and understanding:

1. To resolve the above captioned disciplines, the penalty of removal will be reduced to a 45 day suspension without pay, which will be considered time served.
2. Any time away from work not covered by the 45 day suspension will be considered an approved Leave of Absence without pay.
3. There is no back pay.
4. The appellant agrees to complete any and all processes required by Ancora Psychiatric Hospital's Human Resources Department, including a complete physical, a drug test, a criminal background check, training and any other that are deemed necessary.
5. Although it is management's expectation that this type of behavior will not occur in the future, Employee understands that if the same circumstances present themselves, removal of the employee will be sought by management.

Marlene Muldrow 7/25/2018
Appellant Date

Robert C. Smith, IV 7-25-18
Appellant's Representative Date

Mary Mall 7-25-18
Respondent Date

STATE OF NEW JERSEY

In the Matter of Marlene Muldrow
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-3160
OAL DKT. NO. CSV 07206-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07206-18

AGENCY DKT. NO. 2018-3160

IN THE MATTER OF MARLENE MULDROW,
DEPARTMENT OF HEALTH SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director Employee Relations, for respondent, Department of Human Services, pursuant to N.J.A.C.1:1-5.4(a)(2)

Marc Malfara, Employee Relations Coordinator, for respondent, Ancora Psychiatric Hospital, pursuant to N.J.A.C.1:1-5.4(a)(2)

Record Closed: July 27, 2018 Decided: July 30, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 17, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 30, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 7-30-18

Date Mailed to Parties: 7-31-18

nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

J-1

RECEIVED

2018 JUL 26 P 4:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CSV DKT. NO. CSV 04631, 04633, 04634, 04635, 07206, 07207

AGENCY DKT. NO. 2018

SETTLEMENT AGREEMENT

IN THE MATTER OF

Marlene Muldrow, HST

AND

Department of Health
Ancora Psychiatric Hospital

3161
3160
2705
2703
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The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/14/18 and 4/26/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A1.1, A5.3, A8.3, E1.1	5 days	2/14/18
2. A4.1, A5.4, A8.4, E1.2	10 days	2/14/18
3. A4.2, A5.5, A8.5, E1.3	20 days	2/14/18
4. A4.3, A5.6, A8.6, E1.4	Removal	2/14/18
5. A2.4 A4.4, A8.7, E1.5	Removal	2/14/18
6. A2.5, A4.5, E1.6	Removal	4/26/18

B. The Appellant Marlene Muldrow withdraws ~~his~~/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. 1 thru 6 above		45 day Suspension, to be served for all cases and charges. 45 days will be one penalty for all cases.
2.		

OAL DKT. NO. CSV _____

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 45 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: approved leave of Absence without pay

* Should the appellant be charged again for an attendance violations, the appointing Authority will seek removal.

4. (Strike if not applicable) The Appellant agrees to a

~~_____ resignation in good standing~~

~~_____ general resignation~~

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under ~~N.J.A.C.~~ 17:1-2.18(b) and (c), no pension or seniority time ~~may be credited~~ for periods for which the employee is not paid by the ~~employer~~.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Marlene Muldrow's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/25/2018 — DATE
Appellant

RCL 7-25-18 7-25-18 — DATE
Respondent

7-25-18 — DATE
ON BEHALF OF Appellant

7/25/18 — DATE
ON BEHALF OF

OAL DKT. NO. CSV _____

CERTIFICATION

I, _____, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/25/2018
DATE

Marlin Muldrew
NAME

SETTLEMENT AGREEMENT

Marlene Muldrow, HST
v.

Ancora Psychiatric Hospital
Department of Health

OAL Docket #s CSV-04631-2018 S, CSV-04633-2018 S, CSV-04634-2018 S, CSV-04635-2018 S, CSV-07206-2018 S, CSV - 07207-2018 S

The parties agree to the following terms and understanding:

1. To resolve the above captioned disciplines, the penalty of removal will be reduced to a 45 day suspension without pay, which will be considered time served.
2. Any time away from work not covered by the 45 day suspension will be considered an approved Leave of Absence without pay.
3. There is no back pay.
4. The appellant agrees to complete any and all processes required by Ancora Psychiatric Hospital's Human Resources Department, including a complete physical, a drug test, a criminal background check, training and any other that are deemed necessary.
5. Although it is management's expectation that this type of behavior will not occur in the future, Employee understands that if the same circumstances present themselves, removal of the employee will be sought by management.

Marlene Muldrow 7/25/2018
Appellant Date

Robert C. Luttrell IV 7-25-18
Appellant's Representative Date

Mary Mellyn 7-25-18
Respondent Date

STATE OF NEW JERSEY

In the Matter of Marlene Muldrow
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-3161
OAL DKT. NO. CSV 07207-18

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07207-18

AGENCY DKT. NO. 2018-3161

IN THE MATTER OF MARLENE MULDROW,
DEPARTMENT OF HEALTH SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director Employee Relations, for respondent, Department of Human Services, pursuant to N.J.A.C.1:1-5.4(a)(2)

Marc Malfara, Employee Relations Coordinator, for respondent, Ancora Psychiatric Hospital, pursuant to N.J.A.C.1:1-5.4(a)(2)

Record Closed: July 27, 2018 Decided: July 30, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 17, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 30, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 7-30-18

Date Mailed to Parties: 7-31-18

nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

J-1

RECEIVED

2018 JUL 26 P 4:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

AGENCY DKT. NO. CSV 04631, 04633, 04634, 04635, 07206, 07207
AGENCY DKT. NO. 2018

SETTLEMENT AGREEMENT

IN THE MATTER OF

Marlene Muldrow, HST
3161
3160
2705
2703
2701
2700

AND

Department of Health
Ancora Psychiatric Hospital

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/14/18 and 4/26/18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A1.1, A5.3, A8.3, E1.1	5 days	2/14/18
2. A4.1, A5.4, A8.4, E1.2	10 days	2/14/18
3. A4.2, A5.5, A8.5, E1.3	20 days	2/14/18
4. A4.3, A5.6, A8.6, E1.4	Removal	2/14/18
5. A2.4 A4.4, A8.7, E1.5	Removal	2/14/18
6. A2.5, A4.5, E1.6	Removal	4/26/18

B. The Appellant Marlene Muldrow withdraws ~~his~~/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. 1 thru 6 above		45 day Suspension, to be served for all cases and charges. 45 days will be one penalty for all cases.
2.		

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of 45 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: approved leave of Absence without pay

* Should the appellant be charged again for an attendance violations the appointing Authority will seek removal.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under ~~N.J.A.C.~~ 17:1-2.18(b) and (c), no pension or seniority time ~~may be credited~~ for periods for which the employee is not paid by the ~~employer.~~

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Marlene Muldrow's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/25/2018
DATE

Appellant

RcL ~~7-25-18~~ 7-25-18
DATE

Respondent

7-25-18
DATE

ON BEHALF OF Appellant

7/25/18
DATE

ON BEHALF OF

OAL DKT. NO. CSV _____

CERTIFICATION

I, _____, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/25/2018
DATE

Marlu Muldrew
NAME

SETTLEMENT AGREEMENT

Marlene Muldrow, HST
v.

Ancora Psychiatric Hospital
Department of Health

OAL Docket #s CSV-04631-2018 S, CSV-04633-2018 S, CSV-04634-2018 S, CSV-04635-2018 S, CSV-07206-2018 S, CSV - 07207-2018 S

The parties agree to the following terms and understanding:

1. To resolve the above captioned disciplines, the penalty of removal will be reduced to a 45 day suspension without pay, which will be considered time served.
2. Any time away from work not covered by the 45 day suspension will be considered an approved Leave of Absence without pay.
3. There is no back pay.
4. The appellant agrees to complete any and all processes required by Ancora Psychiatric Hospital's Human Resources Department, including a complete physical, a drug test, a criminal background check, training and any other that are deemed necessary.
5. Although it is management's expectation that this type of behavior will not occur in the future, Employee understands that if the same circumstances present themselves, removal of the employee will be sought by management.

Marlene Muldrow 7/25/2018
Appellant Date

Robert C. Luttrell, IV 7-25-18
Appellant's Representative Date

Mary Mulloy 7-25-18
Respondent Date

8-15-18

A-5

STATE OF NEW JERSEY

In the Matter of Cynthia Pena
Passaic County Board of Social Services

CSC DKT. NO. 2018-2902
OAL DKT. NO. CSV 05838-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 17, 2018 BW

The appeal of Cynthia Pena, Human Services Specialist 1, Passaic County Board of Social Services, removal effective March 19, 2018, on charges, was heard by Administrative Law Judge Joann LaSala Candido, who rendered her initial decision on July 25, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 15, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission therefore dismisses the appeal of Cynthia Pena.

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

DECISION RENDERED BY THE

CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. CSV 05838-18
AGENCY DKT. NO. 2018-2902

IN THE MATTER OF CYNTHIA PENA, PASSAIC COUNTY BOARD OF SOCIAL SERVICES,

---

David H. Weiner, Union Representative for appellant, failed to appear

Albert C. Buglione, Esq., appearing on behalf of respondent, Passaic County Board of Social Services

Record Closed: July 24, 2018 Decided: July 25, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

Appellant, Cynthia Pena, appeals from the Final Notice of Disciplinary Action (FNDA) dated March 17, 2018, terminating her employment for chronic excessive absenteeism or lateness. Appellant filed an appeal with the Civil Service Commission and the Commission granted appellant's request for a hearing and transmitted the matter to the Office of Administrative Law on April 23, 2018, for determination as a contested case. By notice dated May 1, 2018, appellant and respondent's counsel were notified of a telephone prehearing scheduled for May 21, 2018 at 3:00 p.m. The notice requested that appellant provide a telephone number where she could be reached for

the call. On May 18, 2018, Union Representative David H. Weiner entered an appearance on behalf of appellant. The undersigned held a pre-hearing telephone conference on May 21, 2018, whereby Mr. Weiner advised that he was having an issue trying to reach his client. An in-person conference was scheduled for July 23, 2018. Prior to this hearing, Mr. Buglione spoke to Mr. Weiner and was advised that he still had not been able to reach appellant.

Based upon the lack of appearance by either Mr. Weiner or his client and having had notices sent to all parties on May 21, 2018, I must **FIND** this conduct tantamount to an abandonment of her request for a hearing.

ORDER

Based upon the foregoing, I **ORDER** that the appeal filed by appellant in this matter be and is hereby **DISMISSED.**

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

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

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

July 25, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: July 25, 2018

Date Mailed to Parties:

ljb

5-15-18

A-1

STATE OF NEW JERSEY

In the Matter of Carmen Rivera
City of Newark Police Department

CSR DKT. NO. 2017-90 & 2017-89
OAL DKT. NO. CSV 11611-16 & 11613-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlements in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. CSV 11611-16 &
CSV 11613-16
AGENCY DKT. NOS. 2017-90 &
2017-8

IN THE MATTER OF CARMEN RIVERA,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Jr., Esq., for appellant (Fusco & Macaluso, LLC, attorneys)

France H. Casseus, Assisting Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: July 16, 2018 Decided: July 18, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On August 1, 2016, the Civil Service Commission transmitted these cases to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their

settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

7/13/18

DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

dr

Attachment

JUL 16 A 8:52

Carmen Rivera, Appellant,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
v.	:	**OAL DOCKET NOS.: CSV 11611-2016 N;** **CSV 11613-2016 N**
CITY OF NEWARK, Respondent	:	**SETTLEMENT AGREEMENT**

IT IS HEREBY AGREED by and between the City of Newark ("City"), Newark Fraternal Order of Police, Lodge 12 ("Union"), and Employee Carmen Rivera[1] ("Rivera"), to resolve the disciplinary matter as it relates to the two Final Notice of Disciplinary Actions ("FNDA") dated June 17, 2016. Rather than continuing further with the appeal of Rivera's suspension at the Office of Administrative Law on the following charges:

A. CAP 2016-042; IOP 2016-107 **(50-Day Suspension)**: Conduct; Safekeeping of Prisoners; Guarding Prisoners; Neglect of Duty; False Statements; Report of Crime; Responsibility for Own Actions; Knowledge of Laws and Regulations; and other sufficient causes, as codified at N.J.A.C. 4A:2-2.3(a)6 and 4A:2-2.3(a)7, NPD Rules and Regulations Chapters 3:1.2-9; 3:1.2-10; 3:2.3; 3:2.7; 18:6 and 18:20, and;

B. CAP 2016-003; IOP 2015-627 **(10-Day Suspension)**: Insubordination 4A:2-2.3(a)2 and violation of Rules and Regulations Chapter 18:8-Acts of Insubordination and Chapter 18:5-Unfavorable Conduct; and

C. CAP 2016-035; IOP 2016-030 this matter was merged with CAP 2016-003/IOP 2015-627 referenced in paragraph "B"

the City, the Union and Rivera (collectively referred to hereinafter as the "Parties") have determined to resolve this matter by this Agreement, and agree as follows:

[1] On the date which gave rise to the incident noted in the Final Notice of Disciplinary Action, Ms. Rivera was employed as a Police Officer, with the Newark Police Department.

1. The Parties hereby agree that Charge 3 of CAP 2016-042; IOP 2016-107 - Guarding of Prisoners will be upheld. As a result, Rivera will receive 25-Days suspension for said violation. Rivera will receive 25-Days back pay for suspension previously served.
2. The Parties hereby agree that CAP 2016-003; IOP 2015-627 and CAP 2016-035 & IOP 2016-030 will be dismissed. Rivera will receive 10-Days back pay as a result of said dismissal.
3. The City will amend the FNDAs on all matters to reflect the above agreement.
4. The parties agree the total amount of back pay owed to Rivera is Thirty-Five (35) Days.
5. The Parties acknowledge under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer
6. Rivera further waives any and all rights or claims which she has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same.
7. Rivera and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
8. Rivera and the Union each further agree that there is no consideration due Rivera, her counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from her employment and/or the execution of this Agreement, except as otherwise provided herein.
9. Except for the assessment of Rivera's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

10. Rivera and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.
11. Rivera is bound by this Agreement. Anyone who succeeds to Rivera's rights and responsibilities, such as heirs or the executor of her estate, shall also be bound.
12. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.
13. Rivera and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
14. This Agreement contains the sole and entire agreement between Rivera, The Department of Public Safety and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Rivera specifically represents and acknowledges in executing this Agreement that she has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
15. Rivera agrees and acknowledges that she has been fully and fairly represented by her Union in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.

16. Rivera agrees and acknowledges that she has had full opportunity to review this Agreement with her counsel and/or union representation and she enters into same knowingly and voluntarily.
17. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
18. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.
19. By signing this Settlement Agreement, Rivera states that:
    a) She has read it;
    b) She understands it and knows that she is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;
    c) She agrees with everything in it;
    d) Her representative negotiated this Agreement with her knowledge and consent;
    e) She has been advised to consult with her attorney prior to executing this Agreement, and has in fact done so; and
    f) She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

7/13/18
Date

BY: _____
City of Newark Department of Public Safety

7/13/18
Date

BY: _____
Union Attorney/Representative

7/13/18
Date

Carmen Rivera
Carmen Rivera

Approved as to Form and Legality:

7/13/18
Date

_____
Law Department

X 5

CERTIFICATION

I, Carmen Rivera, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7-13-18
DATE

Carmen Rivera
NAME

X 6

8-15-18

A-1

STATE OF NEW JERSEY

In the Matter of Janice Robertson
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2017-3583
OAL DKT. NO. CSV 07317-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07317-17

AGENCY DKT. NO. 2017-3583

IN THE MATTER OF JANICE ROBERTSON, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

William Nash, Esq., for appellant Janice Robertson (Nash Law Firm, LLC, attorneys)

Andy Jong, Deputy Attorney General, for respondent Department of Health, Ancora Psychiatric Hospital (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 17, 2018 Decided: July 26, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on May 22, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 26, 2018
DATE

Tama B. Hughes
TAMA B. HUGHES, ALJ

Date Received at Agency: 7-30-18

Date Mailed to Parties: 7-31-18

tat/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

OAL DKT. NO. 007317-2017 S

JUL 17 2018

OAL DKT. NO. CSV 007317-2017 S
AGENCY DKT. NO. 2017-3583
SETTLEMENT AGREEMENT

IN THE MATTER OF
JANICE ROBERTSON
AND
DEPT. OF HUMAN SERVICES/
DEPT. OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated April 27, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	Removal (for all charges)	10/24/16
2. N.J.A.C. 4A:2-2.3(a)7 Neglect of duty		
3. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		
4. Admin. Order 4:08, C-3.1 Physical or mental abuse of patient, client resident or employee		

5. Admin Order 4:08, C-5.1
   Inappropriate physical contact
   or mistreatment of a patient, client,
   resident or employee

6. Admin Order 4:08, E-1.1
   Violation of a rule, regulation, policy
   procedure, order or administrative
   decision

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. Respondent Department of Human Services/Department of Health will accept a General Resignation from Appellant Janice Robertson, pursuant to N.J.A.C. 4A:2-6.3 effective October 24, 2016. Appellant Janice Robertson agrees not to seek or accept employment with the Department of Human Services/Department of Health or any of its subsidiaries at any time in the future.

C. The Appellant Janice Robertson withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services/Department of Health agrees that:
the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a	General Resignation (resolving all charges)

public employee

2. N.J.A.C. 4A:2-2.3(a)7
   Neglect of duty

3. N.J.A.C. 4A:2-2.3(a)12
   Other sufficient cause

4. Admin. Order 4:08, C-3.1
   Physical or mental abuse of
   patient, client, resident or employee

5. Admin Order 4:08, C-5.1
   Inappropriate physical contact
   or mistreatment of a patient, client,
   resident or employee

6. Admin Order 4:08, E-1.1
   Violation of a rule, regulation, policy
   procedure, order or administrative
   decision

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services/Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services/Department of Health will be kept intact. Nothing herein shall preclude the Department of Human Services/Department of Health from releasing information on this matter to anyone who has a release executed by appellant, or as otherwise consistent with the law. Any information regarding the

underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department of Human Services/Department of Health with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein

F. Except for the assessment of Janice Robertson's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services/Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any

past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6/14/18
DATE

Janice Robertson, Appellant

6/14/18
DATE

ON BEHALF OF Appellant

7-13-18
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Janice Robertson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/14/18
DATE

Janice Robertson

8-15-18

A-6

STATE OF NEW JERSEY

In the Matter of Dario Ruiz
South Woods State Prison,
Department of Corrections

CSC DKT. NO. 2018-1877
OAL DKT. NO. CSR 01913-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 17, 2018 BW

The appeal of Dario Ruiz, Senior Correction Officer, South Woods State Prison, Department of Corrections, removal effective December 7, 2017, on charges, was heard by Administrative Law Judge Jeffery R. Wilson, who rendered his initial decision on July 18, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 15, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Dario Ruiz.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSR 01913-18
AGENCY DKT. NO. N/A

IN THE MATTER OF DARIO RUIZ,
SOUTH WOODS STATE PRISON.

Michael L. Testa, Jr., Esq., for appellant, Dario Ruiz (Testa Heck Testa & White, PA, attorneys)

Jessica M. Saxon, Deputy Attorney General, for respondent, South Woods State Prison (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 18, 2018 Decided Date: July 18, 2018

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Appellant, a Senior Corrections Officer, appeals his removal effective December 7, 2017. The respondent, South Woods State Prison (SWSP) alleges that based upon an investigation conducted by the Special Investigation Division (SID), the appellant knowingly provided an electronic communication device to a person or persons who were confined within a state correctional facility. SWP further contends that, through self-

admission, the appellant acknowledged that this occurred on multiple occasions and that it is documented in the SWSP/SID investigation.

PROCEDURAL HISTORY

The appellant filed a timely appeal of the removal and requested a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL, where it was filed on February 1, 2018, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The respondent filed the within motion for summary decision on March 9, 2018. (R-1.) The appellant waived the 180-day requirement to complete this matter on March 21, 2018. The appellant filed his response in opposition of the within motion for summary decision on May 16, 2018. (A-1.) A telephonic management conference was held on May 14, 2018.

FACTUAL DISCUSSION AND FINDINGS

The following facts of this case are not in dispute; therefore, I **FIND** as **FACT**:

1. The appellant was employed as a Senior Corrections Officer at SWSP during all relevant times.

2. In March 2017, the SID received information from a confidential witness that the appellant was introducing contraband into SWSP and receiving haircuts from an inmate.

3. An additional confidential informant provided information that the appellant was seen retrieving several duffle bags from his personal vehicle and bringing them into the property room where the appellant supervised inmates who processed, sorted and loaded all inmate property arriving or departing SWSP. This confidential informant also reported that the duffel bag contained hair clippers that were utilized by inmates to cut the appellant's hair. This confidential informant further reported that they witnessed the appellant on a cell phone while next to inmates and had a conversation on speaker phone.

4. Based upon the forgoing, the SID commenced an investigation that resulted in a formal investigative report that was issued on October 30, 2017. (R-1, Exhibit 2.)

5. The aforementioned investigation included electronic surveillance of the SWSP property room depicting events occurring on March 28, 2017, March 29, 2017, and April 4, 2017. (R-1, Exhibits 3 and 4.) A review of the recorded surveillance showed that the appellant introduced a duffle bag into the property room, received haircuts from an inmate and navigated through a cellphone while inmates viewed the screen's content.

6. SID then contacted the Cumberland County Prosecutor's Office and The Honorable Cristen D'Arrigo, J.S.C., issued a search warrant on April 12, 2017, to search anything that was accessible to the appellant. (R-1, Exhibit 5.)

7. The appellant was served with the search warrant and submitted to a pat down search. During the pat down search, it was discovered that the appellant had $2,514.55 in U.S. currency on his person as well as sixty-four bank statements and several hand-written notes that contained inmates' names and identification numbers.

8. During the execution of the search warrant, numerous items were seized from the appellant, his vehicle and his lockers that included:

    - $2,514.55 cash
    - sixty-four Bank of America receipts
    - seventeen papers containing various names and telephone numbers
    - five hair clippers, six combs and four brushes
    - twenty-one clipper blades, nine screw drivers and three screws
    - eight razor blades
    - one knife
    - five cell phones
    - one loaded Glock 22.40 caliber Smith & Wesson handgun and one handgun holster
    - three loaded Glock .40 caliber hollow point ammunition magazines
    - one pair of handcuffs
    - State issued inmate undergarments

9. On April 13, 2017, the appellant waived his Miranda Rights and provided an audio-video recorded statement. (R-1, Exhibit 6.) The appellant admitted ownership of the duffel bag seen in the videos and photos. (R-1, Exhibits 3, 4 and 8.) He stated he purposely left his loaded, off-duty firearm in his vehicle despite being afforded the opportunity to properly secure the weapon pursuant to departmental policy. The appellant stated that he accessed his personal cell phone while inside SWSP, while inmates were present and "revealed" its contents. He admitted to receiving haircuts from an inmate while in the property room on several occasions using the appellant's personal hair clippers that he brought into the prison for that specific use. The appellant stated that he obtained the unauthorized possession of the cell phones seized from his vehicle after he removed them from the prison's property room. He admitted to giving inmates access to food items and to taking possession of DOC issued underwear.

10. On March 13, 2017, the appellant was issued Summons S-2017-000676-0601, charging him with violating N.J.S.A. 2C:29-10(d), a crime of the second degree and N.J.S.A. 29-6(b), a petty disorderly persons offense. (R-1, Exhibit 6.) The Cumberland County Prosecutor's office administratively dismissed these charges on November 2, 2017, and listed the basis for dismissal as "insufficient evidence." (R-2 at Exhibit A.)

11. On April 13, 2017, the appellant was issued a Preliminary Notice of Disciplinary Action (R-1 at Exhibit 13), a Departmental Hearing was held on November 30, 2017, and a Final Notice of Disciplinary Action was issued on December 7, 2017, (R-1 at Exhibit 14) that resulted in the appellant being charged with the following violations:

    - **N.J.A.C 4A:2-2.3(a)(6)** – Conduct unbecoming a public employee
    - **N.J.A.C. 4A:2-2.3(a)(12)** – Other sufficient cause
    - **HRB 84-17 (as amended) (D-4)** – Improper or unauthorized contact with inmate – Undue familiarity with inmates, parolees, their families or friends
    - **HRB 84-17 (as amended) (D-7)** – Violations of an administrative procedure and/or regulation involving safety and security
    - **HRB 84-17 (as amended) (C-11)** – Conduct unbecoming an employee

- **HRB 84-17 (as amended) (E-1)** – Violation of a rule, regulation, policy, procedure, order or administrative decision

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:1-12.5(b) provides that a motion for summary decision may be granted if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitled the moving party to summary judgment. Id. at 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one-sided that [moving party] must prevail as a matter of law." Id. at 536. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). However, "the court must grant all the favorable inferences to the non-movant." Brill v. Guardian Life Ins. Co.,142 N.J. at 536.

Here, the appellant is charged with conduct unbecoming a public employee pursuant to N.J.A.C 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atl. City, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann

v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955).

The basis for the charge of conduct unbecoming a public employee was the appellant's unduly familiar relationship with inmates. At all relevant times, the appellant was assigned to the property room at SWSP. On April 13, 2017, the appellant provided an audio-video recorded statement during which he admitted to receiving haircuts from an inmate while in the property room, on several occasions, using the appellant's personal hair clippers that he brought into the prison for that specific use. The appellant admitted that he accessed his personal cell phone while inside SWSP, while inmates were present and "revealed" its screen contents to the inmates. He also admitted to giving inmates access to food items. During his interview, the appellant was evasive and untruthful until confronted with the video surveillance and photographs.

Here, the appellant admittedly introduced items into the prison that included hair clippers, clipper blades and razor blades. These items were then entrusted to inmates who in turn provided personal grooming services to the appellant. Such objects could easily be utilized as deadly weapons against the appellant, other corrections staff or inmates. The appellant admitted that he scrolled through his personal cell phone and then share its screen's contents with inmates. Furthermore, the video surveillance confirmed that the appellant would share food items with inmates by opening the packaged food and pouring into their hands.

As a corrections officer, appellant was held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Appellant's conduct in these unduly familiar relationships and his evasiveness to investigators adversely affected the morale or efficiency of a governmental unit and would tend to destroy public respect in the delivery of governmental services. Appellant's actions were violative of his obligations in a position of public trust. It offended publicly accepted standards of respect and decency. No circumstances existed to warrant or justify appellant's conduct. Moreover, no circumstances existed justifying his relationship with

inmates under his charge. Those unduly familiar relationships existed while the inmates were incarcerated in SWPS.

Therefore, I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has met its burden of proof on this issue.

HRB 84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

General Principles, Subsection C of the Handbook of Information and Rules for Employees of the New Jersey DOC provides that employees are prevented from, "becoming unduly familiar with any inmate or group of inmates or permit[ting] himself to become obligated in any way to an inmate or his family; a parolee or his family." General Rules and Regulations, Subsection K provides that "employees must not give or receive from any inmate or parolee or any inmate or parolee's friend, relative, or representative anything in the nature of a gift or promise or favor, however trivial."

Correction officers are also subject to the DOC Law Enforcement Personnel Rules and Regulations. Article I, Section 2 states in pertinent part:

> No officer shall knowingly act in any way that might reasonably be expected to create an impression of suspension among the public that an officer may be engaged in conduct violative of the public trust as an officer.

Article II, Section 3 states in pertinent part:

> Officers shall be held responsible for the proper performance of duty and for strict adherence to these rules and regulations.

The Law Enforcement Personnel Rules and Regulations provides in pertinent part, at Article III, Section 4 that "no officer shall become unduly familiar with inmates who are incarcerated, on community release, or on parole status..." Appellant was required to follow both the Handbook Rules and the Law Enforcement Rules. The two policies must be read together and supplement each other. The purpose of the policies is consistent. It is to prevent officers from being compromised or becoming obligated to inmates, their friends, or families. These unduly familiar relationships compromise officers, the facility, inmates, and the public. They are an avenue to corruption.

The appellant admittedly maintained relationships with the SWSP inmates under his charge. He admitted to receiving haircuts from an inmate while in the property room, on several occasions, using the appellant's personal hair clippers that he brought into the prison for that specific use. The appellant also admitted that he accessed his personal cell phone while inside SWSP, while inmates were present and "revealed" its screen contents to the inmates. Furthermore, he admitted to giving inmates access to food items. This was an unduly familiar relationship. Such behavior is unbecoming a corrections officer and violates the public trust.

Therefore, I **CONCLUDE** that the appellant's conduct violated HRB 84-17 (as amended), D-4, improper or unauthorized contact with an inmate and undue familiarity with inmates, parolees, their family or friends by engaging in a relationship with SWSP inmates under his charge. Furthermore, I **CONCLUDE** that the appellant's actions violated HRB 84-17 (as amended), C-11, conduct unbecoming and employee by engaging in an unduly familiar relationship with SWSP inmates under his charge.

Next, the appellant admitted that he purposely left his loaded, off-duty firearm in his vehicle while at work, despite being afforded the opportunity to properly secure the weapon pursuant to departmental policy. The Law Enforcement Personnel Rules and Regulations, Article V, Subsection 7 states in pertinent part:

> (a) An employee entering a correctional facility grounds while armed with an off-duty firearm must proceed directly to the weapons collection station of the correctional facility. The off-duty firearm shall be turned in fully loaded, in its holster,

> attached to the State of New Jersey, Firearms Unit Weapons Card. One extra loaded magazine or one extra speedloader in a carrier may be turned into the weapons collection station of the correctional facility with the firearm. No other loose or additional ammunition shall be brought into the correctional facility or carried onto Department property.
>
> (c) Employees are prohibited from storing off-duty weapons or ammunition in their personal vehicles while on Department property.

Therefore, I **CONCLUDE** that the appellant's conduct violated HRB 84-17 (as amended), D-7, violation of an administrative procedure and/or regulation involving safety and security by admittedly purposely leaving his off-duty firearm in his personal vehicle while on-duty as SWSP.

Furthermore, the appellant admitted that he obtained the unauthorized possession of the cell phones seized from his vehicle after he removed them from the prison's property room and that he took possession of DOC issued underwear. The Law Enforcement Personnel Rules and Regulations, Article V, Subsection 3 states in pertinent part:

> Officers shall not willfully, carelessly or negligently lose, destroy, spoil, damage, wrongfully dispose of or convert for personal use or for unauthorized use of another:
>
> (a) Any property belonging to, or assigned by the Department
>
> (b) Any property belonging to, or assigned to, any inmate or parolee under the custody and care of the Department.

Therefore, I **CONCLUDE** that the appellant's conduct violated HRB 84-17 (as amended), E-1, violation of a rule regulation, policy, procedure, order or administrative decision by obtaining the unauthorized possession of the cell phones seized from his vehicle after he removed them from the prison's property room and by taking possession of DOC issued underwear.

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye

as an upholder of that which is morally and legally correct. As detailed above, the appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12).

PENALTY

"The New Jersey Department of Corrections, Human Resources Bulletin 84-17, As Amended, Disciplinary Action Policy" provides that a range of penalty, from three days suspension to removal, may be issued for the sustained charges of conduct unbecoming a public employee. The DOC in this manner has determined that the appropriate penalty is removal. The appellant has been employed by the DOC for over twenty-seven years. He contends that during his employment he has had an exemplary disciplinary record and he argues that a lesser penalty is appropriate under the circumstances and with taking into consideration the principal of progressive discipline.

However, the principle of incremental, or progressive, discipline does not need to be applied in every disciplinary setting, particularly when the misconduct "is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Hermann, 192 N.J. 19, 33 (2007). New Jersey courts have repeatedly concluded that, even in the absence of a prior disciplinary record, removal may be imposed if the charges are serious enough in nature. Ibid.; Henry v. Rahway State Prison, 81 N.J. 571 (1980). While one error, even a serious one, does not necessarily require the ultimate penalty of removal, in cases involving correctional facilities, the evaluation of the seriousness of the offenses and the degree to which such offenses subvert discipline are matters peculiarly within the expertise of the corrections facilities. Bryant v. Cumberland County Welfare Agency, 94 N.J.A.R.2d (CSV) 369.

I have reviewed the appellant's Work History and I am aware of his length of employment with the DOC. (A-1, Exhibit B.) However, based upon all the facts detailed above, I **CONCLUDE** that the appropriate penalty is removal.

ORDER

It is hereby **ORDERED** that the respondent's motion for summary decision is **GRANTED**.

It is hereby **ORDERED** that the following charges are **SUSTAINED**:

- **N.J.A.C 4A:2-2.3(a)(6)** – Conduct unbecoming a public employee
- **N.J.A.C. 4A:2-2.3(a)(12)** – Other sufficient cause
- **HRB 84-17 (as amended)(D-4)** – Improper or unauthorized contact with inmate – Undue familiarity with inmates, parolees, their families or friends
- **HRB 84-17 (as amended)(D-7)** – Violations of an administrative procedure and/or regulation involving safety and security
- **HRB 84-17 (as amended)(C-11)** – Conduct unbecoming an employee
- **HRB 84-17 (as amended)(E-1)** – Violation of a rule, regulation, policy, procedure, order or administrative decision

It is hereby **ORDERED** that the penalty of removal is **AFFIRMED**.

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

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

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

July 18, 2018.
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: July 18, 2018

Date Mailed to Parties: July 18, 2018

JRW/dm

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

7-18-18
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: July 18, 2018

Date Mailed to Parties: July 18, 2018

JRW/dm

WITNESSES

For Appellant:

None

For Respondent:

None

EXHIBITS

For Appellant:

A-1 Appellant's submission in opposition to respondent's Motion for Summary Decision, filed May 16, 2018

For Respondent:

R-1 Respondent's Motion for Summary Decision, filed March 9, 2018

STATE OF NEW JERSEY

In the Matter of Paul Smith
Passaic County, Preakness Healthcare Center

CSC DKT. NO. 2018-471
OAL DKT. NO. CSV 12875-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 15, 2018 BW

The Civil Service Commission, at its meeting of August 15, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 12875-17
AGENCY DKT. NO. 2018-471

IN THE MATTER OF PAUL A. SMITH,
PASSAIC COUNTY PREAKNESS
HEALTHCARE CENTER.

Terry Woodrow, Organizer/Field Representative, AFSCME, for appellant Paul A. Smith pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jose R. Santiago, Assistant County Counsel, for respondent Passaic County (William J. Pascrell, III, County Counsel)

Record Closed: July 26, 2018 Decided: July 27, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant Paul A. Smith filed an appeal from a Final Notice of Disciplinary Action dated August 1, 2017, issued by respondent Passaic County Preakness Healthcare Center. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 5, 2017, for determination as a contested case. A telephone prehearing conference was held on October 12, 2017, and the hearing scheduled for January 18, 2018. Counsel for respondent

requested an adjournment and the hearing was rescheduled for April 30, 2018. The parties appeared at the OAL on April 30, 2018 and engaged in discussions toward an amicable resolution. Subsequently, counsel for respondent forwarded the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

7/27/18

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

RECEIVED
2018 JUL 26 P 2:24
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

WILLIAM J. PASCRELL, III,
PASSAIC COUNTY COUNSEL
401 GRAND STREET
PATERSON, NJ 07505(973) 881-4466
Attorney for Respondent Passaic County Preakness Healthcare Center

PAUL A. SMITH	:	STATE OF NEW JERSEY
	:	
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	AOL DOCKET NO: CSV -12875-2017 N
	:	
vs.	:	**SETTLEMENT AGREEMENT**
	:	
PASSAIC COUNTY PREAKNESS HEALTHCARE CENTER,	:	
	:	
Respondent.	:	

WHEREAS, Paul A. Smith, Petitioner/Appellant is employed as a CNA by Respondent, the Passaic County Preakness Healthcare Center, and

WHEREAS, on or about July 17, 2017, Petitioner was served with a Preliminary Notice of Disciplinary Action, 31A, charging him with a violation of NJAC 4A:2-2.3

1. Conduct Unbecoming a Public Employee

2. Insubordination

12 Other sufficient cause, possible terroristic threat, and

WHEREAS, those charges arose from an incident on July 14, 2017 as stated in the Preliminary Notice of Disciplinary Action - 31-A, (Exhibit A); and

WHEREAS, on August 2, 2017, a Final Notice of Disciplinary Action 31B, (Exhibit B) was issued, upholding the charges and imposing a 60 day suspension without pay from July 17, 2017 through October 6, 2017 and attendance at an Employee Assistance Program, (Exhibit B) and

WHEREAS, Mr. Smith appealed that determination, which is now before the OAL; and

WHEREAS, the parties have agreed that the charges and discipline shall be sustained as amended; and

WHEREAS, the parties in this appeal, having voluntarily resolved all disputed matters between them, they now enter into the following settlement, which fully disposes of all issues in controversy.

1. Petitioner's 31B shall be changed to reflect a suspension without pay of forty five days for conduct unbecoming a public employee and insubordination and Petitioner has already attended the EAP Program.

2. Petitioner will be reimbursed the remaining 15 days not paid, due to the suspension, upon the acceptance of this Settlement Agreement by the Civil Service Commission as a Final Decision.

3. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

4. Respondent, Passaic County /Passaic County Preakness Health Care Center shall amend Petitioner's personnel records to conform to the terms of the Settlement.

5. All internal records of the Preakness Healthcare Center and, County of Passaic will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with law.

6. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

7. Petitioner waives all other claims against the Preakness Healthcare Center with regard to this matter, counsel fees or other monetary relief.

8. This agreement shall not constitute a precedent in matters involving other employees.

9. No Other Claims: Petitioner represents that Petitioner has not filed any other claim, complaint or charges, either formal or informal, against the Preakness Healthcare Center or Passaic County with any other local, state or federal agency or court relating to Petitioner's employment with Respondent. The Petitioner will not file any such actions as related to the claim, complaint or charge to which this document acts as a Release and Settlement at anytime hereafter, unless necessary to enforce this Agreement.

10. Petitioner waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the County of Passaic and Passaic County Preakness Health Care Center, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title Vii of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination Employment Act, Title 11A – the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims

and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practice which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

11. Costs. The Parties shall each bear their own costs, expert fees, attorneys' fees and other fees incurred in connection with this Agreement.

12. Voluntary Execution of Agreement. This Agreement is executed voluntarily and without any duress or undue influence on the part or behalf of the Parties hereto, with the full intent of releasing all claims. The Parties acknowledge that:

They have carefully read this Agreement and it has been explained to them in full;

They have been represented in the preparation, negotiation, and execution of this Agreement by legal counsel of their own choice or that they have voluntarily declined to seek such counsel;

A. They fully understand the terms and consequences of this Agreement and of the releases it contains;

B. They are fully aware of the legal and final binding effect of this Agreement;

C. They freely and voluntarily enter into this Agreement without duress or coercion;

D. The Parties are completely satisfied that this Agreement is fair, reasonable, and acceptable; and

E. The Parties are satisfied with their respective counsel if any and believe their counsel has effectively represented their independent interests.

13. Authority. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them, under the terms and conditions of this Agreement.

Each Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of, or against, any of the claims or causes of action released herein.

14. No Representations. Each Party represents that it has had the opportunity to consult with an attorney, and/or union representative and has carefully read and understands the scope and effect of the provisions of this Agreement. Neither Party has relied upon any representations or statements made by the other Party hereto, which are not specifically set forth in this Agreement.

15. Severability. In the event that any provision or portion of a provision hereof becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provision or portion of such provision.

16. Entire Agreement. This Agreement contains and constitutes the entire understanding and agreement between the parties hereto, respecting the subject matter hereof, and supersedes and cancels all previous negotiations, agreements, commitments and writings in connection herewith. The introductory clauses are incorporated herein and read together are contractual in nature and not mere recitals.

17. No Oral Modification. This Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner, orally or otherwise, except by an instrument in writing of concurrent or subsequent date, signed by a duly authorized officer or representative of each of the parties hereto. The parties agree that they waive the rule of construction against the drafter of this Agreement.

18. Governing Law. The laws of the State of New Jersey shall govern this Agreement.

19. Effective Date. This Agreement is effective after it has been signed by all of the Parties.

20. Counterparts. This Agreement may not be executed in counterparts.

21. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

22. This Settlement Agreement represents the complete and full understanding between the parties.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER A PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN THE SAME AS THEIR OWN FREE ACT. BY SIGNING BELOW, THE UNDERSIGNED FURTHER INDICATE AND ACKNOWLEDGE THAT THIS IS A LEGALLY BINDING DOCUMENT AND THAT THEY ARE FREELY AND VOLUNTARILY GIVING UP CERTAIN RIGHTS TO FILE LEGAL CLAIMS AND TO RELEASE PRIVATE AND CONFIDENTIAL INFORMATION AND INTEND TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT WITHOUT EXCEPTION.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the respective dates set forth below.

6/29/2018
Date

Paul A. Smith

6/29/18
Date

Terry Woodrow, Union Representative

6/29/18
Date

Lucinda Corrado, Director
Preakness HealthCare Center

EXHIBIT A

SD

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

FROM			
Employing Agency Name: County of Passaic	Address/ Phone Number: 401 Grand Street, Paterson, NJ 07505		Date: 07/17/2017
Attorney representing your agency should this matter be appealed: Office of County Counsel		Address/Phone number/Email address: SAME	

TO			
Employee Name: Paul A. Smith	Permanent Civil Service Title: 02502 Certified Nurses Aide		Employee Identification Number: 000707993
Address/ Phone Number: 875 East 25th Street, Paterson, NJ 07504 862-239-0669 / 973-653-9276			Pension Number: 1392235

You are hereby notified that the following charge(s) have been made against you: *(If necessary, use additional sheets and attach)*

Charges:

4A:2-2.3 General causes
6. Conduct unbecoming a public employee
2. Insubordination;
12. Other sufficient cause
Possible terroristic threat

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

Incident 7/14, at 11:30PM into 7/15 12AM
dissatisfied with assignment, he was raising his voice and cursing, made statement "there is no justice in this place, that is why ISIS is coming to chop off your heads all those fucking white people"

☐ *If checked, charges are continued on attached page.*

☒ *If checked, incidents are continued on attached page.*

☒ You are hereby suspended effective 7/17/2017
(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 5 (five) *days of receipt of this form. If you request a hearing it will be held on July 27, 2017 at (time) 10AM at (place of hearing) Preakness Healthcare Center, 305 Oldham Road, Wayne, NJ

*Must be a minimum of five days

The following disciplinary action may be taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☒ Removal, effective (date) TBD

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ (amount) which is equal to _____ (number) (number of working days)

Appointing authority or authorized agent's signature and title:

Signature Lucinda Conrado 7/17/17 Title Lucinda Conrado, Executive Director Preakness Healthcare

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☐ Receipt Number _____

☒ Signature of Server _____ ☒ Date of personal service 7/17/17

CPF-31A Revised 05-24-11

DISTRIBUTION: Employee, Union Representative or Attorney; Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

E Mailed AFSCME 7/17/17

EXHIBIT B

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
Preakness Healthcare Center	401 Grand Street Paterson, NJ 07505	08/01/2017

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Office of County Counsel	401 Grand Street, Paterson, NJ (973) 881-4460

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
PAUL A SMITH	NRS AIDE	000707993

Address/ Phone Number	Pension Number
675 East 25th Street Paterson, NJ 07504	

On 07/17/2017 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ **You requested a hearing which was held on** 07/27/2017 ☐ **You did not request a hearing**

☐ **You requested a hearing and did not appear at the designated time and place**

Sustained Charges:	**Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:**
Violation of Administrative Code: 4A:2-2.3 - Conduct unbecoming a public employee - Insubordination - Other sufficient cause * Possible Terrorist Threat	See Attached 31A
☐ *If checked, charges are continued on attached page.*	☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for 60 Days working days, beginning 07/17/2017 and ending 10/06/2017, returning on 10/9/2017

☐ Indefinite suspension pending criminal charges effective (date)_____

☐ Removal, effective (date)_____

☐ Demotion to position of _____ effective (date)_____

☐ Resignation not in good standing, effective (date)_____ ☒ Other Disciplinary Action

☐ Fine ____ *amount* which is equal to ____ *number* (number of working days) EAP Program

Appointing authority or authorized agent's signature and title:

Signature [signature] **Title** Barbara E. De Spirito, Director of Human Resources

This form must be personally served on the employee or sent by certified or registered mail.

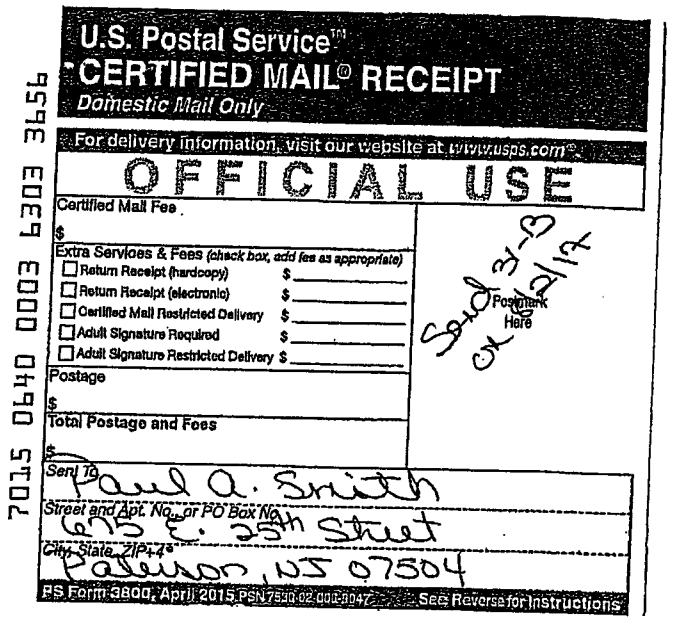
☑ **Certified or Registered Mail** ☐ **Receipt Number** 7015 0640 0003 6830 3656

☒ **Signature of Server** [signature] ☒ **Date of ~~personal~~ service** 8/2/2017

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.



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- ☐ Return Receipt (electronic) $
- ☐ Certified Mail Restricted Delivery $
- ☐ Adult Signature Required $
- ☐ Adult Signature Restricted Delivery $

Postage
$

Total Postage and Fees
$

Postmark Here

Sent 31-8 CK 8/2/17

Sent To: Paul A. Smith
Street and Apt. No., or PO Box No.: 675 E. 25th Street
City, State, ZIP+4®: Paterson, NJ 07504

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

7015 0640 0003 6303 3656

SENDER: COMPLETE THIS SECTION

- ■ Complete items 1, 2, and 3.
- ■ Print your name and address on the reverse so that we can return the card to you.
- ■ Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Paul A. Smith
675 E. 25th Street
Paterson, NJ 07504

9590 9403 0897 5223 1772 13

2. Article Number (Transfer from service label)
7015 0640 0003 6303 3656

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐ Agent
☐ Addressee

B. Received by (Printed Name) | C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- Insured Mail
- Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☒ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

Aectfineis 6 Neattftcwte CenteA

a .ee$_g$act$_i$ e$_{ms}$.

To: Paul A. Smith, CNA

From: Lucinda Corrado, Executive Director
Barbara DeSpirito, Director of Human Resources

Date: August 1, 2017

Re: Disciplinary Hearing Decision

As indicated on the attached decision on July 27, 2017 you are required to immediately enroll in the Employee Assistance Program. Within 48 hours or receipt of this correspondence, please call to enroll. Scheduling must be at the employee's personal time.

- Intervention Strategies International — 1-800-663-

0404 All services are confidential,

Employee Signature: _____ Date: 6/29/2018

CC: Barbara DeSpirito, Director of Human Resources
Dr. Tracy Waldman, Intervention Strategies
International Renee' Peterman, HR Specialist

* * * * * *

305 Oldham Road, Wayne, NJ 07470
Phone: (973) 317-7020 www.passaiccountynj.org/Preakness

Y-15-17

A-7

STATE OF NEW JERSEY

In the Matter of Samad Washington
City of Newark Police Department

CSC DKT. NO. 2014-1963
OAL DKT. NO. CSV 02415-14

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: [AUGUST 17, 2018 BW

The appeal of Samad Washington, Police Officer, City of Newark, Police Department, three-month suspension (92 calendar days), on charges, was heard by Administrative Law Judge Joann LaSala Candido, who rendered her initial decision on July 16, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 15, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

This is the final administrative determination in this matter. Any further review

should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 02415-14
AGENCY DKT. NO. 2014-1963

IN THE MATTER OF SAMAD WASHINGTON,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony Fusco, Esq. (Fusco & Macaluso, attorneys)

Karron Rizvi, Esq., Assistant Corporation Counsel, for respondent (Kenyatta Stewart, Corporation Counsel)

Record Closed: July 12, 2018 Decided: July 16, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Samad Washington (appellant) appeals his ninety-day suspension as a police officer with the City of Newark (respondent) which sustained charges against him alleging that he violated N.J.A.C. 4A:2-2.3(a)(2), insubordination; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, and departmental policies and procedures Rules and Regulations 18.8, acts of insubordination, Rules and Regulations Chapter 3:1. 2-4, demonstration of respect, Rules and Regulations Chapter 5:1.1, conduct unbecoming, and Rules and Regulations Chapter 5:4.1, obedience to orders. The specification reads:

> On April 4, 2013, at approximately 12:25 p.m., at 311 Washington Street, Communication Division, Police Officer Samad Washington, assigned as dispatcher, did commit an act of insubordination to Lieutenant Robert Clark, a superior officer, to wit: Lieutenant Clark gave Officer Washington instruction regarding his dispatch duties at which time Officer Washington became verbally confrontational and questioned Lieutenant Clark. Officer Washington stood up walked towards Lieutenant Clark while glaring at him as he made threatening remarks, "You need to remember who you're talking to." Officer Washington attempted to walk up onto the supervisor's Platform and was physically blocked by Police Officers Alnesa Mallory and Michael Walski. Officer Washington continued to push towards the platform, Captain Wilfredo Mercado then exited his office and Assisted in the restraint of Officer Washington, who was eventually escorted from the dispatch floor.
>
> On April 4, 2013, at approximately 12:25 p.m., at 311 Washington Street, Communication Division, Police Officer Samad Washington, assigned as dispatcher, did receive a lawful verbal order from Captain Wilfredo Mercado, a superior officer, directing Officer Washington to leave the dispatch floor and go to the hallway, he did disobey this order when he failed to comply as directed.

Appellant disputes the charges sustained enumerated above in the Final Notice of Disciplinary Action dated February 4, 2014.

On February 26, 2014, the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case. The matter was heard by former Administrative Law Judge Joan Bedrin-Murray on April 20, 2015, and September 16, 2015. The matter was re-assigned to Judge Leslie Celentano on December 20, 2017, upon Judge Bedrin-Murray leaving the OAL, before being re-assigned to the undersigned on June 29, 2018. The record closed on July 12, 2018, upon receipt of the appellant's complete disciplinary record.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented in the file, I **FIND** the following **FACTS**:

1. Appellant, a police officer, has been employed by respondent at the time of this hearing for twenty-four years. He was assigned to the prison and processing division, Squad B.
2. On or about April 4, 2013, while a dispatcher and wearing headsets, appellant received a call from an officer in the East District who was attempting to pull over a suspicious vehicle. He was wearing his headsets while dispatching. Washington was attempting to get the location of the officer to send back-up.
3. Lieutenant Robert Clark was appellant's immediate supervisor. On April 4, 2013, Lieutenant Clark announced that he needed the air to dispatch a message and waited approximately five seconds before taking over Channel 3 that appellant was communicating on. Lieutenant Clark was looking for a police vehicle when he took the air.
4. Appellant told Lieutenant Clark that he had the air when the lieutenant interrupted. Appellant and Clark loudly spoke to each other about the interruption and two fellow officers walked out of the dispatch room with appellant after being directed by Captain Wilfredo Mercado to leave the area on more than one occasion.

CONCLUSIONS OF LAW

The City of Newark Police Department has the burden of proving the charges against Officer Samad Washington by a preponderance of the credible evidence. N.J.S.A.11A:1-1 to 12-6. Preponderance is the greater weight of credible evidence and convincing power presented, not necessarily dependent on the number of witnesses. State v. Lewis, 67 N.J. 47 (1975). Moreover, the evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). And, where the standard is reasonable probability, the evidence must

be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Lowe v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant is charged with insubordination. The Civil Service Commission utilizes a more expansive definition of insubordination than a simple refusal to obey an order. In re Chaparro, CSV 4112-10, Initial Decision (November 12, 2010), modified, CSC (March 18, 2011) (citing In re Stanziale, A-3492-00T5 (App. Div. April 11, 2002), <http://njlaw.rutgers.edu/collections/courts/> (appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, A-2488-07T2 (App. Div. April 26, 2010), <http://njlaw.rutgers.edu/collections/courts/>; In re Moreno, CSV 14037-09, Initial Decision (June 10, 2010), modified, CSC (July 21, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 23, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Pettiford, CSV 8804-07, Initial Decision (March 13, 2008), modified, Merit System Board (May 21, 2008), <http://njlaw.rutgers.edu/collections/oal/>. (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor.)

The Civil Service Commission also has determined that an appellant is required to comply with an order of his or her superior, even if he or she believed the orders to be improper or contrary to established rules and regulations. See Palamara v. Twp. of Irvington, A-5408-05T3 (App. Div. February 28, 2005), <http://njlaw.rutgers.edu/collections/courts/>; compare, In re Allen, CSV 11160-04, Initial Decision (May 23, 2005), remanded, Merit System Board (July 14, 2005), CSV 09132-05 Initial Decision, (November 22, 2005), adopted, Merit System Board (January 26, 2006), <http://njlaw.rutgers.edu/collections/oal/> (in which the Board determined that the appellant's disobedience was justified by concerns for the safety of the clients on a bus and reversed his removal).

In this case, there is sufficient evidence that appellant was insubordinate when directed to leave the dispatch room and failing to do so until his fellow officers escorted him out as well as engaging in an argument with a superior. I therefore **CONCLUDE** that appellant engaged in conduct that amounted to insubordination and disrespect.

"Conduct unbecoming" a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Based upon all of the foregoing, including the evidence and certifications submitted, I **CONCLUDE** that appellant violated the rules and policies of the Institution when he confronted his superior in an argumentative manner and needed to be escorted out of the dispatch area by at least two fellow officers. I therefore **CONCLUDE** that respondent has satisfied its burden of proving, by a preponderance of the credible evidence conduct unbecoming a public employee.

I further **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the credible evidence, all charges against appellant.

Respondent suspended the appellant for ninety days. Violation of Newark Police Department Rules and Regulations of insubordination or disrespect for any superior officer and as per N.J.A.C. 4a:2-2.3(a)(2) insubordination, in regard to the established conduct for a law enforcement unit, public employees who are protected by the provisions of the Civil Service Act may be subject to major disciplinary action for a variety of offenses involving their employment. An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. The same holds true for conduct unbecoming. In determining the reasonableness of a sanction, the employee's past record and any mitigating

circumstances should be reviewed for guidance. W. New York v. Bock, 38 N.J. 500 (1962). However, the courts should not adhere to rigid disciplinary guidelines in assessing penalties. To determine whether sufficient cause exists to justify the sanction, the conduct must be examined considering certain factors. Moreover, the employee's conduct must be evaluated in context with its relationship to the nature of the job and the circumstances, which may impact specific conduct. On appeal, the Board may modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). Indeed, the Board is empowered to substitute its judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Henry, 81 N.J. at 579. However, the penalty imposed may not be so disproportionate to the offense and the mitigating factors that the administrative decision is arbitrary and unreasonable. Feldman v. Town of Irvington Fire Dep't, 162 N.J. Super. 177, 182 (App. Div. 1978), overruled on other grounds by Steinel v. Jersey City, 99 N.J. 1 (1985). The following charges have been sustained:

1. 03/22/93 - Two-day suspension for False Statement.
2. 12/22/92 - Three-day suspensions for Disobedience of Orders.
3. 02/24/94 - Division Answering Subpoena.
4. 10/30/95 - Two-day suspension for Disobedience of Orders.
5. 07/17/99 - Five-day suspension for Acts of Insubordination.
6. 05/23/00 - Sixty-day suspension for Acts of Insubordination.
7. 10/30/06 - Reprimand

The determination as to the appropriate penalty is properly considered in the context of the ongoing and continuous violations of Newark Police Department policy and the disregard for standing orders. Also considered, but of less import, is the prior disciplinary record, consisting of seven disciplinary actions, ranging from a two-day suspension to a sixty-day suspension. I **CONCLUDE** that the nature of the conduct, against the backdrop of the prior disciplinary record here, amply justifies the ninety-day suspension.

ORDER

It is **ORDERED** that the charges of insubordination, conduct unbecoming, and the Newark Police Department Rules and Regulations against appellant are and hereby shall be **SUSTAINED**.

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

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

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

July 16, 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: July 16, 2018

Date Mailed to Parties: July 16, 2018

ljb

8-15-18

B-022

STATE OF NEW JERSEY

In the Matter of Christopher Munn, City of Trenton Police Department	**DECISION OF THE CIVIL SERVICE COMMISSION**
CSC Docket No. 2018-2366	
	Administrative Appeal

ISSUED: AUGUST 17, 2018 (BW)

Christopher Munn, a Police Officer with the City of Trenton Police Department, represented by Paul W. Tyshchenko, Esq., requests to reinstate the appeal of his 120-hour suspension, which was dismissed on the basis of his failure to appear at the April 17, 2018 settlement conference at the Office of Administrative Law (OAL).

The appellant timely appealed his suspension to this agency which transmitted the matter to OAL as a contested case. The OAL scheduled the matter for a settlement conference on April 17, 2018, and sent a notice dated March 6, 2018 to this effect to the appellant's attorney and the City of Trenton's (City) attorney. On the scheduled date, the appellant and/or his attorney failed to appear. The OAL issued a "Failure to Appear" notice which indicated that the appellant and his attorney failed to appear at the scheduled proceedings. On April 24, 2018, the matter was returned to the Civil Service Commission (Commission) for a final decision, with a notice giving the parties 13 days to present any excuse for failure to appear to this agency.

In support of the appellant's request for reinstatement of his appeal, the appellant's attorney argues that he did not appear as a result of a clerical error either on the part of his office or the OAL, as he never received the notice. Moreover, the appellant's attorney asserts that the appellant should not be denied a fair hearing because of a clerical error.

In response, the appointing authority, represented by Stephen E. Trimboli, Esq., maintains that the appellant's request in this matter should be denied. Specifically, the appointing authority asserts that the appellants failure to appear is the latest in a series of actions designed to burden the City and cause it to incur legal fees unnecessarily. The City had to pay for the services of its attorney and the loss of two superior police officers for the period of time they were required to appears for a settlement conference. The appointing authority states the OAL sent the notice to appellant's attorney and not to the appellant as is the procedure when someone is represented by an attorney. The City requests that if the appeal is reinstated that the appellant refund the City all costs and legal fees incurred by the City when it appeared for the settlement conference.

CONCLUSION

With regard to the instant matter, the appellant's attorney indicates that he did not receive the Notice of Settlement Conference dated March 6, 2018. In this regard, as noted correctly by the appointing authority, when an appellant is represented by an attorney, OAL only sends notice to the attorney. Accordingly, as the appellant does not bear any individual responsibility for his failure to appear at the settlement conference on April 17, 2018 and he did not intend to abandon his appeal, it would be unfair not to permit him to pursue his statutory right to challenge his suspension based on a clerical error by his attorney.

Moreover, the City's request for reimbursement due to nonappearance is denied as the Commission has no jurisdiction over sanctions for nonappearance at a settlement conference. In this regard, while *N.J.A.C.* 4A:10-1.1 and *N.J.A.C.* 4A:10-2.1 provide that if there is evidence of a violation or noncompliance with Title 11A or *N.J.A.C.* 4A, the Commission may take action which includes assessing costs, charges and fines, no such regulatory violations are evident in this matter. Rather, OAL rules, specifically *N.J.A.C* 1:1.14.4, govern such sanctions. That rule indicates that if the Judge does not receive an explanation from a party for nonappearance within one day, the matter is referred back to the transmitting agency. Sanctions under that rule are **only** considered where the Judge **has** received an explanation from a party **and** finds no good cause to reschedule the hearing. That did not occur in this matter. Moreover, even if the Commission could utilize this provision, since it has found good cause for the matter to proceed, no such sanctions would be warranted. Accordingly, the Commission finds that under the circumstances presented in this matter, to deny the appellant a hearing on the merits of his disciplinary action would be unjust.

ORDER

Therefore, it is ordered that Christopher Munn's request to reinstate his appeal be granted and the matter be transmitted to the OAL for further proceedings.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15 TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries and Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Christopher Munn
Paul W. Tyshchenko, Esq.
Stephen E. Trimboli, Esq.
Beth Wood (w/file)

9-5-18

A-1

STATE OF NEW JERSEY

In the Matter of Maria Bertone
Hunterdon Developmental Center
Department of Human Services

CSC DKT. NO. 2017-1658
OAL DKT. NO. CSV 18276-16

(ON REMAND DKT. NO CSV 18276-16)

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13519-17

(ON REMAND CSV 18276-16)

CSV DKT. NO. 2017-653

IN THE MATTER OF MARIA BERTONE,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Rashidah N. Hasan, Esq., for appellant

Rimma Razhba, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 2, 2018 Decided: August 2, 2018

BEFORE **SARAH G. CROWLEY** ALJ:

This matter concerns the appeal of Maria Bertone from the action of the respondent, Department of Human Services, Hunterdon Development Center. The appeal was filed with the Office of Administrative Law (OAL) on September 14, 2017 pursuant to N.J.S.A. 40A:14-202(d).

The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 2, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 8-6-18

Date Mailed to Parties: 8-7-18

OAL DKT. NO. CSV 13519-17
AGENCY DKT. NO. 2017-1658

IN THE MATTER OF
MARIA BERTONE

AND

SETTLEMENT AND LAST CHANCE AGREEMENT

DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement and Last Chance Agreement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **November 9, 2016** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1.N.J.A.C.4A:2-2.3(a)1	Removal	4/29/16
2. N.J.A.C.4A:2-2.3(a)6	Removal	4/29/16
3. N.J.A.C.4A:2-2.3(a)7	Removal	4/29/16
4. N.J.A.C.4A:2-2.3(a)12	Removal	4/29/16
5. A.O. 4:08 B1.1	Removal	4/29/16
6. A.O. 4:08 C3.1	Removal	4/29/16
7. A.O. 4:08 C4.1	Removal	4/29/16
8. A.O. 4.08 C5.1	Removal	4/29/16
9. A.O. 4.08 C11.1	Removal	4/29/16

B. The parties have agreed to the following:

1. Appellant shall be reinstated to the position of Cottage Training Technician ("CTT") at Hunterdon Developmental Center.
2. The Final Notice of Disciplinary Action dated November 9, 2016 shall be modified as follows: six (6) months consecutive suspension without pay (time already served).
3. Appellant waives any and all claims for back-pay or attorney's fees from Respondent.
4. Any other days from the time of the last suspension day until reinstatement shall be recorded as Approved Leave of Absence Without Pay.
5. This settlement constitutes a final warning and last chance agreement arising from Appellant's conduct in this matter. Appellant shall be subject to discharge and/or removal by Respondent for any future conduct that results in violation of any of the regulations, policies or procedures cited in Paragraph A of this Agreement, including any violations of Respondent's policies regarding client abuse and neglect.
6. Upon the parties' signing of this Agreement, and only after the Civil Service Commission approves this Agreement, Respondent shall begin procedures for reinstatement of Appellant.
7. After her reinstatement, Appellant shall be re-trained with regard to her job duties and responsibilities and applicable Departmental policies and procedures, including training on client abuse and neglect, including sensitivity training

C. The Appellant withdraws her appeal and request for a hearing.

D. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

E. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of Maria Bertone's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family

Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending worker's compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/2/18
DATE

Jim Hoff, ERO HDC

8-2-18
DATE

ON BEHALF OF Hunterdon Developmental Center DAG

8-2-18
DATE

ON BEHALF OF Maria Bertone

OAL DKT. NO. CSV 13519-17

CERTIFICATION

I, Maria Bertone, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

August 2, 2018 — Maria T Bertone

DATE

4-5-18

A-02

STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Gary Bode and Fred O'Callaghan, Department of Corrections

CSC Docket Nos. 2018-1671 & 2018-1708
OAL Docket Nos. CSR 18358-17 & CSR 18648-17 (consolidated)

ISSUED: September 21, 2018 (EG)

The appeals of Gary Bode and Fred O'Callaghan, Correction Lieutenants[1] with East Jersey State Prison, Department of Corrections (DOC), of their removals effective December 7, 2017 and December 15, 2017, respectively, on charges, were heard by Administrative Law Judge Susana E. Guerrero (ALJ), who rendered her initial decision on August 1, 2018. Exceptions were filed on behalf of the appointing authority and exceptions and a reply to exceptions were filed on behalf of the appellants.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 5, 2018, did not adopt the ALJ's recommendation to modify the removals to 180 calendar day suspensions. Rather, the Commission modified the removals to 60 working day suspensions.

DISCUSSION

The appellants were charged with conduct unbecoming a public employee, neglect of duty and other sufficient cause. Specifically, the appointing authority alleged that the appellants entered general population unsuited and without following proper procedure, creating an unsafe environment for medical and custody staff members. Upon the appellants' appeals, the matters were transmitted to the OAL for hearings as contested cases. The matters were consolidated at OAL.

[1] Pursuant to P.L.2017, c.293, the title of Correction Lieutenant has been retitled Correctional Police Lieutenant.

The ALJ set forth in her initial decision that on August 26, 2107, the appellants were the highest-ranking officers at the prison. During the first shift that day there was a physical altercation between two inmates in the big yard. An officer witnessed the altercation and called in a code. O'Callaghan responded by approaching the gates. He was informed by the officer that one inmate had picked up another inmate and slammed him to the ground on his head. O'Callaghan could see the injured inmate convulsing on the ground. O'Callaghan then witnessed the inmate stop convulsing and ordered the gate opened. He also called in a code 53 medical emergency and called for a suited team. O'Callaghan then preceded to enter the yard and was followed by nine officers. These officers were not ordered by O'Callaghan to enter the yard. O'Callaghan and these other officers were not suited with protective gear. The 97 inmates in the yard at the time of the incident were ordered to retreat to the far end of the yard, about half the length of a football field away from the injured inmate. They all complied before O'Callaghan entered the yard. Once O'Callaghan entered the yard, he ran directly to the inmate and checked his pulse. Medical staff arrived within two minutes of O'Callaghan entering the yard. O'Callaghan remained with the medical staff for approximately 10 to 15 minutes, until the inmate was carried away on a stretcher. After the codes were called, Bode also entered the yard without any protective gear.

Correction Sergeant[2] Vargas responded to the code by arriving at the gates to the yard with 13 officers. He entered the yard and ordered the 97 inmates to lay on the ground, put their hands behind their heads and to cross their legs as a protective measure. The 13 officers then created a barrier between the inmates and the injured inmate, O'Callaghan, the other officers with O'Callaghan, and the medical staff. Vargas claims that Bode denied his request for a second team and that Bode had ordered that his team remain in the yard with the inmates after the injured inmate had been removed from the yard.

The appointing authority's witnesses testified that the appellants violated several provisions of at least three Internal Management Procedures (IMPs), as well as the Law Enforcement Personnel Rules and Regulations. The IMPs provided the procedures to be utilized during emergency situations, and the responsibilities and the requirements for Lieutenants in such situations.

The ALJ found that O'Callaghan entered the yard unsuited and that his entry caused other officers to enter the yard unsuited. The ALJ stated O'Callaghan's actions constituted neglect of duty and conduct unbecoming a public employee as he violated the IMP requiring him to enter suited and with a team of 13 suited officers. Further, O'Callaghan failed to ensure the safety of the officers who accompanied him and the medical staff. Additionally, the ALJ found that Bode's actions in entering the yard without being suited and his ordering of Vargas'

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[2] Pursuant to P.L.2017, c.293, the title of Correction Sergeant has been retitled Correctional Police Sergeant.

team to remain in the yard with the inmates after the injured inmate was taken away constituted neglect of duty and conduct unbecoming a public employee. The ALJ found Bode's actions reckless and unnecessarily jeopardized the safety and security of Vargas' team. Moreover, the ALJ found that the charge of other sufficient cause against the appellants were proven by the appointing authority as both appellants clearly violated IMPs.

With regard to the penalty, the ALJ determined that the errors committed by O'Callaghan in responding to the code in question were insufficiently severe to render O'Callaghan unsuitable to continue in his position. The ALJ indicated that in O'Callaghan's 18 years with DOC, his disciplinary history consisted of a single written reprimand. Therefore, she concluded that a 180 calendar day suspension was a more appropriate penalty. In assessing the proper penalty for Bode, the ALJ indicated that the penalty was excessive for the infractions he committed. The ALJ stated that Bode only had one written reprimand present in his disciplinary record in his 12 years with DOC. Thus, the ALJ determined a 180 calendar day suspension a more appropriate penalty for Bode.

In its exceptions, the appointing authority argues that the ALJ properly found all the charges were proven and sustained against the appellants, but that the ALJ applied irrelevant and immaterial factors in reducing the penalties. Specifically, it argues that the fact that no riot, hostage situation or deaths occurred did not excuse the actions of the appellants. The potential for harm, violation of procedures, and risk of safety to the prison was inexcusable for the highest-ranking officers in the prison at the time of the incidents. In this regard, it contends that the appellants actions were so egregious that removal was warranted.

In their exceptions and reply to exceptions, the appellants argue that the ALJ erred in finding the appellants violated the IMPs. They contend that a plain reading of the IMPs in question indicate that the appellants did not violate any procedures. Additionally, the appellants contend that ALJ improperly found the testimony of Assistant Superintendent Jeffery Crothers credible and did not give enough weight to their testimony. Specifically, they contend that the testimony of Crothers contained many inconsistencies. Finally, the appellants argue that the 180 calendar day suspension was too severe in the instant matter based on their disciplinary histories and the fact that both appellants acted with good intentions and there were no injuries or negative consequences as a result of their actions.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination regarding the charges. However, the Commission does not agree with the ALJ's recommendation to modify the removals to 180 calendar day suspensions. Rather, the Commission modifies the removals to 60 working day suspensions. In their exceptions, the appellants argue that the ALJ erred in finding the appellants violated the IMPs as a plain reading of the IMPs in question indicate

that the appellants did not violate any procedures. The Commission does not agree. As the ALJ clearly indicated, both the appellants violated IMPs regarding the proper and safe response to emergency situations. Both appellants entered the yard where inmates were present without the proper safety equipment and without the properly equipped number of other officers in violation of the IMPs. Their failure to follow proper procedures risked escalating the situation and potentially put the lives of other officers and medical personnel in danger.

The appellants also contend that the ALJ did not give enough weight to their testimony and claimed the testimony Crothers was inconsistent with the facts. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. The ALJ explicitly indicated that she found Crother's testimony credible that Bode should not have entered the yard at all and that he should have reported to his appropriate post once the code was called. Further, while the ALJ specifically found the appellants' testimony that they were never specifically trained on how to respond to a code in the yard nor specifically instructed not to enter the yard while inmates were present, the Commission agrees with the ALJ that they were required to be familiar with and follow the IMPs. The appellants claim that not enough weight was given to this finding in determining the charges is unpersuasive.

In determining the proper penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is

recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Further, even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. *See Henry v. Rahway State Prison, supra,* 81 *N.J.* at 579-80. In the instant matter, both appellants had only one written reprimand each in their disciplinary histories. O'Callaghan had been employed for 18 years with DOC, while Bode was employed for 12 years. Moreover, given the actual incident in question, the Commission does not find removal to be appropriate under these circumstances. In this regard, while it is clear the appellants both violated IMPs and that the appointing authority proved the charges, as the ALJ indicated, they acted with benevolent intentions to preserve the life of the inmates and did not believe that they put any officers or medical personnel in danger. Further, no officers, medical personnel or inmates sustained any injuries as a result of their actions. However, the Commission acknowledges that the appellants' failure to follow procedures could have resulted in severe consequences. In this regard, the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). The Commission is particularly mindful of this standard when disciplinary action is taken against a high ranking law enforcement officer in a correctional facility. Accordingly, the Commission imposes 60 working day suspensions on both appellants, which will serve as an indication that any further infractions committed by the appellants will potentially subject them to removal from employment.

Accordingly, the appellants are entitled to back pay, benefits and seniority for the period after the imposition of the 60 working day suspensions up to their dates of reinstatement. With regard to counsel fees, since the appellants have not prevailed on the primary issues on appeal, they are not entitled to awards of counsel fees. *See N.J.A.C.* 4A:2-2.12. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert* Dean (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, all the charges were upheld and major discipline imposed. Consequently, as the appellants have failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v.*

Department of Corrections, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips*, *supra*, the appointing authority shall immediately reinstate the appellants to their permanent positions.

ORDER

The Civil Service Commission finds that the appointing authority's actions in removing the appellants were not justified. Therefore, the Commission modifies the removals to 60 working day suspensions. The Commission further orders that the appellants be granted back pay, benefits and seniority for the period after the imposition of the 60 working day suspensions through the dates of their actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellants to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellants' reinstatements be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

IN THE MATTER OF GARY BODE,
EAST JERSEY STATE PRISON.

OAL DKT. NO. CSR 18358-17
2018-1671

IN THE MATTER OF FRED O'CALLAGHAN,
EAST JERSEY STATE PRISON.

OAL DKT. NO. CSR 18648-17
2018-1705

Kevin Jarvis, Esq., for appellants Gary Bode and Fred O'Callaghan (O'Brien, Belland & Bushinsky, attorneys)

Jessica Saxon, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 19, 2018 Decided: August 1, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Correction lieutenants Gary Bode ("Bode") and Fred O'Callaghan ("O'Callaghan") (collectively appellants) appeal the decisions of the New Jersey Department of Corrections (NJDOC), East Jersey State Prison (EJSP or "respondent"), to remove them from their employment. The removals stemmed from a determination that the appellants failed to properly respond to an incident at EJSP on August 26, 2017, and that this was

detrimental to the orderly operations of the facility and jeopardized the safety and security of EJSP, including its staff.

PROCEDURAL HISTORY

Respondent issued a Preliminary Notice of Disciplinary Action (PNDA) dated October 6, 2017, notifying Bode of the charges made against him concerning his response to an emergency code. (J-3.) An internal disciplinary hearing took place on November 15, 2017, and a Final Notice of Disciplinary Action (FNDA) was issued on December 7, 2017, which sustained all charges in the PNDA. (J-1.)

O'Callaghan was also issued a PNDA dated October 6, 2017, notifying him of the charges made against his response to an emergency code. (J-4.) A departmental hearing was held on November 28, 2017, and an FNDA was issued on December 15, 2017, sustaining the charges listed in the PNDA. (J-2.)

Bode and O'Callaghan each requested a hearing, and the appeals were filed with the Office of Administrative Law (OAL) on December 11, 2017, and December 20, 2017, respectively, to be heard as contested cases pursuant to N.J.S.A. 40A:14-202(d).

In the interest of fairness and efficiency, the undersigned consolidated the appeals on February 5, 2018, pursuant to appellants' request, and without objection from respondent. The matter was heard over the course of four days, April 4, April 5, May 11, and June 18, 2018, and the record closed on June 19, 2018, upon the undersigned's receipt of a copy of an exhibit.

CHARGES

The sustained charges in Bode's December 7, 2017, FNDA and O'Callaghan's December 15, 2017, FNDA are identical. They include the following: conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12); and violations of the following provisions of Human Resources Bulletin 84-17, as amended: serious mistake due to

carelessness but not resulting in danger to persons or property (B.7); conduct unbecoming an employee (C.11); violation of administrative procedures and/or regulations involving safety and security (D.7); and violation of a rule, regulation, policy, procedure, order, or administrative decision (E.1).

The incidents giving rise to these charges are as follows:

> On 10-06-2017 Administration received a completed investigative report from S.I.D. based on an incident on 8/26/2017 where you responded to an incident in the General Population big yard, unsuited and without following proper procedures, policies or administrative guidelines. Your actions were detrimental to the orderly running of the facility and jeopardized the safety and security of the institution. In addition your actions jeopardized the safety of medical and custody staff members.

FACTUAL DISCUSSION

Most material facts in this matter are undisputed, and I, therefore, **FIND** the following to be the relevant and credible **FACTS** in this matter:

Bode became employed by the NJDOC in July 2006, and became a lieutenant at EJSP in March 2016. On August 26, 2017, he was the first-shift operations relief lieutenant at EJSP.

O'Callaghan has been employed by the NJDOC since approximately 2000. He was promoted to lieutenant in or around July 2012. On August 26, 2017, O'Callaghan was the first-shift area lieutenant, and his area of responsibility included the Big Yard.

On the morning of Saturday, August 26, 2017, Bode and O'Callaghan, as lieutenants, were the highest ranking officers at EJSP. EJSP staffs fewer officers and supervisors on weekends.

During the first shift on August 26, 2017, there was a physical altercation between two inmates in the EJSP's Big Yard, which is an enclosed large outdoor area,

approximately the size of two football fields, where a sally-port[1] leads into the prison. The fight occurred during a movement (i.e., when a large number of inmates were being moved in groups from the Big Yard back to their cells). There were approximately 190 inmates in the Big Yard prior to the movement.

Upon witnessing the two inmates fight, Officer Bennett, who was assigned to the Big Yard, called a Code 33.[2] There were approximately ninety-seven inmates in the Big Yard at the time the Code 33 was called, in addition to the two inmates involved in the fight.

When the Code 33 was called, O'Callaghan responded by approaching the gates to the Big Yard. Bennett informed him of the fight he had witnessed, and that one inmate picked up the other and slammed him to the ground, and that the inmate was dropped on his head. From the gate area (at the entrance to the yard), O'Callaghan witnessed the injured inmate (inmate W.) convulsing on the ground.

The inmate who injured inmate W., inmate M., obeyed orders to approach the gate to be taken out of the yard. He was handcuffed and escorted out of the Big Yard without incident. This occurred before O'Callaghan entered the yard. O'Callaghan then saw that the injured inmate had stopped convulsing and was motionless, and he ordered Bennett to open the sally-port gate to the Big Yard so that he could enter the yard and assess the injured inmate. O'Callaghan called a Code 53 at that time.[3] He also yelled over the radio for a suited team.[4]

O'Callaghan was followed into the yard by approximately nine officers. He did not order them to follow him into the yard. O'Callaghan and these other officers entered the yard unsuited, not wearing any protective gear.

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[1] A sally-port consists of a holding area with two gates that controls movement going into and out of the prison from the yard.

[2] A Code 33 is an emergency code, for an inmate fight or disturbance.

[3] A Code 53 is a medical emergency.

[4] "Suited" refers to wearing protective gear, including a helmet and a protective vest, and carrying a baton. Some officers are also required to carry shields as part of a suited team, and the supervisor would have an MK46 spray (a type of mace used for crowd control, also referred to as an MK9).

While inmate M. was being taken out of the yard, and before O'Callaghan entered, the ninety-seven inmates were ordered to retreat to the far end of the Big Yard (the distance being about half of a football field), away from the injured inmate. They all complied with the directive to walk to the end of the yard and face the fence.

Sgt. Anthony Vargas, the operations sergeant, responded to the Code 33 by arriving at the gates of the Big Yard with his team of thirteen officers.

Once the inmates were at the other end of the Big Yard, O'Callaghan entered the yard and ran directly to the injured inmate. O'Callaghan checked the pulse of inmate W., and medical staff arrived within a minute or two of O'Callaghan approaching the injured inmate. O'Callaghan remained with the injured inmate and the medical staff in the yard for approximately ten to fifteen minutes, until the inmate was carried away on a stretcher.

Vargas entered the Big Yard with his team, and they ordered the ninety-seven inmates to lay on the ground, put their hands behind their heads, and cross their legs, as a protective measure. He and his team created a barrier between the ninety-seven inmates and inmate W., O'Callaghan and the other officers accompanying him, and medical staff. Vargas ordered the unsuited officers to leave the yard. Vargas and his team were all suited.

After the codes were called, Bode also responded to the Big Yard without wearing any protective gear.

Vargas radioed Stephen Linardos, the Star sergeant, requesting a second response team and MK46. Vargas maintains that Bode denied his request for a second team and MK46, which prompted him to then call Center Control[5] to make a subsequent request for a second team and mace. The mace was delivered to Vargas in the yard, and a second team was never sent.

[5] Center Control is the unit that coordinates the security and communication functions in the facility.

Once the injured inmate was taken out of the yard, accompanied by O'Callaghan and medical staff, Vargas instructed his team to exit the yard. However, Bode stopped Vargas and instructed him to remain in the yard with his team, and Bode left the yard to speak with Linardos on a landline about moving the inmates out of the yard. Once Bode left the yard, Vargas, contrary to Bode's order, directed his team to exit the yard. As they were exiting the yard, O'Callaghan radioed Vargas with instructions to exit the yard. Vargas and his team later moved the ninety-seven inmates back into the building without incident.

O'Callaghan prepared an Unusual Incident Report in response to the incident. Bode wrote a report of the incident after he was instructed to do so two days after the incident. These reports do not mention that any officers entered the yard unsuited on August 26, 2017.

Respondent asserts that Bode and O'Callaghan violated several provisions of at least three EJSP Internal Management Procedures (IMPs), as well as the Law Enforcement Personnel Rules and Regulations. These are listed below:

IMP for Emergency Response

EJSP's IMP for Emergency Response (J-6) states: "Custody Staff members are reminded to assess the risk to themselves and other staff members and act appropriately. Common sense and sound judgement as well as a sense of duty shall guide staff in their decision making process."

When responding to an emergency, the IMP specifically states the following with regard to an Initial Response Team:

> One (1) Supervisor and five (5) Officers will be dispatched from the Star for all disturbance codes that occur on housing units, shops, and other areas with the exception of the Mess Hall, Yards and Drill Hall or other self contained secured area with no staff or visitors present. The designated Supervisor will be issued the emergency Response Belt. Designated Response Officers are issued batons (marked with red tape)

> and handcuffs at the beginning of their respective Shift. **The Initial Response Team for the Mess Hall, Yards and Drill Hall (or other self contained secured area) will consist of one (1) Supervisor and thirteen (13) Officers suited in protective gear.**
>
> [Emphasis added.]

With respect to the Secondary Response Team, the IMP states:

> One (1) Supervisor and ten (10) Officers suited in protective gear will be dispatched from the Star for all disturbance codes that occur on housing units, shops, and other areas with the exception of the Mess Hall, Yards and Drill Hall or other self contained secured area with no staff or visitors present. **The Secondary Response Team for the Mess Hall, Yards and Drill Hall (or other self contained secured area) will consist of one (1) Supervisor and thirteen (13) Officers suited in protective gear.**
>
> [Emphasis added.]

The IMP for Emergency Response states that when a Code 33 is called,

> the Star Sergeant will clear the immediate area of all inmates and seal the barrier doors to the unaffected areas. The Star Sergeant will give out the Emergency Response Belt (handcuffs, leg irons, MK-9 spray and keys as needed) to the Initial Response Supervisor (affected Area Sergeant or first available supervisor). . . . **The Initial Response Supervisor will be in charge of the scene and must use sound judgement and take control of the situation. . . .**
>
> **If a major disturbance occurs in the** Mess Hall, **Yard Area**, Drill Hall or other self contained secured area with no staff or visitors present, **the Initial Response Team will consist of 13 officers and one supervisor equipped with helmet, vest and baton from the Pass Office ready Room. Five members of this team will be assigned protective shields. The supervisor will also have the MK-9 OC spray. Once the team is suited they shall proceed to the area of the emergency as one unit. The highest ranking staff member present shall assess and determine whether the Response Team will enter the affected area to control the disturbance based on safety and security concerns and**

> **the totality of the circumstances. A Secondary Response Team shall be assembled in the Rotunda consisting of 13 officers and supervisor suited with the same equipment as the first team. The first team will not enter the affected area until the secondary team is assembled**. If the secondary response team is advanced to the affected area, a third team will be assembled in the Rotunda with the necessary equipment, utilizing equipment from the Arsenal if necessary.
>
> [Emphasis added.]

With respect to responding to a Code 33 in the yards, the IMP states in part:

> All unit and area activities will be terminated, all movement will be suspended and all compounds will be secured. Civilian traffic within the confines of the institution will be controlled accordingly. These areas cannot be entered until an assessment of the situation can be made. If the involved inmates comply with all staff directives and report to a sally-port for removal then only the necessary officers and supervisors will be dispatched with any necessary equipment. If the situation involves non-compliant inmate(s) and entry may be required then the Initial Response Team (13 Officers) will suit up with protective gear and respond to the area. This team may enter via any entry point as deemed appropriate by the on-scene supervisor or Shift Commander. A Secondary Response Team (13 Officers) will suit up with protective gear and stand-by for assignment.
> *Note #1: The first team may only enter the area when the second team is prepared. Any additional staff and/or equipment will be sent to the area upon request of the on-scene supervisor or as directed by the Shift Commander . . . .*

IMP for Operations Lieutenants

EJSP's IMP for Operations Lieutenants (J-7) states, in part:

> Whenever an emergency code is called by Center and/or the "Whooper" alarm is activated, the Operations Supervisor on duty will secure the outermost entrance door to the Operations Unit and report to the Star for emergency response assignment until the emergency is cleared by the Center.

> ***Nothing in this document shall preclude an Officer or Supervisor from responding to the aid of another staff member. Custody Staff members are reminded to assess the risk to themselves and other staff members and act appropriately. Common sense and good judgment as well as sense of duty shall guide staff in their decision making process . . . .***

IMP for Area Lieutenants

The IMP for Area Lieutenants (J-8) addressing responding to a Code 33 states, in part:

> All inmates in the affected area are to be secured in their assigned cells/dormitory or an unaffected area. In unaffected areas officers are to ensure that all inmate movement into and out of the unit/area ceases until the Shift Commander clears the emergency code.

It later states:

> ***Nothing in this document shall preclude an Officer or Supervisor from responding to the aid of another staff member. Custody Staff members are reminded to assess the risk to themselves and other staff members and act appropriately. Common sense and good judgment as well as sense of duty shall guide staff in their decision making process.***

The EJSP IMP for Operations Lieutenants and the IMP for Area Lieutenants both require those lieutenants to be knowledgeable of all posts and written decrees within their areas of responsibility and ensure staff compliance with all post orders, rules, regulations, policies, procedures, and administrative decisions. (J-7; J-8.)

NJDOC's Law Enforcement Personnel Rules and Regulations

Article II, Section 3, of the NJDOC's Law Enforcement Personnel Rules and Regulations reads: "Officers shall devote their full attention to their assignments to ensure

that all duties are performed in accordance with current rules and regulations. Lack of diligence on the part of officers will not be tolerated." (J-5.)

Testimony

For Respondent

Assistant superintendent Jeffrey John Crothers ("Crothers") was promoted to assistant superintendent at the NJDOC in August 2017, and has more than seventeen years of experience with the Department. He testified as an expert for respondent, particularly with respect to EJSP's policies and procedures concerning emergency response.

Crothers began his employment at EJSP in August 2017, but was on vacation on August 26. On August 28, he participated in an administrative review of the events that occurred on August 26, which consisted of reviewing video surveillance[6] and reports issued of the incident. The team conducting the review then referred the matter to the NJDOC's Special Investigations Division (SID) for an investigation. Those involved in the SID investigation determined that Bode and O'Callaghan should be disciplined, and the administrator and the Office of Employee Relations called for their removal.

Crothers testified that it was a violation of EJSP policy for O'Callaghan and Bode to enter the yard unsuited, and that there is a general rule that officers do not go into the Big Yard. He believes that there were another nine officers, approximately, who also entered the yard unsuited, and that they did so because they were following their leader, O'Callaghan.

Crothers also noted that O'Callaghan omitted things in his report, and that Bode did not even write a report until ordered to do so days later. Their reports improperly failed to indicate that they, or other officers, entered the yard unsuited.

[6] The incident was recorded on multiple video cameras, and footage of the August 26, 2017, incident was viewed at the hearing.

Crothers testified that when the Code 33 was called, policy required that the Tie-To[7] be cleared first (by Linardos and his General Assignment officers). O'Callaghan and his response team should have gone to the Ready Room to get suited. A second team also should have gone to the Ready Room to suit up, and, once suited, both teams should have gone to the Star[8] together. Bode should have suited up that second team, which would have been led by a sergeant, in this case, Vargas. The first team, led by O'Callaghan, would have entered the yard to assess the situation, make the calls, and bring the aggressor through the sally-port. Bode would have remained at the Star, and the second team would have stayed in the prison and only have gone into the yard if necessary. This, according to Crothers, is consistent with the IMP for a Code 33 occurring in a mass-movement area, such as the Big Yard, and should have occurred here. Crothers considered O'Callaghan to be the initial-response supervisor, and, pursuant to the IMP for Emergency Response, he was also required to report to the Star and take charge of all subsequent operations and response teams, and ensure that his compound is secure and under control. This did not occur.

Crothers testified that the response to the Code 33 was initially chaotic and that the central hub of the jail was not being controlled. For example, some inmates who had moved out of the Big Yard to go back to their cells and were passing through the Tie-To at the time the Code 33 was called, walked around, instead of through, the metal detector. Crothers did agree, however, that it was the duty of the Star sergeant to secure the Tie-To, lock down the area, and stop any and all movement, and that this did not appear to have been done.

Crothers describes O'Callaghan's (and his accompanying officers') response on August 26 as one that would have been proper had the code been called in a housing unit, a hallway, or a shop. However, since the code occurred in the Big Yard, the IMP requires that there be, at a minimum, twenty-six suited officers (thirteen as part of the

[7] The Tie-To is an area in the jail that contains metal detectors and leads to several areas in the jail, including the Big Yard.

[8] The Star is a central location in the prison that houses the Star sergeant, who controls movement inside the jail.

Initial Response Team and thirteen as part of a Secondary Response Team) and two suited supervisors.

Crothers agreed that O'Callaghan properly called the Code 53. Crothers testified that the two nurses should have arrived with an officer and two inmate porters, but they arrived without them due to the urgency with which O'Callaghan called the code.

With respect to Bode, Crothers testified that Bode should have come out of operations and should have taken control of the floor when the Code 33 was called. He should not have been in the yard at all. Crothers criticized Bode for denying Vargas's request for an MK46 and a second team. Crothers described Bode's order to Vargas to remain in the yard as "reckless" and "unreasonable," but not unlawful, and he agreed that Vargas disobeyed Bode's orders to remain in the yard and pat down the ninety-seven inmates in the yard. Crothers believes Bode abandoned Vargas and his team, and that the situation in the yard was not safe. Crothers agreed that O'Callaghan made the right decision by having Vargas leave the yard. Once the aggressor and victim were removed from the yard, the staff should have exited.

While Crothers recognized that errors were committed by other officers in responding to the code, only the lieutenants were disciplined.

Crothers testified that he believed that there were inmates in the sally-port who were being moved into the prison from the yard at the time the Code 33 was called. He testified that when an emergency code is called and recreation is in progress, recreation officers are to immediately lock both sally-port gates and lock down the yard. According to Crothers, however, Bennett led the twenty-five inmates into the sally-port, did not lock it down or let them go out, and when O'Callaghan ordered the gate opened, there were fifty inmates, instead of just the twenty-five, moving into the prison at once. Crothers, however, concedes that this is not documented in any report and is based on his reasonable belief. Bennett's report only mentions that he was ordered to open the gate so that O'Callaghan could enter the yard.

Crothers testified that familiarity with the IMPs is part of lieutenant training. There is a ten-day mandatory course prior to becoming a lieutenant, and one course addresses how to be a competent leader. He taught emergency response, which Bode attended. O'Callaghan also received emergency-response training at the academy.

Following this incident, EJSP majors, lieutenants, sergeants, and officers were retrained on emergency response, and changes to policy were made. Now, for example, custody staff must receive administrative approval from the shift commander prior to entering the yard during a code when the yard is occupied by inmates.

Sgt. Stephen Linardos ("Linardos") has been employed by the NJDOC for eighteen years and has held the position of sergeant at the EJSP for five and a half years. He has been the Star sergeant at EJSP for approximately two years, and served as Star sergeant on August 26, 2017.[9]

Linardos was at the Star when Bennett called the Code 33. When the code was called, all the custody staff that was in the Tie-To responded to the Big Yard, and Linardos testified that they should have gone to the Star before exiting. When the code was called, inmates were left in the Tie-To area that had to be secured, and Linardos tried to get them back into their wings, and temporarily secured them in a holding cage.

Linardos recalled that O'Callaghan called a Code 53, and said "Call 911" and "I need that suited team now" over the radio, at which point Vargas's suited team was dispatched.

Linardos recounted that Bode called from the yard and stated that they would start sending inmates back inside the prison. Linardos told him not to do so because most of the custody staff was in the yard.

Sgt. Anthony Vargas ("Vargas") has been employed by the NJDOC for fifteen years, and has been a sergeant at EJSP since July 2011.

[9] As a Star sergeant, Linardos handles scheduling, calls out mass movements, and sets up emergency-response teams in the event there is an emergency.

Vargas was the operations sergeant on August 26, 2017. When Bennet called the Code 33, Vargas proceeded to the Star. Linardos told him that the Initial Response Team went out to the yard, and that he needed to suit up in the Pass Office with the other officers. Vargas was in charge of suiting up, and he put on his gear and counted his thirteen officers. He then heard O'Callaghan's radio transmission that he needed a suited team to the yard ASAP. According to Vargas, O'Callaghan was yelling on the radio, and Vargas's initial thought was that an officer was down.

Vargas did not know what Bode was doing in the yard. Vargas radioed the Star and asked for cans of mace and for the second team to come to the gate. Vargas testified that Bode went on the radio and said that Vargas did not need the additional mace or team, and Vargas then radioed the shift commander requesting the same.

Vargas ordered his team to leave the yard once the injured inmate exited the yard with the medical staff because he believed it was unsafe to stay in the yard. He testified that Bode had ordered him to keep his team in the yard, and that Bode wanted them to pat down the inmates, ten at a time, in the yard before sending them inside. Vargas explained to Bode why it would be unsafe to pat down prisoners in the Big Yard. Bode radioed Linardos to tell him that he was going to send the yard in, but Linardos radioed Bode back asking Bode to call him on the landline. Bode then left the yard to call Linardos, and Vargas made the decision to have his team exit the yard despite Bode's order to stay in the yard.

Vargas drafted two reports in response to the incident. The first, a Preliminary Incident Report, was written less than two hours after the August 26 incident. (R-8.) Vargas then prepared a Special Custody Report on August 28, 2017. (R-9.)

After this incident, Linardos did a "debriefing" for the officers about being suited in the yard, and Vargas also verbally counselled the officers that they should never go into the yard, mess hall, or drill hall unsuited during an emergency.

Senior correction officer Larry Clouse ("Clouse") has been a senior correction officer since 1997, and has worked at EJSP since 2004. Currently, he is a General Assignment officer at EJSP.

Clouse was part of Vargas's response team on August 26, 2017. While in the Ready Room, Clouse heard O'Callaghan calling that he needed a team "now," screaming and hollering and indicating that he needed a suited team. O'Callaghan's panicked tone caused Clouse to think that they had possibly lost a cop.

Clouse was concerned in the yard because the officers were significantly outnumbered by the inmates, and that it could have turned into a hostage situation. He recalled Vargas telling Bode that the inmate was removed from the yard and that he wanted the team out of the yard, but that Bode denied this request and instead contacted Center by radio to ask if they were ready for the yard to return. The radio transmission asked Bode to call back immediately.

Clouse wrote a Special Custody Report four days after the incident because he was asked to do so. (R-10.)

Senior correction officer James Vincent Colacci ("Colacci") became employed by the NJDOC in 2017 as a correction officer recruit. On August 26, 2017, he was working in the Tie-To. He responded to the Code 33 with officer Eddie Parin and another officer. They ran over to the inmate that was on the ground and stood by him. He ran in unsuited because he did not want to let O'Callaghan run in alone, but he was aware that he was required to be suited in the yard. He later left the yard when Vargas ordered him to do so. He drafted a Special Custody Report on August 26, 2017. (R-11.)

Patrick Nogan ("Nogan") is an administrator with the NJDOC, where he serves as chief executive of EJSP. He has served in this position for approximately four years, and has twenty years of experience with the NJDOC.

Nogan became aware of the August 26 incident when he received an email from the shift commander advising him of the Code 33 yard incident. Approximately two days

later, he received a written complaint from the PBA vice president and an executive board member of the sergeants unit alleging that what was reported concerning the events was not accurate, and that what occurred jeopardized security and put the officers in danger. He scheduled an emergency meeting with several majors, the assistant superintendent, and the associate administrator. They reviewed the reports and the video of the incident to determine whether there was any validity to the union's complaint. He was shocked and dismayed, and stated that he had never seen anything that egregious, reckless, and dangerous in a correctional facility. These actions put not only the officers' lives at risk, but also those of the inmates, and jeopardized public confidence and trust. Nogan testified that the slightest miscalculation could have resulted in total loss of custody control of the facility. He referenced that the sally-port gates were open and inmates could have rushed the Tie-To, where there was not enough staff to handle it.

After consultation with the management team, it was determined that only the leaders (i.e., lieutenants) of this reckless and dangerous situation should be disciplined. The "reckless leadership," retreating to safety and leaving the staff in danger, and ordering the staff to stay in a very dangerous situation, constituted a "deliberate" violation of policy. Nogan testified that while he is familiar with the policies, he is not an expert.

Nogan criticized Bode's and O'Callaghan's failure to properly report the incident. Bode purposefully failed to write a report, which he should have written since he was involved in the incident, and had to be ordered to do so days after the incident. According to Nogan, O'Callaghan made purposeful omissions in his report.

After the incident, there was a "refamiliarization," not a "retraining," with the security major and supervisors to go over emergency-response procedures. A written order was also put out prohibiting a lieutenant from ordering entry into any yard or mess hall without first consulting the on-call.

For Appellants

Senior correction officer Edward Parin ("Parin") was employed by the NJDOC, at the EJSP facility, for the past seven years. He is a General Assignment officer.

When the Code 33 was called, Parin was standing in the Tie-To scanning the movement. Parin responded to the sally-port at the moment inmate W. was making his way to the sally-port. Parin cuffed and escorted him to the infirmary with other officers.

Parin recalled Vargas asking for mace over the radio at least twice, and that it sounded urgent. Parin went to Linardos at the Star, who already had the mace ready, and Parin took it into the yard. Parin was not suited when he entered the yard. Vargas ordered Parin to leave the yard as soon as he brought in the mace. He could not remember the other officers, aside from Bode and O'Callaghan, who were not suited in the yard. He prepared a Special Custody Report for the incident. (A-2.)

Within two to three weeks of the incident, Parin was verbally counseled by Vargas about "being more mindful."

Senior correction officer Edwin Cordova ("Cordova") has been employed by the NJDOC for eighteen years. He is a senior correction officer, and has been assigned to EJSP since 2002. On August 26, 2017, he was a General Assignment officer assisting Bennett in the Big Yard. He was at the sally-port gate when the inmates were being moved from the yard back into the building. Cordova was asked to open the sally-port gate when the Code 33 was called. He testified that there were no inmates in the sally-port at the time the code was called. Cordova entered the yard with O'Callaghan and other officers. He was unsuited. Cordova then went back to the sally-port and assisted with returning the inmates back into the building. Cordova authored a report on August 26, 2017, concerning this incident. (A-3.)

Fred O'Callaghan has been employed by the NJDOC since approximately 2000, and was promoted to lieutenant in approximately July 2012.

While O'Callaghan did receive lieutenants training, and other training at EJSP, he testified that he never received training for responding to an emergency in the EJSP yard. He also testified that he was never instructed not to enter the yard unsuited while inmates were present.

O'Callaghan could not remember exactly where he was when the Code 33 was called, but it was somewhere near the Tie-To or Star. He responded to the code as the area lieutenant, and his job was to respond to the area and assess the situation. As area lieutenant, he would never go to the Star and suit up as part of a team. O'Callaghan testified that he acted consistently with the IMP for Area Lieutenants.

When O'Callaghan heard the code and approached the yard, there were officers in the sally-port, including Officers Parin and Schuler. O'Callaghan also entered the sally-port, and there he asked Bennett about what had happened in the yard. O'Callaghan then ordered inmate M. to the gate, and ordered the other inmates to move to the other side of the yard, about half a football field away. They all complied with the orders. When inmate M. approached the gate, the gate was cracked open about a foot and a half, and then immediately shut. Inmate M. was handcuffed and escorted out. When inmate M. was at the gate, O'Callaghan called for a suited team to escort the inmate out. Vargas was in the sally-port with O'Callaghan before they entered the yard.

When O'Callaghan ordered inmate M. to the yard gate, he saw inmate W. going into convulsions and shaking violently on the ground. When the inmate stopped moving, O'Callaghan thought that he may have stopped breathing or had a broken neck. He then ordered Bennett to open the gate so he could enter to check the inmate's vitals. O'Callaghan testified that custody has an obligation to perform CPR when medical staff is not available. When he entered the yard, the inmates were on the far side of the yard, laying on the ground in compliance with the orders given.

O'Callaghan testified that he never ordered any officer to go into the yard with him, and he never believed that ordering the gate opened, and entering unsuited, placed anyone in danger.

O'Callaghan called the Code 53 after inmate M. was removed from the yard. He was not panicked when he called the Code 53, but did call with a sense of urgency. He never had concerns regarding the medical team's safety. In the yard, while tending to the

injured inmate, O'Callaghan heard Vargas urgently call for more mace. O'Callaghan estimates that he was in the yard for a total of approximately ten to fifteen minutes.

When O'Callaghan left the yard with the injured inmate, medical staff, and another officer, he met with Linardos at the Star. They still had approximately forty to fifty inmates in the Tie-To holding cage. He testified that they were going to move the inmates held in the holding cage out first, to get them back to their housing units, and then begin to slowly remove the inmates from the yard, ten at a time. After speaking with Linardos, O'Callaghan went back to the yard area, where he informed Vargas that they would empty the holding cage before letting inmates out of the yard.

O'Callaghan prepared an Unusual Incident Report and emailed it to the facility major and his secretary.[10] He denied intentionally leaving anything out of his report, as he did not feel that it was pertinent to mention in the report that he entered the yard unsuited. Moreover, he never denied that he went in unsuited.

Gary Bode began his employment with the NJDOC in July 2006, and became a lieutenant at EJSP in March 2016.

Bode received two weeks of training when he became a lieutenant, but he did not receive any training on how to respond to a code in EJSP's Big Yard. He agreed that he was ill-prepared by the NJDOC to handle an emergency response. To prepare for any emergency response, he read the IMPs.

Bode asserts that this matter was initiated against him because members of the administration and Vargas had an issue with him. In January 2017, a major issued a letter of instruction alleging that Bode violated the chain of command with respect to his handling of inquiries concerning the calculation of overtime. Vargas then filed an Equal Employment Division (EED) complaint against Bode in December 2016 that was determined to be unfounded in December 2017. Vargas filed another EED complaint against Bode in November 2017, which was found to be administrative in nature.

[10] The Unusual Incident Report is not in evidence.

When the Code 33 was called, Bode was on the second floor; he went downstairs, started walking towards the Star, and then he heard the Code 53. Linardos mentioned that he was putting teams together, and Bode wanted to see what was happening in the yard. In his experience, the lieutenant does not suit up with the team. When he arrived at the gate to the yard, he saw all the inmates lying on the floor, and he saw the injured inmate having a seizure. Bode then went back inside to see if Linardos needed anything.

Since O'Callaghan was handling the one injured inmate, Bode went into the yard to provide an overall assessment of the incident. Bode testified that in the yard, Vargas was getting jumpy, was loud and in a panic, and Bode kept telling him to calm down. Vargas then started calling out for a second team and for an MK9, which he should have had with him. However, Bode testified that he never denied Vargas's requests for an MK9 and a second team.

Bode saw O'Callaghan and the injured inmate exit the yard, so he radioed Linardos at the Star to ask him to let him know when the area was clear to start bringing the inmates into the building. Linardos asked Bode to call him on the landline, and during that time Vargas is saying "we are not supposed to be in here" loud enough for other officers and inmates to hear him. Bode told Vargas to relax, and that he was going to make a phone call and would be right back. He went to speak with Linardos about clearing out the yard. Bode left to make the call to Linardos, and Vargas disobeyed his direction and left the yard. On the phone, Linardos told Bode that there were no officers in the Tie-To.

Bode later told Vargas that he was insubordinate for not following his order. Vargas told Bode that he did not have to be in the yard since nobody was in danger.

Bode asserts that no IMP or other policy explicitly prohibits one from entering the yard unsuited. According to the Post orders for operations lieutenant, he was required to go to the Star in an emergency, which he did. Bode conceded that according to the IMPs, he was supposed to report to the Star and remain there until the code had cleared. (J-7 at 13.)

Bode did not write a report on the day of the incident because, according to him, he had no impact on the code, and he has never had to write a report in response to a Code 33 or Code 53. His major asked him to write a report days later. The only thing he left out of his report was his argument with Vargas that day because he felt that he had already dealt with it. His report did not mention unsuited officers, because he was unaware of anyone in the yard who was unsuited, and there was no purpose to document that or the fact that he was unsuited. He believes that he and other officers in the yard were not required to be suited, and that they would only have to be suited if there was a noncompliant inmate. He never felt that they were in danger in the yard, because the inmates were compliant.

Robert D. LaPenta ("La Penta") has been employed for twenty-six and a half years with the NJDOC. He became a lieutenant in 2005, and worked at EJSP from 1996 until approximately June 2018, at which time he transferred to the correctional staff training facility in Sea Girt. He was a training lieutenant at the time of this incident (and since 2013), and testified that he only trained custody staff on emergency response in this facility after the August 26, 2017, incident.

LaPenta testified that the IMPs cannot cover every situation. One main objective of officers is the preservation of human life and the security of the institution, and he mentioned the importance of using good judgment and common sense when a policy does not apply to a specific situation.

In his thirteen years of experience as a lieutenant, he has never seen a lieutenant as part of a suited team, and he, himself, was never part of a suited team as a lieutenant.

ADDITIONAL FINDINGS OF FACTS

When assessing credibility, inferences may be drawn concerning the witness's expression, tone of voice, and demeanor. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness's interest in the outcome, motive, or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which

it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter:

When O'Callaghan presented to the gate to the Big Yard, he was responding to the Code 33. Crothers testified convincingly that O'Callaghan presented as the initial-response supervisor and, as such, the IMPs for responding to a Code 33 in the yard required that, prior to entering the yard, O'Callaghan present to the Ready Room to get suited with the required protective gear and thirteen officers, and that this initial suited response team not enter the yard until the second response team is assembled. While Vargas and his suited team were present when O'Callaghan entered the yard with several unsuited officers, O'Callaghan did not have the required number of officers with him to constitute a complete team, and O'Callaghan and his team failed to suit up as required by the IMPs. This, in turn, jeopardized the safety and security of the medical staff, the other unsuited officers, and O'Callaghan himself. O'Callaghan's running into the yard unsuited also created a disruption to the orderly running of the facility, in that it caused the officers in the Tie-To to abandon their posts to follow O'Callaghan, their leader, into the yard while inmates passing through the Tie-To avoided the metal detectors before being shepherded into a holding cage. O'Callaghan's running into the yard unsuited also created a disruption to the orderly running of the facility because it caused other officers to follow O'Callaghan into the yard without being suited, jeopardizing the safety of all those involved in the response to the code.

Despite assertions made by Crothers and Nogan that the sally-port gates were left open by O'Callaghan (leaving the jail vulnerable because the inmates in the yard could

have rushed the Tie-To), and that O'Callaghan ordered the gate opened while there were twenty-five inmates held there (resulting in a disruption in the movement and an influx of twenty-five additional inmates into the jail during the lock-down), no reliable evidence presented substantiated these allegations.

Crothers testified credibly that Bode should not have entered the yard at all and that the IRP for Operations Lieutenant required that he respond to the Star once the code was called and remain there until the emergency was cleared. While Bode may have initially responded to the Star, he did not remain there until the emergency was cleared. This constitutes a violation of EJSP's IMP for Operations Lieutenants. Moreover, while Bode argues that no IMP specifically requires all custody staff to be suited when entering the yard, as Crothers testified, the IMPs addressing emergency responses in the yard expressly require all those responding to the code to be suited in protective gear. Bode's entering the yard unsuited during the code ran contrary to EJSP procedures, showed poor judgment, and jeopardized, at a minimum, his own safety.

Finally, Bode concedes that he instructed Vargas and his team to remain in the yard with the ninety-seven inmates despite Vargas's attempts to leave the yard once the injured inmate and all those attending to him were no longer in yard. While Bode maintains that his order was reasonable and that there was no danger to Vargas or his team because the inmates were compliant, Vargas, Clouse, and Crothers testified credibly that it was unsafe to stay in the yard, in part because they were significantly outnumbered by the inmates. Bode did not offer any convincing justification for prohibiting Vargas and his team from leaving the yard once the injured inmate had been removed, and his order to Vargas showed poor judgment and was reckless. The fact that O'Callaghan later ordered Vargas to exit the yard (after Bode had directed Vargas to stay) only highlights the unreasonableness of Bode's order.

Finally, while Bode and O'Callaghan were required to be familiar with IMPs, rules and regulations that apply to them as lieutenants at EJSP, and while they received general emergency-response training as part of their lieutenants training, both O'Callaghan and Bode testified credibly that they were never specifically trained on how to respond to a code in the EJSP Big Yard, and they were never specifically instructed

not to enter the yard unsuited while inmates were present. In carrying out their duties, however, both lieutenants were required to use sound judgment and common sense, and to follow the applicable IMPs.

LEGAL ANALYSIS AND CONCLUSION

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Neglect of Duty

O'Callaghan and Bode are both charged with "neglect of duty," N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), http://njlaw.rutgers.edu/collections/oal/. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

O'Callaghan

In the within matter, O'Callaghan entered the Big Yard unsuited, and this predictably caused other officers to follow him into the yard, also unsuited. Entering the yard unsuited, and without a team of thirteen suited officers, constitutes neglect of duty not only because O'Callaghan's response to the Code 33 runs counter to the IMP for Emergency Response, but because he failed to ensure the safety of the officers who accompanied him and the medical staff. This clearly constituted a breach of the duty owed by O'Callaghan to the performance of his job as a lieutenant in a State prison.

Based upon the foregoing, I **CONCLUDE** that the appointing authority has proven by a preponderance of the credible evidence that the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), should be sustained as to Fred O'Callaghan.

Bode

With respect to Bode, the IMP for Operations Lieutenants required that he report to the Star and remain there until the emergency had cleared. Instead, he entered the yard and did so without any protective gear, risking his safety. Bode also unreasonably ordered Vargas and his team to remain in the yard, and in a potentially dangerous situation, when their presence there was no longer necessary. Bode's order to Vargas was reckless and unnecessarily jeopardized the safety and security of Vargas and his response team.

Based upon the foregoing, I **CONCLUDE** that the appointing authority has proven by a preponderance of the credible evidence that the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), should be sustained as to Gary Bode.

Conduct Unbecoming a Public Employee

O'Callaghan and Bode are also charged with "conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an

elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellants' status as lieutenants in a prison setting subjects them to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."
>
> [Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305–06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

O'Callaghan

The charge of conduct unbecoming, with respect to O'Callaghan, is supported by his mishandling of the code, which constituted a violation of the IMP for Emergency Response, and specifically his failure to respond to the yard suited and with a team of thirteen suited officers. This put at risk the safety of the medical staff and the officers in the yard, and could have resulted in a serious threat to the prison had the inmates in the yard not been as cooperative as they were that morning.

I **CONCLUDE** that O'Callaghan's response to the emergency in the Big Yard supports the charge of conduct unbecoming, N.J.A.C. 4A:2-2.3(a)(6).

Bode

With respect to Bode, the charge of conduct unbecoming is supported by his failure to follow the IMP for Operations Lieutenants, that required him to report to the Star for emergency-response assignment until the emergency was cleared, and by presenting to the yard unsuited and directing Vargas and his response team to remain in the yard when their presence there was unwarranted and only further exposed them to the potential danger of an inmate attack.

Therefore, I **CONCLUDE** that Bode's actions in response to the code amounts to conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6).

Other Sufficient Cause

Appellants have further been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Specifically, both O'Callaghan and Bode are charged with violating NJDOC Human Resources Bulletin (HRB) 84-17, as amended, including: B.7, serious mistake due to carelessness but not resulting in danger to persons or property; C.11, conduct unbecoming an employee; D.7, violation of administrative procedures and/or regulations involving safety and security; and E.1, violation of a rule, regulation, policy, procedure, order, or administrative decision. (J-1; J-2.) Other sufficient cause is

an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

O'Callaghan

O'Callaghan's conduct in response to the code in the Big Yard was such that he violated this standard of good behavior. Specifically, O'Callaghan's failure to suit up before entering the yard in response to the code, his failure to ensure that the officers accompanying him were also suited, and his failure to assemble a suited team of thirteen officers, and only enter the yard when the second team was at the gate, constituted a serious mistake due to O'Callaghan's carelessness, in violation of HRB 84-17, B.7. As indicated above, under "Conduct Unbecoming a Public Employee," O'Callaghan's actions constituted conduct unbecoming, as well as a violation of administrative procedures and policies involving safety and security, specifically the IMP for Emergency Response, which provides procedures for responding to an emergency code in a safe, secure, and expected manner.

As such, I **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that O'Callaghan violated N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, as well as HRB 84-17, as amended: serious mistake due to carelessness but not resulting in danger to persons or property (B.7); conduct unbecoming an employee (C.11); violation of administrative procedures and/or regulations involving safety and security (D.7); and violation of a rule, regulation, policy, procedure, order, or administrative decision (E.1).

Bode

Bode's conduct on August 26, 2017, was such that he violated this standard of good behavior. Specifically, Bode's failure to remain at the Star when the code was called and until the emergency cleared violated the IMP for Operations Lieutenants, and his decision to enter the yard, and enter the yard unsuited, during the emergency code was inconsistent with emergency-response procedures set forth in the IMP for Emergency

Response. As these failures compromised the orderly operations of a code, and jeopardized the safety of officers in the yard, Bode's actions constituted a careless error in violation of HRB 84-17, B.7. As explained above, Bode's response to the code when he entered the yard unsuited constitutes conduct unbecoming a public employee, which is also a violation of HRB 84-17, C.11. Bode's violation of the IMPs for Operations Lieutenants and Emergency Response, as explained above, also constitutes a violation of HRB 84-17, D.7 and E.1, as these IMPs contain administrative procedures/policies affecting the safety and security of those in the prison.

As explained above, Bode's order to the operations sergeant and his team to remain in the yard with ninety-seven inmates when their presence there was no longer needed and after the sergeant had voiced his justifiable concerns about remaining in the yard, also constituted unbecoming conduct in violation of HRB 84-17, C.11.

Therefore, I **CONCLUDE** that respondent has proven by a preponderance of the credible evidence that Bode violated N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, as well as HRB 84-17, as amended: serious mistake due to carelessness but not resulting in danger to persons or property (B.7); conduct unbecoming an employee (C.11); violation of administrative procedures and/or regulations involving safety and security (D.7); and violation of a rule, regulation, policy, procedure, order, or administrative decision (E.1).

PENALTY

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. at 519. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522–24. Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention. Rotundi v. Dep't of Health & Human Servs., CSV 385-88, Initial Decision (Sept. 29, 1988).

Here, respondent argues that the appellants' misconduct was so severe that it falls outside of progressive discipline, and that removal is the only appropriate remedy because the appellants both compromised the safety and security of EJSP, its staff, and the inmates. I do not agree.

O'Callaghan

O'Callaghan's decision to enter the Big Yard unsuited during an emergency was inappropriate and jeopardized not only his own safety and security, but that of the officers who followed him into the yard and the medical staff who responded to the code. I do believe, however, that O'Callaghan entered the yard with the benevolent intention of preserving the life of an inmate who he believed was seriously injured, and that at the time, O'Callaghan did not feel that any medical or custody staff in the yard was in any real danger—the inmates were complying with all orders and Vargas's team had formed a protective barrier between the inmates and those tending to the injured inmate. Also, while O'Callaghan's mishandling of the code is not inconsequential, no staff or inmate was injured, and it is also worth noting that several other officers also made errors in responding to this code but were never disciplined, only counseled or re-trained. Therefore, I **CONCLUDE** that the errors committed by O'Callaghan in responding to the code on August 26, 2017, were insufficiently severe to render O'Callaghan unsuitable to continue in his position, and I further **CONCLUDE** that the penalty of removal is excessive, and that progressive discipline should apply.

It is undisputed that in his eighteen years at the NJDOC, and six years as a lieutenant, O'Callaghan's disciplinary history consisted of only one written reprimand, in approximately 2004, for arriving thirty minutes late to work. Nevertheless, the sustained charges against O'Callaghan are serious in nature and major disciplinary action is warranted. I, therefore, **CONCLUDE** that a 180-day suspension is more appropriate and proportionate to the offense.

Bode

While Bode's order to Vargas was misguided and reckless, ultimately the response team did not remain in the yard with the inmates for any significant period of time following Bode's order. Vargas and his team began to retreat from the yard almost immediately after Bode left the yard to call Linardos about moving the inmates back into the prison. Vargas and his team were already retreating from the yard when O'Callaghan ordered their removal from the yard, and they were back inside the prison before Bode returned to the yard. As stated above, all inmates fully complied with orders during the code, and nobody was injured. Accordingly, I **CONCLUDE** that removal is an excessive discipline here, and that progressive discipline should apply.

In his twelve years at the NJDOC, Bode has only been written up once, for allegedly violating the chain of command. As with O'Callaghan, however, the sustained charges against Bode are serious and major disciplinary action is warranted. I, therefore, **CONCLUDE** that a 180-day suspension is the more appropriate and proportionate discipline.

ORDER

O'Callaghan

Respondent has proven by a preponderance of the credible evidence the following charges against O'Callaghan: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and the following violations of NJDOC Human Resource Bulletin (HRB) 84-17, as amended: (B.7), serious mistake due to carelessness but not resulting in danger to persons or property; (C.11), conduct unbecoming an employee; (D.7), violation of administrative procedures and/or regulations involving safety and security; and (E.1), violation of a rule, regulation, policy, procedure, order, or administrative decision. Accordingly, I **ORDER** that the charges against O'Callaghan be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that O'Callaghan be suspended for 180 days.

I further **ORDER** that O'Callaghan be reinstated to his position as a lieutenant, and that any applicable back pay and other benefits be issued to O'Callaghan.

Bode

Respondent has proven by a preponderance of the credible evidence the following charges against Bode: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and the following violations of NJDOC Human Resource Bulletin (HRB) 84-17, as amended: (B.7), serious mistake due to carelessness but not resulting in danger to persons or property; (C.11), conduct unbecoming an employee; (D.7), violation of administrative procedures and/or regulations involving safety and security; and (E.1), violation of a rule, regulation, policy, procedure, order, or administrative decision. Accordingly, I **ORDER** that the charges against Bode be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that Bode be suspended for 180 days.

I further **ORDER** that Bode be reinstated to his position as a lieutenant, and that any applicable back pay and other benefits be issued to him.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked

"Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 2018
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: August 1, 2018

Date Mailed to Parties: August 1, 2018

jb

APPENDIX

WITNESSES

For Appellants:

Edward Parin
Edwin Cordova
Fred O'Callaghan
Gary Bode
Robert D. LaPenta

For Respondent:

Jeffrey John Crothers
Stephen Linardos
Anthony Vargas
Larry Clouse
James Colacci
William Sullivan
Kirt Rocco
Patrick Nogan

EXHIBITS

Joint:

J-1 Final Notice of Disciplinary Action to Gary Bode dated December 7, 2017
J-2 Final Notice of Disciplinary Action to Fred O'Callaghan dated December 15, 2017
J-3 Preliminary Notice of Disciplinary Action to Gary Bode dated October 6, 2017
J-4 Preliminary Notice of Disciplinary Action to Fred O'Callaghan dated October 6, 2017
J-5 Law Enforcement Personnel Rules and Regulations
J-6 East Jersey State Prison Level III Emergency Response, effective date March 1, 2009

J-7 East Jersey State Prison Level III Operations Lieutenant, effective August 25, 2012, revised March 11, 2017

J-8 East Jersey State Prison Level III Area Lieutenant, effective September 30, 2011, revised August 25, 2016

J-9 Work History for Gary Bode from January 1, 1985, to December 13, 2017

J-10 Work History for Fred O'Callaghan from January 1, 1985, to December 7, 2017

J-11 Amended Table of Offenses and Penalties

J-12 East Jersey State Prison Level III Recreation Officers, effective April 26, 2010, revised August 25, 2016

For Appellants:

A-1 Memorandums to Fred O'Callaghan from Patrick Nogan dated February 10, 2014; from James Jones dated March 20, 2017, and September 1, 2017; from Michael Pascal dated August 30, 2017; and Notice of Informal Pretermination Hearing dated October 6, 2017

A-2 Special Custody Report by E. Parin dated August 31, 2017

A-3 Special Custody Report by E. Cordova dated August 31, 2017

A-4 E-mails, Gary Bode and Richard Service

A-5 East Jersey State Prison schedule, December 31, 2016, through January 16, 2017

A-6 Letter from Leila Lawrence, Esq., to Anthony Vargas dated December 5, 2017

A-7 E-mails, Gary Bode and Ronald Marczak

A-8 Memorandum from James Jones to Gary Bode dated January 5, 2017

A-9 Letter from Leila Lawrence, Esq., to Gary Bode dated December 11, 2017

A-10 Letter from Leila Lawrence, Esq., to Gary Bode dated December 14, 2017

For Respondent:

R-1 Department of Corrections New-Hire Processing Checklist for Gary Bode, effective hire date July 6, 2006

R-2 Workplace Policy Acknowledgement of Receipt of Fred O'Callaghan dated May 8, 2012, and December 1, 2013, with various documents

R-3 East Jersey State Prison Policy and Post Order Receipt Form dated March 21, 2016

R-4 CD Statement and Surveillance dated August 26, 2017

R-5 Picture of White Board

R-6 Training Summary Report for Gary Bode dated February 13, 2018

R-7 Training Summary Report for Fred O'Callaghan dated February 13, 2018

R-8 Preliminary Incident Report from Anthony Vargas regarding Fred O'Callaghan dated August 26, 2017

R-9 Special Custody Report by Anthony Vargas dated August 28, 2017

R-10 Special Custody Report by L. Clouse dated August 30, 2017

R-11 Special Custody Report by COR Colacci dated September 1, 2017

R-12 Special Custody Report by W. Sullivan dated August 28, 2017

R-13 Special Investigations Report by Michael Kubik for Gary Bode and Fred O'Callaghan dated October 5, 2017

R-14 CD Interview of Fred O'Callaghan

R-15 CD Interview of Gary Bode

R-16 Special Custody Report by Gary Bode dated August 30, 2017

9-5-18

A-1

STATE OF NEW JERSEY

In the Matter of Shonda Burroughs Department of Military and Veterans Affairs, New Jersey Veterans Memorial Home Vineland	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NO. 2018-2292 OAL DKT. NO. CSV 03052-18	

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03052-18

AGENCY REF. NO. 2018-2292

IN THE MATTER OF SHONDA BURROUGHS, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, NEW JERSEY VETERANS MEMORIAL HOME VINELAND.

William A. Nash, Esq., for appellant, Shonda Burroughs (Nash Law Firm, LLC, attorneys)

Aimee Blenner, Deputy Attorney General, for respondent, Department of Military and Veterans Affairs, New Jersey Veterans Memorial Home-Vineland (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 8, 2018 Decided: August 8, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

Appellant, Shonda Burroughs, Human Services Technician for the New Jersey Veterans Memorial Home-Vineland, received a disciplinary action of removal effective November 6, 2017. She appealed the matter and it was transmitted to the Office of

Administrative Law (OAL) where is was filed on February 28, 2018, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to 14B-15 and 14F-1 to 14F-13.

The parties appeared on August 8, 2018, for the scheduled hearing date and advised they had agreed to a settlement of all issues in dispute. They presented a fully executed Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement, and having heard the testimony of the petitioner on August 8, 2018, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve of the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 8, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 8-10-18

Date Mailed to Parties: 8.13.18

/dm

APPENDIX
LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

OAL DKT. NO. CSV 03052-2018
AGENCY DKT. NO.
SETTLEMENT AGREEMENT

SHONDA BURROUGHS
V.
DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, NEW JERSEY VETERANS MEMORIAL HOME - VINELAND

J-1 with oeps/rule 4:64

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated January 8, 2018 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4a:2-2.3(a)(6) – Conduct unbecoming a public employee; Removal effective 11/6/17
2. N.J.A.C. 4A:2-2.3(a)(12) – Other sufficient cause; Removal effective 11/6/17
3. C-5(1st) Inappropriate physical contact or mistreatment of a patient, client, resident, or employee; Removal effective 11/6/17
4. C-11 (1st) Any improper conduct which violates common decency; ~~Reoval~~ Removal SB AB effective 11/6/17
5. C-20 (1st) – Discourtesy to public, visitors, patients, resident, or clients; Removal effective 11/6/17
6. E-1 (1st) Violation of a rule, regulation, policy, procedure, order, or administrative decision; Removal effective 11/6/17

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: 6 month suspension, which Appellant has already served.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: Appellant will not receive any backpay.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: ~~Unpaid suspension.~~ Authorized leave of absence without pay. SB

C. The Appellant Shonda Burroughs withdraws her appeal and request for a hearing, and the Respondent Appointing Authority New Jersey Department of Military and Veterans Affairs agrees that the following result will occur with regard to each charge:

Appellant will serve an unpaid six month suspension as penalty for all of the charges that she has incurred. She will not receive any backpay.

The parties agree that this Settlement Agreement shall constitute a Last Chance Agreement with regard to any future infractions of C-5, C-11, and E-1 and that should any breach of this Last Chance Agreement occur, Respondent will seek to remove the Appellant from State Service. The Department's decision will be final. There will be no further room for negotiations. The Appellant understands that she is required to strictly adhere to the State's policies and all departmental policies and procedures. The Appellant is hereby formally informed by the State that her conduct has been inappropriate and subsequent incidents will not be tolerated.

Appellant will remain on the first shift, 7am-3pm, and will be moved to the Liberty Unit. Upon her return to work, she will be monitored by a Charge Nurse/Supervisor for approximately a month. She will be monitored daily for two weeks, then once a week for a period of two weeks. The charge nurse/supervisor will fill out a form to track Appellant's progress throughout the monitoring period. Appellant's days off will remain the same. SB

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. New Jersey Department of Military and Veterans Affairs shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the New Jersey Department of Military and Veterans Affairs will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Shonda Burrough's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Military and Veterans Affairs, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages

and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/8/18
DATE

Shonda Burroughs

8/8/18
DATE

ON BEHALF OF Appellant

8/8/18
DATE

ERC.
ON BEHALF OF Respondent

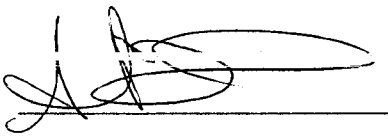
CERTIFICATION

I, Shonda Burroughs, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/9/18
DATE


Shonda Burroughs

STATE OF NEW JERSEY

In the Matter of David Cohen
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-398
OAL DKT. NO. CSV 11976-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 11976-17
AGENCY DKT. NO. 2018-398

IN THE MATTER OF DAVID COHEN,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant, David Cohen, (Nash Law Firm, LLC)

Shareef M. Omar, Deputy Attorney General, for respondent, Department of Human Services, Ancora Psychiatric Hospital (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 25, 2018 Decided: July 26, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on August 18, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and by their statements placed on the record, July 23, 2018.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 26, 2018
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: 7-27-18

Date Mailed to Parties: 7-27-18

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on July 25, 2018

RECEIVED
2018 JUL 25 P 2:00
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OAL DKT. NO. CSV 11976-2017 S
CSC DKT. NO. 2018-398
SETTLEMENT AGREEMENT

3-1

DAVID COHEN

v.

DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATIRC HOSPITAL

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final Notice of Disciplinary Action** dated July 20, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(6) - Conduct unbecoming a state employee – removal effective 11/18/16
2. N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause – removal effective 11/18/16.
3. E1.3 charge, that is, violation of a rule, regulation, policy, procedure, order or administrative decision,

B. The parties have agreed to the following:

1. The Appellant withdraws his appeal and request for a hearing with OAL Docket No: CSV 11976-2017 S.
2. The Appellant has agreed to return to work in his former position.
3. The **Final Notices of Disciplinary Action** dated July 20, 2017 will be modified as follows:
    a. The penalty of removal shall be amended to a **forty-five (45) day suspension** – having already been served. The remaining time between Appellant's suspension and reinstatement shall be marked as an approved leave of absence.

4. Appellant understands that termination will be sought if a similar incident occurs.
5. The Appellant will not receive any back pay or attorney's fees from the appointing authority.
6. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. The State of New Jersey shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the State will be kept intact. Nothing herein shall preclude the State from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

E. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers

Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

G. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

H. The parties waive the right to file exceptions and cross exceptions.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7-23-18
DATE

David Cohen

7-27-18
DATE

William A. Nash, Esq.
ON BEHALF OF Appellant

7-25-18
DATE

Marc Malfara
ON BEHALF OF Respondent

CERTIFICATION

I, David Cohen, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7-23-18
DATE

David Cohen

9-5-18

A-1

STATE OF NEW JERSEY

In the Matter of Alain Gomez
Town of West New York
Department of Public Affairs

CSC DKT. NO. 2018-1271
OAL DKT. NO. CSV 01775-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 01775-18
AGENCY DKT. NO. 2018-1271

IN THE MATTER OF ALAIN GOMEZ,
TOWN OF WEST NEW YORK
DEPARTMENT OF PUBLIC AFFAIRS.

Jenelle Blackmon, Union Representative, Communications Workers of America, for appellant Alain Gomez pursuant to N.J.A.C. 1:1-5.4(a)(6)

Daniel C. Stark, Esq., for respondent (DeCotiis, Fitzpatrick, Cole & Giblin, attorneys)

Record Closed: July 16, 2018 Decided: August 14, 2018

BEFORE **ANDREW M. BARON**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on February 1, 2018, for determination as a contested case. The parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 14, 2018
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: August 14, 2018

Date Mailed to Parties:

mm

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into by and between Alain Gomez ("Gomez"), the Town of West New York (the "Town"), and Communications Workers of America Local 1045 (the "Union"), (collectively, the "Parties").

WHEREAS, on or about August 28, 2017, the Town served Gomez with a preliminary notice of disciplinary action ("PNDA") charging him with violations of N.J.A.C. 4A:2-2.3(a) (the "Charges"); and

WHEREAS, the PNDA indicated that, due to the Charges, Gomez could be subject to a suspension of ninety (90) working days beginning August 28, 2017 and ending January 2, 2018; and

WHEREAS, Gomez requested a department hearing before the appointing authority regarding the Charges; and

WHEREAS, Gomez was consequently granted a departmental hearing, which took place on September 15, 2018; and

WHEREAS, following the departmental hearing, the departmental hearing officer determined that the Charges sustained Mr. Gomez's ninety (90) day suspension, and Gomez was accordingly issued a final notice of disciplinary action on or around October 20, 2017; and

WHEREAS, Gomez appealed the decision of the departmental hearing officer to the Civil Service Commission; and

WHEREAS, on or about February 21, 2018, the Union filed a grievance on Gomez's behalf, which was scheduled for arbitration before the Public Employment Relations Commission (PERC) under docket number AR-2018-390 (the "Grievance"); and

WHEREAS, the Grievance related to the Town having denied Gomez's six-week vacation request (July 10, 2017 through August 18, 2017), and instead having granted him three-weeks of approved vacation leave; and

WHEREAS, the above-described issues involved in the Grievance were also at issue in the Charges and the scheduled hearing before the Civil Service Commission; and

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The Town agrees to reduce Gomez's ninety (90) working day suspension to a sixty (60) working day suspension. Accordingly, the Town agrees to provide Gomez with a check for wages in an amount equal to thirty (30) working days' pay minus garnishments and tax withholdings as required by law.

2. The Union hereby withdraws the Grievance and any and all other pending

grievances concerning Gomez's employment with the Town pertaining to the October 20, 2017 final notice of disciplinary action, with prejudice.

3. The Parties expressly agree that this Agreement shall have no mitigating precedential effect on any other pending or future disciplinary actions. Gomez, with full understanding of his legal rights, voluntarily and unconditionally releases and forever discharges the Town, as well as the Town's past and present employees, officers, insurers, reinsurers, directors, agents, attorneys, representatives, predecessors, successors and assigns (collectively, the "Releasees") from all contracts, agreements, promises, liabilities, claims, causes of action, charges, complaints, grievances, obligations, costs, losses, damages, injuries, attorneys' fees and other legal responsibilities (collectively, the "Claims") of any form whatsoever arising from the beginning of the world through the date Gomez signs this Agreement, whether known, unknown, unforeseen, unanticipated, unsuspected or latent, which Gomez ever had or now has against any of the Releasees.

4.

A. Gomez's release of Claims against the Releasees includes but is not limited to: any and all Claims arising out of and/or related to Gomez's employment with the Town; any and all Claims under any federal, state and/or local statutory, constitutional, common law or tort cause of action for battery, assault, pain and suffering, lost wages, bonus, sick leave, vacation leave and other paid-time-off, intentional or negligent infliction of emotional distress, defamation, breach of collective bargaining agreement, breach of contract or implied contract, breach of public policy, wrongful discharge and/or for benefits owed (except for vested benefits); any and all Claims under the National Labor Relations Act, the Labor Management Relations Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 and/or 1991, the federal False Claims Act, the Reconstruction Era Civil Rights Acts, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act of 1974, the Internal Revenue Code, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Fair Credit Reporting Act, the Occupational Safety and Health Act, the Immigration Reform and Control Act, the federal Whistleblower Protection Statutes, the Worker Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Constitution, the Millville Dallas Airmotive Plant Job Loss Notification Act, and the New Jersey Wage and Hour Laws and any and all amendments to each of the foregoing laws; and any and all Claims under any other federal, state and/or city laws, codes, rules or regulations. This Agreement applies to all Claims through the date of Gomez's execution of this Agreement and not to Claims arising thereafter. The release of Claims in this Paragraph does not apply to Claims that cannot, as a matter of law, be waived by private agreement.

4.5. Gomez represents he has not filed any Claims against the Town. To the extent any such Claims have been filed, Gomez agrees to promptly withdraw and/or direct the pertinent court or agency to dismiss their respective matters with prejudice. Nothing in this Agreement is intended to interfere with (a) the Equal Employment Opportunity Commission's ("EEOC") or any comparable state or local agency's ability to enforce any anti-discrimination law within their jurisdiction, or (b) Gomez's ability to participate in an investigation, file a charge, or otherwise communicate with the EEOC or comparable state or local agency responsible for enforcing anti-discrimination laws.

~~5.~~6. Nothing in this Agreement shall constitute an admission of liability or wrongdoing by the Town and/or the Union, nor shall it create or constitute a practice or precedent.

~~6.~~7. Gomez acknowledges and agrees that the Union has fully and fairly represented Gomez in all matters concerning his employment with the Town, including but not limited to the negotiation and execution of this Agreement, and Gomez fully releases the Union from any and all claims and liability.

~~7.~~8. The provisions of this Agreement are to be severable so that in the event any provision(s) is held to be illegal or unenforceable by any court or agency of competent jurisdiction, or by operation of any applicable law, the remaining terms of this Agreement shall remain valid and in full force and effect.

~~8.~~9. This Agreement has been negotiated and entered into in the State of New Jersey, and shall be governed by the laws of the State of New Jersey, without giving effect to any conflict of laws principles, except to the extent federal law controls.

~~9.~~10. This Agreement contains the entire agreement of the parties as to the subject matter hereof and cancels and supersedes all other written and oral agreements and understandings between them as to such subject matter. Gomez represents and acknowledges that in executing this Agreement, he has not relied upon any representation or statement made by any of the Releasees or the Union regarding the subject matter, basis, or effect of this Agreement other than as specifically stated in this Agreement. The terms in this Agreement can only be modified in a written document signed by Gomez, the Union, and the Town.

~~10.~~11. Gomez represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Gomez represents and warrants that he enters into this Agreement voluntarily, of his own will, without any pressure or coercion from any person or entity including, but not limited to, the Town.

~~11.~~12. The precatory phrases ("whereas clauses") are not mere recitals, but are specifically agreed to by the parties and are incorporated herein by reference.

~~12.~~13. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which will constitute one and the same agreement. A signature affixed by a party to a counterpart of this Agreement and delivered by electronic transmission is valid, binding and enforceable against such party.

ALAIN GOMEZ

Signature

Alain Gomez

Print Name

5/18/18

Date

TOWN OF WEST NEW YORK

Signature

James M. Coyan

Print Name

05/18/18

Date

CWA LOCAL 1045

Kathleen Lordo Pres. C.W.A Local 1045

Signature

Kathleen Lordo

Print Name

5/18/2018

Date

7-5-18

A-1

STATE OF NEW JERSEY

In the Matter of Jamie Howell
Township of Hillside Police Department

CSC DKT. NO. 2018-1942
OAL DKT. NO. CSR 01352-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 01352-18

Agency DKT No. 2015-1942

IN THE MATTER OF JAIME HOWELL,
TOWNSHIP OF HILLSIDE (POLICE DEPARTMENT)

Timothy R. Smith, Esq., (Caruso Smith Picini, attorneys) appearing for appellant, Jaime Howell

Daniel Antonelli, Esq., (Antonelli Kantor, attorneys) appearing for respondent City of Paterson (Police Department)

Record Closed: July 17, 2018 Decided: August 3, 2018

BEFORE **ANDREW M. BARON**, ALJ:

This matter concerns the appeal of appellant Jaime Howell from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on January 18, 2018, pursuant to N.J.S.A. 40A:14-202(d).

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 3, 2018

DATE

ANDREW M. BARON, ALJ

Date Received at Agency: August 3, 2018

Date Mailed to Parties:

mm

SETTLEMENT AND LIMITED RELEASE AGREEMENT

THIS SETTLEMENT AND LIMITED RELEASE AGREEMENT ("Settlement Agreement") is entered into between the Township of Hillside (the "Township"), and Jamie Howell ("Howell"). Collectively each a "Party" and together, referred to herein as the "Parties."

WHEREAS, Howell has been subject to certain administrative disciplinary charges dated November 27, 2017; and

WHEREAS, the Township placed Howell on an interim suspension pending the outcome of such disciplinary charges; and

WHEREAS, the Township terminated Howell based on his disciplinary charges on December 4, 2017; and

WHEREAS, Howell appealed the Township's interim suspension and termination to the New Jersey Office of Administrative Law; and

WHEREAS, the Township and Howell have a pending matter in the New Jersey Office of Administrative Law bearing OAL Docket No.: CSR 01352-2018 N; and

WHEREAS, the Parties wish to avoid the expense and uncertainties of litigation, and wish to resolve and settle all disputes and claims relating to Howell's interim suspension and termination; and

WHEREAS, Howell accepts the Township's settlement terms;

NOW, THEREFORE, in consideration of the mutual promises and covenants described below, the Parties agree as follows:

1. (a) **The Township's Limited Release.** In consideration of the Settlement Terms (as defined in Section 3 of this Settlement Agreement), the Township and anyone claiming through same, including but not limited to, executors, administrators, trustees, agents, representatives, employees, principals, members, directors, partners, subsidiaries, affiliates, successors or predecessors, past or present, or anyone acting or purporting to act on their behalf, and assigns of each of them, hereby irrevocably and unconditionally releases, acquits, and forever discharges, to the full extent permitted by law, any and all Claims (as defined below), whether known or unknown, that the Township may have against Howell and all of his present and former heirs, spouse(s), family members, relatives, executors, administrators, trustees, agents, representatives, employees, principals, and any and all persons acting on his behalf, from the beginning of time through the date Howell signs and delivers this Settlement Agreement to counsel for the Township. "Claims" means any and all actions, charges, controversies, demands, causes of action, suits, rights, defenses and/or claims whatsoever, arising, directly or indirectly, from Howell's interim suspension and termination. The Township specifically releases any and all Claims and/or crossclaims asserted or that could have

been asserted relative to Howell's interim suspension and termination.

(b) **Howell's Limited Release.** Howell and anyone claiming through same, including but not limited to heirs, spouse(s), family members, relatives, executors, administrators, trustees, agents, representatives, employees, principals, members, directors, partners, subsidiaries, affiliates, successors or predecessors, past or present, or anyone acting or purporting to act on his behalf, and assigns of each of them, hereby irrevocably and unconditionally releases, acquits, and forever discharges, to the full extent permitted by law, any and all Claims (as defined below), whether known or unknown, that Howell may have against the Township and all of its present and former officers, agents, directors, board members, supervisors, attorneys, insurers, re-insurers, employees, members, stockholders, all related companies, and any of their corporate parents, subsidiaries, and affiliates, and all persons acting on his behalf, from the beginning of time through the date Howell signs and delivers this Settlement Agreement to counsel for the Township. "Claims" means any and all actions, charges, controversies, demands, causes of action, suits, rights, and/or claims whatsoever, arising, directly or indirectly, from Howell's interim suspension and termination. Howell specifically releases any and all defenses asserted or that could have been asserted relative to his interim suspension and termination as well as all claims and counterclaims related to such interim suspension and termination.

2. **Non-Waiver.** The Parties do not release or waive any claim or cause of action which it may have against any other person or entity, other than the claims specified above. No waiver by any party of any breach or series of breaches or defaults in performance by another party, and no failure, refusal or neglect of any party to exercise any right, power or option given under the terms of the Settlement Agreement or to insist upon strict compliance with or performance of any party's obligation under this Settlement Agreement, shall constitute a waiver of the provisions of this Settlement Agreement with respect to any subsequent breach thereof or a waiver by any party of its rights at any time thereafter to require exact and strict compliance with the provisions thereof.

3. **Settlement Terms.** The parties agree to the following settlement terms: (1) the Township shall pay Howell for forty-five (45) days of back pay based on an hourly rate of $60.32 and 37.5 hours per week from November 27, 2017 through January 11, 2018 totaling $15,834.00; (2) Howell shall submit to the Township a valid and binding irrevocable letter of retirement from his employment with the Township. The letter of retirement will unequivocally state that Howell is irrevocably retiring from his employment with the Township, in good standing, effective January 11, 2018. A copy of the letter of retirement is attached hereto as Exhibit "A"; (3) the Township shall pay Howell for forty-one point five (41.50) days of unused vacation days based on the hourly rate of $60.32 and 10.75 hours per day totaling $26,910.26; (4) the Township shall pay Howell for five (5) days of unused comp days based on the hourly rate of $60.32 and 10.75 hours per day totaling $3,242.20; (5) the Township shall pay Howell for three hundred forty-four (344) hours of accumulated sick time incentive based on the hourly rate of $60.32 totaling $20,750.08; (6) the Township shall pay Howell for

forty-two (42) days of terminal leave based on the hourly rate of $60.32 and 8.5 hours per day totaling $21,534.24; (7) the Parties agree that Howell shall not receive any attorney fees or costs; (8) Howell shall withdraw his motion for interim relief pending in the New Jersey Office of Administrative Law bearing OAL Docket No.: CSR 01352-2018 N; and (9) Howell shall withdraw his appeal pending in the New Jersey Office of Administrative Law bearing OAL Docket No.: CSR 01352-2018 N.

4. **Payment.** As good consideration for Howell's execution, delivery, and non-revocation of this Settlement Agreement, the Township shall make an initial payment of forty-four thousand one hundred thirty-five dollars and thirty-nine cents ($44,135.39) (the "Initial Settlement Payment") payable to "Jamie Howell." The Initial Settlement Payment will be made within fifteen (15) days of the Civil Service Commission's approval of this Settlement Agreement. The Township shall make a final payment of forty-four thousand one hundred thirty-five dollars and thirty-nine cents ($44,135.39) (the "Final Settlement Payment") payable to "Jamie Howell." The Final Settlement Payment will be made within sixty (60) days of the Initial Settlement Payment. The parties acknowledge that nothing in this Settlement Agreement shall be deemed to be an admission of liability.

5. **Who is Bound.** The Township and Howell are bound by this Settlement Agreement. Anyone who succeeds to the Township's rights and responsibilities, such as its successors and assigns, is bound, and anyone who succeeds to Howell's rights and responsibilities, such as his respective successors and assigns, is also bound.

6. **Confidentiality and Non-Disparagement.**

(a) The Township agrees not to publish or communicate to any individual, organization or entity any Disparaging remarks, comments or statements concerning Howell.

(b) Howell agrees not to publish or communicate to any individual, organization or entity any Disparaging remarks, comments or statements concerning the Township.

(c) For purposes of this Settlement Agreement, the term "Disparaging" shall mean remarks, comments, statements, or communications (written or oral) that reflect adversely on the capabilities, perceived work performance, business affairs, practices or reputation of the Township or Howell.

(d) The Parties agree that they will keep confidential the terms of the Settlement Agreement, including, but not limited to, the Settlement Payment.

(e) The Parties agree that it shall not be a violation of this section of the Settlement Agreement for the Parties to disclose to their attorneys, accountants, and/or tax professionals the terms of the Settlement Agreement including the Settlement Payment. The Parties further agree that in the event that Howell and/or his counsel are subpoenaed by any person or entity (including, but not limited to, any governmental agency or court of competent jurisdiction) to give testimony (in a deposition, court

proceeding or otherwise) or provide documents which in any way relates to the subject matter of this release or the settlement, Howell will give prompt notice of such request, in writing, to Daniel Antonelli, Esq., counsel for the Township, not less than fifteen (15) days prior to the time set for disclosure, or as soon as practicable.

7. **Construction of Agreement and Severability.** This Settlement Agreement represents the entire and complete understanding and full agreement between the Parties with respect to the matters set forth herein, and except as set forth in this Settlement Agreement, there are no representations, warranties, promises, understanding or agreements, oral or otherwise, that have been made or are relied upon by the Parties to this Settlement Agreement. This Settlement Agreement may not be clarified, modified, changed or amended except in a writing signed by each of the Parties.

In the event that one or more of the provisions contained in this Settlement Agreement shall for any reason be held unenforceable in any respect under the law of any state of the United States or the United States, such unenforceability shall not affect any other provision of this Settlement Agreement, but this Settlement Agreement shall then be construed as if such unenforceable provision or provisions had never been contained herein. This Settlement Agreement and any and all matters arising directly or indirectly therefrom shall be governed under the laws of the State of New Jersey without reference to choice of law rules. The Parties consent to the sole jurisdiction of the federal and state courts of New Jersey.

8. **Non-Admission.** This Settlement Agreement is not intended, and shall not be construed, as an admission by any Party of a violation of any federal, state or local law (statutory or decisional), ordinance or regulation. This Settlement Agreement is not intended and shall not be construed as an admission that any Party committed any wrong whatsoever against any other Party. Neither this Settlement Agreement nor its terms are admissible in any proceeding in a court of competent jurisdiction other than in a proceeding for breach of the terms contained herein.

9. **Acceptance.** The Parties were represented by counsel and this Settlement Agreement was negotiated by counsel. The Parties and counsel for the Parties have reviewed this Settlement Agreement and have participated in its drafting and, accordingly, no party shall attempt to invoke the rule of construction to the effect that ambiguities, if any, are to be resolved against the drafting party.

10. **Assignment and Transfer.** The Parties expressly represent and warrant that they have not assigned or transferred to any person, firm, corporation, partnership, association or other entity, any or all of the rights, duties or obligations embodied or released in this Settlement Agreement and otherwise have the full right and power to enter into this Settlement Agreement.

11. **Acknowledgments.** The Parties acknowledge and agree that they are knowingly and voluntarily entering into this Settlement Agreement. By entering in this Settlement Agreement, no party waives any rights or Claims that may arise after the date that the

party executes and delivers this Settlement Agreement to the other.

12. **Opportunity for Review.** The Parties represent and warrant that they (i) have had sufficient opportunity to consider this Settlement Agreement, (ii) have read this Settlement Agreement, (iii) understand all the terms and conditions hereof, (iv) are not incompetent or has a guardian, conservator or trustee appointed for them, (v) has entered into this Settlement Agreement of their own free will and volition, (vi) have duly executed and delivered this Settlement Agreement, (vii) understand that each Party is responsible for its own attorney's fees and costs, (viii) have been advised to and has had the opportunity to review this Settlement Agreement with counsel of its choice or have chosen voluntarily not to do so, and (ix) understands that this Settlement Agreement is valid, binding and enforceable against each Party in accordance with its terms.

13. **Countersign/Copies.** This Settlement Agreement may be executed in counterparts, including counterparts transmitted by electronic mail or telephone facsimile. Each counterpart, once executed, shall have the efficacy of a signed original. Signed counterparts may be used in place of the originals for any purpose.

14. **Warranty.** Each person whose signature appears on this Settlement Agreement warrants and guarantees that he or she has been duly authorized and has full authority to execute this Settlement Agreement on behalf of the person or entity for whom he or she executes this Settlement Agreement.

IN WITNESS WHEREOF, the Parties hereto knowingly and voluntarily executed this Settlement Agreement as of the date set forth below:

TOWNSHIP OF HILLSIDE

Dated: 7-11-18

By: _____
Name: Dahlia Vertreese
Title: Mayor

TOWNSHIP OF HILLSIDE

Dated: 7-11-18

By: _____
Name: Lorraine Messiah
Title: Township Clerk

JAMIE HOWELL

Dated: 6/12/18

By: _____
Name: Jamie Howell

Exhibit "A"

Effective January 11, 2018, I, Jamie Howell, hereby retire my position in the Hillside Police Department in good standing. This letter of retirement is binding upon me and anyone acting on my behalf and irrevocable in nature and deed. By my signature below, I am also certifying that my irrevocable retirement is being done by me with the full knowledge of what an irrevocable retirement consists of. I do not have any mental or other defects which would prevent me from making a rational decision, such as an irrevocable retirement; and, I completely and fully take this action of my own free will and volition. I have not been coerced, forced or unduly influenced into signing this letter of retirement. I have also had the opportunity to speak with my attorney prior to signing this letter of retirement. This letter of retirement shall go into effect once the Settlement Agreement between myself and the Township of Hillside is fully executed and approved by the Township of Hillside's Council and the Civil Service Commission.

Dated: 6/6/18

By: _____
Jamie Howell

9-5-18

A-1

STATE OF NEW JERSEY

In the Matter of Vincent Ortmann,
Union County, Department of Correctional Services

CSC DKT. NO. 2018-254
OAL DKT. NO. CSV 11287-17
OAL DKT. NO. PTC 04452-17
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

RECEIVED
JUN 29 2018
NJ DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. PTC 04452-17
AGENCY DKT. NO. N/A

VINCENT ORTMANN,
Petitioner,
v
MONMOUTH COUNTY POLICE ACADEMY,
Respondent.

and

IN THE MATTER OF VINCENT ORTMANN, UNION COUNTY DEPARTMENT OF CORRECTIONAL SERVICES.

OAL DKT. NO. CSV 11287-17
AGENCY DKT. NO. 2018-254
(CONSOLIDATED)

Joshua M. Forsman, Esq., appearing for petitioner/appellant Vincent Ortmann (Caruso, Smith, Picini, PC, attorneys)

Steven W. Kleinman, Esq., appearing for respondent Monmouth County Police Academy

Denise Errico Esmerado, Esq., appearing for respondent Union County Department of Administration Services (Ruderman, Horn & Esmerado, P.C., attorneys)

Record Closed: June 26, 2018 Decided: June 27, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

These matters were transmitted to the Office of Administrative Law for determination as contested cases by the Police Training Commission on March 30, 2017, and by the New Jersey Department of Personnel on August 8, 2017. The matters were consolidated by order dated October 16, 2017.

The parties agreed to an amicable resolution and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. It is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this Initial Decision with the **POLICE TRAINING COMMISSION**.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the Police Training Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 27, 2018
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: 6-29-18

Date Mailed to Parties:

cmo

RECEIVED
2018 JUN 26 P 4:55
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND COMPLETE RELEASE

This Settlement Agreement and Complete Release ("Agreement") is entered into this _____ **day of April, 2018** and is by and between the Monmouth County Sheriff's Office ("MCSO"), the County of Union ("Union County"), and Vincent Ortmann ("Ortmann").

RECITALS

WHEREAS, Ortmann was employed by Union County as a County Corrections Officer; and,

WHEREAS, Ortmann was required to successfully complete the Basic Course for County Corrections Officers as a condition of his continued employment by Union County as a County Corrections Officer; and,

WHEREAS, Union County enrolled Ortmann in the Basic Course for County Corrections Officers at the Monmouth County Police Academy ("MCPA"), which is a division of the MCSO, commencing on or about February 13, 2017; and,

WHEREAS, Ortmann was dismissed from the MCPA on March 7, 2017 for failing to meet the minimum required physical conditioning standards set forth in Directive 4-2016, dated August 17, 2016, effective January 1, 2017, issued by the Police Training Commission ("PTC") for failing to perform the required push-ups in the specified time frame; and,

WHEREAS, due to his dismissal from the MCPA, Union County removed Ortmann from his employment as a County Corrections Officer effective March 17, 2017; and,

WHEREAS, Ortmann timely filed an appeal (the "Dismissal Appeal") of his dismissal from the MCPA to the PTC, which was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case under docket number PTC 04452-2017 S; and,

WHEREAS, Ortmann also timely filed an appeal (the "Removal Appeal") of his removal from employment at Union County to the Civil Service Commission ("CSC"), which was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case under docket number CSV 11287-2017 N; and,

WHEREAS, the Dismissal Appeal and the Removal Appeal were consolidated for a plenary hearing before Administrative Law Judge Kathleen M. Calemmo; and,

WHEREAS, prior to the commencement of the hearing at the OAL, the parties engaged in settlement discussions; and,

WHEREAS, the MCSO, Union County and Ortmann now desire to resolve all outstanding issues with respect to the foregoing events via this Agreement and amicably resolve both the Dismissal Appeal and the Removal Appeal.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the MCSO, Union County and Ortmann hereby agree as follows:

1. **RESOLUTION OF THE DISMISSAL APPEAL AND REMOVAL APPEAL; TERMS AND CONDITIONS.**

The MCSO, Union County and Ortmann agree as follows:

a. In lieu of his dismissal from the MCPA's Basic Course for County Corrections Officers, Ortmann shall be deemed to have voluntarily withdrawn from same.

b. In lieu of his removal from employment by Union County, he shall be deemed to have resigned from his employment in good standing as a County Corrections Officer, effective and retroactive to March 17, 2017.

c. The parties agree that Ortmann may seek future employment as a sworn law enforcement officer with Union County. In the event that Ortmann is hired by a law

enforcement agency that utilizes the MCPA for training purposes, there shall be no bar on his ability to re-enroll in the MCPA.

d. Ortmann waives any and all claims arising from or relating to his dismissal from the MCPA or his removal from Union County, including but not limited to, back pay, benefits, attorneys' fees and/or costs.

e. The MCPA and Union County will amend their records to conform to the terms of the Agreement and will do all that is reasonably necessary to cause any Civil Service records to reflect Ortmann's resignation in good standing instead of removal. All internal records will remain intact. Internal records shall also include a copy of this Agreement and any related documents.

2. **COMPLETE RELEASE AND RELINQUISHMENT OF CLAIMS.**

In consideration of the settlement hereinabove, and to the fullest extent permissible by law, Ortmann, along with his successors, assigns, heirs, representatives and estates (collectively, "**Releasor**"), agrees to irrevocably and unconditionally relinquish any and all causes of action, demands or claims, including claims for attorney's fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the MCSO (as well as its funding agent, the County of Monmouth) and Union County, as well as all of their elected and appointed officials, officers, members of the governing body, agents, attorneys, employees, agencies and instrumentalities (collectively, "**Releasees**"), regardless of whether such claims are presently known or unknown to Releasor. This full and unconditional relinquishment and release of claims includes, but is not limited to, any causes of action, demands or claims relating in any way to Ortmann's enrollment at the MCPA or his

removal from employment by Union County, or any other events, information or disputes giving rise to this matter, the Dismissal Appeal, the Removal Appeal or the Agreement.

This full and unconditional Release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This full and unconditional Release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, common law, public policy, including, but not limited to, the United States Constitution, the federal Fair Labor Standards Act (FLSA), the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act (EPA), the federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), Sections 1981 through 1988 of Title 42 of the United States Code; the federal National Labor Relations Act; the federal Immigration Reform and Control Act; the federal Occupational Safety and Health Act; the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, the New Jersey Civil Rights Act, the New Jersey Employer-Employee Relations Act, the New Jersey Wage and Hour Laws, the New Jersey Wage Payment Laws.

This full and unconditional Release also specifically includes, but is not limited to, claims for reemployment by contract or recall rights, compensatory damages, punitive damages, reinstatement, back pay, overtime compensation, back benefits, back emoluments, attorneys' fees, equitable relief, or any other relief.

Ortmann represents that there are no outstanding charges, complaints, claims or actions against the County of Union, which involve claims related to Ortmann. In the event that there is outstanding any such proceeding, action, charge, complaint or claim filed against the County of Union, by or on behalf of Ortmann, Ortmann shall cause the immediate withdrawal and dismissal with prejudice and on the merits of each such proceeding, action, charge, complaint or claim. However, this full and unconditional Release does not prevent, and is not intended to prevent, Ortmann from making an allegation of discrimination to the U.S. Equal Employment Opportunity Commission ("EEOC"), the New Union Division on Civil Rights ("NJDCR") or any other state or local civil rights agency. However, Releasor irrevocably waives any right to receive any monetary relief or any other compensation whatsoever in connection with the prosecution of a charge or suit brought on Ortmann's behalf by the EEOC, NJDCR, or any other third party such as another federal, state or local governmental agency or entity.

Ortmann represents and warrants that he has no knowledge of any work-related injury or illness incurred while working for the County of Union, that he has not filed a claim or an application for benefits under the Workers' Compensation Laws, and that he does not contend that he has any such claim.

3. **ACKNOWLEDGEMENT.**

Ortmann acknowledges that this Agreement shall resolve all issues related to the Dismissal Appeal and the Removal Appeal and that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel, Joshua M. Forsman of Caruso Smith Edell Picini, P.C., prior to entering into it and that he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

4. **SATISFACTORY REPRESENTATION.**

Ortmann certifies that (1) he is satisfied with the representation his legal counsel has provided him in this matter, (2) his legal counsel has not made any representations concerning the terms or effects of this Agreement other than those contained herein; and (3) he has been advised by his legal counsel that by entering into the Agreement, he is irrevocably waiving any further due process to which he may be entitled in this matter. Ortmann has advised his legal counsel that with these understandings, he agrees to the terms contained in this Agreement.

5. **GOVERNING LAW AND FORUM.**

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

6. **HEADINGS.**

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

7. **SEVERABILITY CLAUSE.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

8. **AMBIGUITIES.**

Each party and their counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

9. **MODIFICATIONS TO BE IN WRITING.**

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

10. **ENTIRE UNDERSTANDING.**

This Agreement and Release sets forth the entire understanding between the MCSO, Union County and Ortmann, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

11. **NON-ADMISSION.**

Nothing in this Agreement shall be construed as an admission by any party that any action it has taken was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

12. **AGREEMENT NON-PRECEDENTIAL.**

The parties agree that this Agreement shall be non-precedential, is limited to specific, unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other enrollee at the MCPA or any other employee of Union County. The parties shall not utilize this settlement in any way with respect to any other proceeding involving the MCPA or Union County unless specifically provided for herein.

13. **OTHER ACTIONS.**

Ortmann agrees that he will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery, offer evidence or voluntarily assist in any claims or litigation that may be pending or filed in the future, unless required by law or court order (in which case he agrees to notify the MCPO and Union County before doing so to provide for an opportunity to oppose such a request. Under such circumstances, Ortmann, will immediately notify the County of Union, in writing, directed to Director

Ronald Charles, Union County Department of Corrections, 15 Elizabethtown Plaza, Elizabeth, NJ 07202 or Mr. Charles's successor.

14. **APPROVALS.**

The parties acknowledge that this Agreement may be subject to approval by the PTC and the Civil Service Commission and shall be provided to the PTC, the Civil Service Commission and/or the assigned Administrative Law Judge for their respective approvals if so required. Any disapproval by the PTC or the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

15. **REPRESENTATIONS.**

Each person signing this Agreement represents and warrants that she or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

16. **ACKNOWLEGEMENT.**

By signing this Agreement and Release, Vincent Ortmann acknowledges:

i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.

iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE MCSO AND UNION COUNTY TO CONSULT WITH AN ATTORNEY OF MY CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND

REPRESENT THAT I IN FACT HAVE CONSULTED WITH AN ATTORNEY.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.

vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

viii. I REPRESENT AND AGREE THAT I AM NOT UNDER THE INFLUENCE OF ANY ILLNESS, INCLUDING MENTAL OR EMOTIONAL ILLNESS, MEDICAL CONDITION, DISABILITY OR IMPAIRMENT, OR OF PRESCRIPTION OR OTHER MEDICATION THAT WOULD AFFECT MY ABILITY TO REVIEW THIS AGREEMENT IN ITS ENTIRETY, UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILY AGREE TO IT.

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE MCSO, UNION COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Vincent Ortmann executed the foregoing Agreement this 1 day of June 2018.

Sworn and subscribed to before me this 1st day of June 2018

VINCENT ORTMANN

Notary Public of the State of New Jersey

SUMMI VERMA
Notary Public - State of New Jersey
My Commission Expires Oct 27, 2021

The County of Union

Date: 6/8/18

By: _____

Printed Name: RONALD L CHARLES

Monmouth County Sheriff's Office

Date: _____

By: _____

Printed Name: _____

The County of Union

Date:_____

By:_____

Printed Name: _____

Monmouth County Sheriff's Office

Date: 6/18/18

By: _____

Printed Name: Stan Kleiman, Esq.
Special Cnty Counsel

9-5-18

STATE OF NEW JERSEY

In the Matter of Gilbert Segarra, Essex County, Department of Public Safety and Corrections CSC DKT. NO. 2017-2596 OAL DKT. NO. CSV 03374-17 OAL DKT. NO. PTC 00731-17 (CONSOLIDATED)	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
JUL 02 2018
NJ DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION

July 2, 2018 CA

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. PTC 00731-17

GILBERT SEGARRA,

Appellant,

vs.

ESSEX COUNTY COLLEGE PUBLIC SAFETY ACADEMY,

Respondent.

OAL DKT. NO. CSV 03374-17

AGENCY DKT. NO.: 2017-2596

GILBERT SEGARRA,

Appellant,

vs.

ESSEX COUNTY DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,

Respondent.

Valerie. Palma DeLuisi, Esq., for Appellant (Law Offices of Nicholas J. Palma, P.C., attorneys)

Joy B. Tolliver, Esq., General Counsel, appearing for Respondent, Essex County College Public Safety Academy

Jill Caffrey, Esq. appearing for Respondent, Essex County Department of Public Safety and Corrections

Record Closed: June 26, 2018 Decided: June 27, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the PTC matter Appellant appeals his dismissal from the basic training course due to excessive absences. The Police Training Commission transmitted the PTC matter to the Office of Administrative Law (OAL), where it was filed on January 18, 2017, as a contested case, pursuant to N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

In the CSV matter Appellant appeals a Final Notice of Disciplinary Action dated January 23, 2017, providing for a penalty of removal.

In the PTC matter a prehearing conference was held by the Honorable John P. Scollo, ALJ, on February 1, 2017, who thereafter entered a prehearing order dated February 10, 2017.

In the CSV matter a prehearing conference was held by the undersigned on March 20, 2017. A prehearing order was entered on March 22, 2017.

Petitioner filed a motion to consolidate both matters on March 27, 2017.

Pursuant to N.J.A.C. 1:1-17.2(c) oral argument on the motion was held telephonically on March 30, 2017, wherein the parties consented to the consolidation and agreed the predominant interest lies with the Police Training Commission. An Order of Consolidation and Predominant Interest was entered by the undersigned on March 30, 2017.

The parties appeared for the hearing on April 26, 2017 and advised that the matter was settled and placed the terms of the settlement upon the record.

An executed settlement agreement was received on June 25, 2018, whereupon the record was closed.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Appellant's appeal is withdrawn with prejudice.

I hereby **FILE** this Initial Decision with **POLICE TRAINING COMMISSION**.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, who/which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the (title of the agency head with the predominant interest) does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision **POLICE TRAINING COMMISSION** shall forward the record, including this recommended

decision and its final decision, to **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **POLICE TRAINING COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

June 27, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at (Police Training Commission):_____

Date Mailed to Parties: _____

OFFICE OF THE COUNTY COUNSEL

Hall of Records, Room 535, Newark, New Jersey 07102
973.621.5003 --- 973.621.4599 (Fax)
www.essexcountynj.org

2018 JUN 26 P 2:

Joseph N. DiVincenzo, Jr.
Essex County Executive

Courtney M. Gaccione
Essex County Counsel

June 25, 2018

Honorable Thomas Betancourt, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102

Re: In the Matter of Gilbert Segarra v. Essex County College Public Safety Academy; Essex County Department of Public Safety and Corrections
OAL Docket No. PTC-00731-17
OAL Docket No. CSV-03372-17

Dear Judge Betancourt:

Enclosed please find the fully executed original Stipulation of Settlement in connection with the above entitled matter for processing by your office.

Respectfully,

Jill Caffrey
Assistant County Counsel
973-621-4428

JC:ks
enc.
cc: Nicholas J. Palma, Esq. w/enc.
Joy B. Toliver, Esq. w/enc.
Sgt. Joseph Regateiro, Disciplinary Unit, ECCF w/enc.

COURTNEY M. GACCIONE, ESSEX COUNTY COUNSEL
BY: JILL CAFFREY, ASSISTANT COUNTY COUNSEL
HALL OF RECORDS - ROOM 535
NEWARK, NEW JERSEY 07102
973-621-4428
Attorney for the County of Essex

Segarra, Gilbert v. Essex County College Public Safety Academy; Essex County Dept of Public Safety and Corrections	OAL DKT. NO.: PTC 00731-17 OAL DKT. NO.: CSV 03374-17 **STIPULATION OF SETTLEMENT AND LAST CHANCE AGREEMENT**

It is hereby stipulated and agreed to by and between, the County of Essex (the "County"), Essex County College Public Safety Academy (the "Academy") and Gilbert Segarra (the "Employee" or "Segarra") (collectively the "Parties"), that the above-captioned matter be and same is hereby settled upon the following terms and conditions:

1. Employee hereby acknowledges being charged as specified in the Final Notice of Disciplinary Action dated January 23, 2017, which was duly served upon employee in accordance with the Civil Service Rules.
2. In lieu of the Removal, issued by the Final Notice of Disciplinary Action dated January 23, 2017, the County hereby agrees to allow the Employee to attend the next available Police Academy. Employee agrees and understands that the County cannot guarantee where or when the next available Police Academy will take place; of which the cost of attendance shall be borne by the County. All expenses, including transportation,

parking, tolls, etc., relating to the attendance at said Police Academy will be borne by employee. Employee understands that, prior to Police Academy admittance, s/he must also comply with the Police Training Commission's medical clearance requirements in accordance with N.J.A.C. 13:1-8.1(a)5.

3. Further, the Academy hereby agrees to no longer pursue the termination of Segarra. In exchange for same, Segarra agrees to not pursue re-enrollment in the Essex County College Public Safety Academy.

4. Employee understands and accepts that this is the employee's last and final opportunity to successfully attend and complete the Police Academy. Failure to be medically cleared to attend the Police Academy in accordance with N.J.A.C. 13:1-8.1(a)5 or dismissal from the Police Academy for any reason whatsoever, including but not limited to work related accident or injury, shall result in termination.

5. Employee further understands and agrees that the period which he has been out of work shall be deemed a leave of absence without pay and thus shall not seek back pay of any kind. Employee further understands that he will be permitted to return to work only upon successful completion of the Police Academy. Upon successful completion of the Police Academy, Employee's date of hire will be restored to his original date of hire. The Employee understands that any time considered a leave of absence will be deducted from his seniority and the County will not make any back payment for any pension contributions during the period of time prior to his return to active duty.

6. The Parties agree that the terms and conditions of this Stipulation of Settlement and the discussions and negotiations leading up to it shall be kept absolutely confidential hereafter and shall not be disclosed by Segarra to any employee or former employee of the County or other persons or the general public unless compelled to do so by the judicial process. However, Segarra may make disclosures to members of his immediate family, attorney, union representative and as may be required by his accountant in connection with the discharge of the latter's duties in preparation of tax returns or financial statements. Segarra's failure to comply with the confidentiality provisions of this program may result in the dissolution of the within Stipulation of Settlement.

7. In the event that an action is brought by the County or Academy for Segarra's breach of the confidentiality conditions set forth in paragraph 6 hereof, in addition as to such other relief as is appropriate, the County and Academy shall be entitled to reasonable attorneys fees and costs.

8. This Stipulation of Settlement and General Release is not and shall not in any way be construed as an admission by the County or Academy of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to Segarra, but instead constitutes the good faith settlement of a disputed claim and the County and Academy specifically disclaims any liability to Segarra or any other person. The parties have entered into this Stipulation

of Settlement and General Release in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and Segarra does not purport to be the prevailing party in any threatened or pending litigation.

9. Segarra represents and certifies that he has carefully read and fully understands all of the provisions of and effects of this Stipulation of Settlement and General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with his attorney. Further, Segarra certifies that he has voluntarily entered into this Stipulation of Settlement and General Release and that the County or Academy has not made any representations concerning the terms of effects of this Stipulation of Settlement and General Release other than those contained herein.

10. This Stipulation of Settlement shall neither set a precedent nor constitute a past practice.

11. This Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Stipulation of Settlement and General Release shall, in all cases, be construed as a whole according to its fair meaning and strictly for or against any of the parties.

12. Should any provision of this Stipulation of Settlement and General Release be declared or determined by any court to be illegal or invalid, the validity of

the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

13. This Stipulation of Settlement shall not be considered binding and/or final until approved by and executed by all parties.

14. Segarra agrees that this Stipulation of Settlement and General Release shall operate as a complete and final disposition of this matter. In consideration for the County and Academy's satisfactory action in resolving this matter, Segarra agrees to release and forever discharge the County and Academy, the County's and Academy's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, though, under or in concert with, both in their official and individual capacities, from any and all claims/relief he has now, whether or not he now knows about those rights, arising out of his employment with the County/enrollment with the Academy, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealing; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law against

Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that Segarra is waiving all claims, and the right to a trial by jury of all possible claims, against the County and Academy, in relation to this matter, from the beginning of Segarra's employment with the County to the date this Stipulation of Settlement and General Release is executed.

15. Segarra shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

16. This Stipulation of Settlement and General Release may not be modified, altered or changed, except upon the prior express written consent of the parties.

17. This Stipulation of Settlement and General Release the result of negotiations with Segarra and Segarra's attorney and/or union representative with whom he had an opportunity to consult prior to signing the same.

Dated: 5/31/18

JILL CAFFREY ESQ.
ASSISTANT COUNTY COUNSEL

Dated: 6/25/18

ROBERT D. JACKSON
COUNTY ADMINISTRATOR

Dated: 6-22-18

ALFARO ORTIZ, DIRECTOR
DEPARTMENT OF CORRECTIONS

Dated: 5/23/18

NICHOLAS J. PALMA, ESQ.
ATTORNEY FOR EMPLOYEE

Dated: 5/23/18

GILBERT SEGARRA
EMPLOYEE

Dated:

JOY B. TOLIVER, ESQ.
ATTORNEY FOR ACADEMY

9-5-18

A-4

STATE OF NEW JERSEY

In the Matter of Milliodere Senescat
New Lisbon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-1921
OAL DKT. NO. CSV 19368-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 7, 2018 BW

The appeal of Milliodere Senescat, Human Services Assistant, New Lisbon Developmental Center, Department of Human Services, removal effective August 19, 2016, on charges, was heard by Administrative Law Judge Joseph A. Ascione, who rendered his initial decision on August 2, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission, pursuant to the settlement agreement between the parties that was placed on the record indicating a general resignation, dismisses the appeal of Milliodere Senescat.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. CSV 19368-16
AGENCY DKT. NO. 2017-1921

IN THE MATTER OF MILLIODERE SENESCAT, DEPARTMENT OF HUMAN SERVICES, NEW LISBON DEVELOPMENTAL CENTER.

Rashidah Hasan, Esq., for appellant Milliodere Senescat

Aaron Creuz, Deputy Attorney General, for respondent Department of Human Services, New Lisbon Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 25, 2018 Decided: August 2, 2018

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, appellant, Milliodere Senescat, challenges her removal on August 19, 2016, on charges of violation of N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee, and N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause). Specifically, B.2-2, Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would result in danger to persons or property; B.3-2, Sleeping while on duty; D.7-2,

Violation of administrative procedures and or regulations involving safety and security; and E.1-2, Violation of a rule regulation, policy, procedure, order or administrative decision. The event allegedly committed on May 14, 2016. The event, falling asleep while assigned for enhanced supervision of a patient. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on December 27, 2016, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to -13.

The respondent presented its case on May 16, 2018, the parties agreed to a settlement on the record of a voluntary resignation in good standing without any back pay or attorney's fees. The undersigned permitted the parties to submit a settlement agreement within ten days of that date. The settlement agreement did not appear. The OAL set up a telephone conference for July 17, 2018, to discuss the whereabouts of the settlement agreement. Appellant's counsel failed to appear for the July 17, 2018, telephone conference and requested to be excused from the failure to appear which the undersigned granted. Appellant's counsel represented his inability to obtain appellant's signature on the settlement agreement; and requested a new hearing date. The failure to appear was excused. On July 20, 2018, the respondent through counsel, Aaron J. Creuz, DAG, objected to granted new hearing dates due to the interruption of the presentation of its case with the settlement, and the loss of available witnesses which were available for testimony back on May 16, 2018; but now were no longer employed by the respondent. A second telephone conference was scheduled for July 24, 2018. Appellant's counsel again failed to appear for the telephone conference and requested that the failure to appear be excused, new hearing dates be set, and he be allowed to make a motion to be relieved as counsel.

FACTUAL FINDINGS REGARDING THE PROCEEDINGS

Based upon a review of the record, and the submission of respondent's counsel to the second request of appellant's counsel to be excused from the failure to appear at the July 24, 2018, telephone conference, and giving fair weight thereto, I **FIND** the following **FACTS**:

1. The appellant's counsel's reason to be excused from the failure to be available for the telephone conference on July 24, 2018, is a law office failure and does not meet the criteria to be excused from the failure to appear.

2. The respondent will suffer additional costs and expenses, if compelled to complete its hearing; and there are no assurances that respondent's witnesses previously available will be available in the future. Accordingly, respondent will be prejudiced by the reopening of the matter.

3. The transcript from May 16, 2018, reflects that the appellant agreed to the terms of a settlement; and then changed his mind to execute a document memorializing the settlement which provided for a general resignation in good standing, with no back pay or attorney's fees and an agreement not to reapply for employment with the respondent.

4. The representation of appellant's counsel that she would be seeking to be relieved as counsel is inconsistent with the prehearing order in this matter as it would delay further hearing dates.

ORDER

IT IS ORDERED that the petition be **DISMISSED** outright or in accord with the settlement agreement reached on the record of a resignation in good standing, without back pay or attorney's fees, and a representation that appellant will not seek further employment with the respondent; and,

IT IS ORDERED in the event of remand by the **CIVIL SERVICE COMMISSION** to excuse the default and provide a new hearing for appellant that it do so only conditioned on a payment by appellant of the additional costs incurred by the respondent to present the initial hearing, in the event an entirely new hearing is required, or the remainder of the hearing, if an entire new hearing is not required.

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

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

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

August 2, 2018
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 8/2/18

Date Mailed to Parties: 8/2/18

lam

APPENDIX

LIST OF EXHIBITS

C-1 Appellant's counsel's request of July 19, 2018, to be excused from the July 17, 2018 failure to appear

C-2 Respondent's counsel's objection of July 20, 2018, to grant new hearing dates due to availability of witnesses

C-3 Appellant's counsel's request of July 25, 2018, to be excused from the July 24, 2018 failure to appear

9-5-18

A-5

STATE OF NEW JERSEY

In the Matter of Sekou Sheriff
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2018-1195
OAL DKT. NO. CSV 16989-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 7, 2018 BW

The appeal of Sekou Sheriff, Cottage Training Technician, Hunterdon Developmental Center, Department of Human Services, resignation not in good standing effective May 16, 2017, on charges, was heard by Administrative Law Judge Tricia M. Caliguire, who rendered her initial decision on August 1, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was justified. The Commission therefore affirms that action and dismisses the appeal of Sekou Sheriff.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 16989-17
AGENCY REF. NO. 2018-1195

IN THE MATTER OF SEKOU SHERIFF,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Rashida Hasan, Esq., for appellant

Shareef Omar, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney General, State of New Jersey, attorney)

Record Closed: July 26, 2018 Decided: August 1, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

This case involves the appeal by appellant, Sekou Sheriff (Sheriff), of the decision of respondent, New Jersey Department of Human Services (DHS or Department), that Sheriff's absence from the job on five consecutive days without permission was job abandonment, resulting in Sheriff's resignation not in good standing from the position of Cottage Training Technician at the Hunterdon Developmental Center (HDC).

PROCEDURAL HISTORY

On March 24, 2017, DHS mailed a Preliminary Notice of Disciplinary Action (PNDA) dated March 10, 2017, to Sheriff, charging him with (1) job abandonment in violation of Administrative Order A3.1; (2) resignation not in good standing pursuant to N.J.A.C. 4A:2-6.2(c); (3) conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and (4) other sufficient causes pursuant to N.J.A.C. 4A:2-2.3(a)(12). Sheriff did not request a departmental hearing, and, on April 17, 2017, DHS mailed a Final Notice of Disciplinary Action (FNDA) dated April 12, 2017, to Sheriff, sustaining all charges against him, with notice that he would be removed from employment effective February 19, 2017. Both the PNDA and the FNDA were sent by certified mail to the last address Sheriff provided, but both mailings were returned unclaimed.

Sheriff attempted to return to work on October 23, 2017, at which time he was provided with courtesy copies of the PNDA and FNDA. Sheriff filed this appeal on October 24, 2017, and the Civil Service Commission (CSC) transmitted this matter on November 14, 2017, to the Office of Administrative Law (OAL), which filed it for determination as a contested case on November 15, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

This matter was initially assigned to the Honorable Gerald Foley, ALJ, who held a settlement conference with the parties on December 19, 2017. Since settlement was not reached, this matter was reassigned to the undersigned and scheduled for a prehearing telephone conference on January 29, 2018. At appellant's request, this conference was adjourned. I held prehearing telephone conferences with the parties on February 26, 2018, and May 8, 2018, after which I issued a prehearing order and scheduled the hearing for July 30, 2018.

On June 27, 2018, respondent filed a motion for summary decision in its favor claiming there are no genuine issues of material fact in dispute. Specifically, respondent seeks that summary decision be granted in its favor finding that Sheriff's appeal was not filed in a timely manner and must be dismissed and, in the alternative, that Sheriff is guilty of the charges

described in the FNDA, and that DHS properly recorded him as having resigned not in good standing. Accordingly, I adjourned the hearing to allow time to address the motion.

On July 20, 2018, Sheriff submitted a brief in opposition to the motion for summary decision. The DHS filed a reply brief in further support of the motion for summary decision on July 26, 2018, and the motion is now ripe for determination.

FACTUAL DISCUSSION AND FINDINGS

Based on the papers filed by the parties in this case, I **FIND** the following undisputed **FACTS:**

Sheriff was employed by DHS as a Cottage Training Technician at HDC since 2003. On or about December 20, 2016, a leave request submitted by Sheriff was approved by his supervisors at HDC by which Sheriff used vacation and administrative leave from January 14, 2017 through February 2, 2017. Sheriff was expected to return to duty on February 6, 2017. Letter Br. of Resp't. (June 27, 2018), Exhibit B.

Sheriff did not return to work on February 6, 2017, and his absence was noted as unauthorized. Id., Exhibit C. The next two days, Sheriff called out sick. Ibid. On February 8, 2017, Violet H. Savice (Savice), LPN/CM, transmitted to HDC an application for Sheriff to take medical leave pursuant to the Family and Medical Leave Act.[1] Id., Exhibit D. In this application, Savice described Sheriff's medical condition as hypertension and diabetes and estimated he would be incapacitated from February 3, 2017, through March 15, 2017. Ibid. On February 13, 2017, HDC sent notice to Sheriff that his FMLA application was not approved as additional information was needed to determine whether the FMLA applied to his request. Id., Exhibit E. HDC required Sheriff to respond on or before February 21, 2017, but failed to specify what information was missing from his initial application. Ibid.

[1] 29 U.S.C.A. 2601, et seq.

On February 15, 2017, Gemeh Kesselhe (Kesselhe), Attending Medical Officer at Redemption Hospital, Monrovia, Liberia, transmitted a medical report to HDC regarding Sheriff, which stated that he was seen in the Emergency Room on February 3, 2017, diagnosed with diabetes and hypertension, admitted to the hospital for one week, and advised to "suspend travel" until March 15, 2017. Id., Exhibit F. On March 24, 2017, Kesselhe transmitted a second medical report to HDC regarding Sheriff, which stated that his recovery had been "gradual, not as anticipated," and therefore, Sheriff was "further admonished to suspend travel" through May 15, 2017. Id., Exhibit G. Respondent provided no copies of additional correspondence, if any, generated by HDC in response to the doctor's reports described above.

In the PNDA and the FNDA, DHS claims that Sheriff failed to notify his supervisor of his intended absences and failed to report to work on February 19, 21, 22, 23, and 26, 2017, and all subsequent work days up to and including March 10, 2017, and then April 12, 2017, the dates of the PNDA and FNDA, respectively. Id., Exhibits H and I.

HDC sent both the PNDA and the FNDA to Sheriff by certified mail to the address in Newark, New Jersey, which Sheriff had provided, however, both certified mailings were returned to HDC unclaimed by Sheriff. Ibid. In the papers filed to support this motion, respondent first stated that the PNDA and FNDA were also sent to Sheriff by regular mail. Id., p. 4. In its reply brief, however, respondent stated that the documents were also sent to Sheriff by registered mail. Reply Br. of Resp't. (July 26, 2018), p. 2. Sheriff claims he did not receive either the PNDA or the FNDA prior to October 23, 2018.

Sheriff was last seen by Kesselhe at his office in Liberia on September 24, 2017, at which time Kesselhe issued a medical report stating that Sheriff "can now resume active job as required." Letter Br. of Appell't. (July 20, 2018), Appendix A. Sheriff presented this report to HDC in person on or about October 23, 2017.[2] Further, Sheriff presented HDC the report of Total Medical Support Group, Irvington, New Jersey, that he was cleared to return to work, effective October 16, 2017. Letter Br. of Resp't., Exhibit M.

[2] The record is not clear as to whether Sheriff returned to HDC on only one or more than one occasion in his attempt to resume working.

Respondent did not permit Sheriff to return to work and, instead, on October 23, 2017, provided him with "courtesy copies" of the PNDA and FNDA. Id., Exhibits K and L. On October 24, 2017, Sheriff appealed the decision of respondent to record his resignation not in good standing.

POSITIONS OF THE PARTIES

Respondent claims first that Sheriff's appeal is untimely and therefore, should be dismissed. According to respondent, the CSC improperly granted Sheriff's appeal "based on the handwritten date on the courtesy copy of the FNDA" which Sheriff obtained when he returned to HDC in October 2017, seven months after the FNDA was issued. Id., p. 6. In support of its position, respondent cites the statute which provides that appeals of removals must be "made in writing to the [CSC] no later than 20 days from receipt of the final written determination of the authority." N.J.S.A. 11A:2-15. Respondent contends that "there is nothing in HDC's records suggesting Appellant's change of address, or that the FNDA was not delivered to him." Letter Br. of Resp't., p. 7.

Appellant responds that respondent failed to effectuate personal service of the PNDA and/or the FNDA on Sheriff and should not be permitted to proceed with this matter. "Service by certified or registered mail also require proof of such service," which respondent does not provide. Letter Br. of Appell't., p. 3. Regular mail, which respondent initially claimed to have used, cannot substitute for personal service or service by certified or registered mail. Ibid.

In its reply brief, respondent claims for the first time that the PNDA and FNDA were sent to appellant by certified and registered mail. Reply Br. of Resp't. (July 26, 2018), p. 2. (Presumably, though respondent does not say that it erred in its initial statement that regular mail was used, respondent means to substitute "registered" for "regular" with respect to the form of mailing.) Respondent refers to the green return-receipt card on which the boxes for both certified and registered mail are checked, and claims it satisfied its notice obligations. Id.; Letter Br. of Resp't., Exhibit J.

Alternately, respondent claims it is entitled to summary decision because there is no genuine issue of material fact that Sheriff abandoned his job while abroad in Liberia. Even if the medical reports provided by Sheriff's Liberian doctor are presumed credible, respondent argues that Sheriff was cleared to return to work twice—on March 15, 2017, and then again on May 15, 2017—but did not return nor request additional leave. The next correspondence from Sheriff and/or his doctors was dated September 24, 2017, and received by HDC on October 23, 2018, more than five months after Sheriff had previously been cleared to return to work.

Respondent argues that HDC is a twenty-four hour psychiatric care facility which "relies on the diligence of its employees to remain in operation." Employee attendance policies are strictly enforced and "DHS policy mandates automatic removal for a first offense of job abandonment." See, Letter Br. of Resp't., Exhibit A (NJ DHS Disciplinary Action Program (January 1, 1981), p. 4). Further, DHS policy defines job abandonment as "absence from work as scheduled without permission for five (5) consecutive days." Ibid.

In response, appellant claims that summary decision is not appropriate as there is a genuine dispute as to whether HDC had sufficient reason to deny FMLA leave to Sheriff and whether HDC had effective notice of the basis for Sheriff's continuing absences.

Finally, respondent argues that even if Sheriff had produced the medical report dated September 24, 2017, when it was initially issued rather than in October 2017, neither Sheriff nor his doctor provided any communication to HDC between May 15, 2017, and October 23, 2017, a gap of more than five months. Appellant has yet to explain why he did not notify his supervisors, or request permission for his absence, after May 15, 2017, or why he waited for almost a month after being cleared to return to work in September 2017, to attempt to return to work in October 2017.

LEGAL ANALYSIS AND CONCLUSIONS

Summary decision is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute.

By applying the applicable law and standard of proof to the undisputed facts, a decision may be reached in a case without the necessity of a hearing at which evidence is presented and testimony taken. The procedure is equally applicable in judicial as well as executive branch administrative proceedings. N.J.A.C. 1:1-12.5.

The regulations provide that the decision sought by the movant "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). For the adverse party (in this case, Sheriff) to prevail, he "must set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

The standards for determining motions for summary judgment are found in Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74–75 (1954), and later in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). A motion for summary decision may only be granted where the moving party sustains the burden of proving "the absence of a genuine issue of material fact," and all inferences of doubt are drawn against the movant. Judson, 17 N.J. at 74-75. The existence of disputed facts will only prevent summary decision if the disputed facts are material to the application of the underlying charges. Frank v. Ivy Club, 120 N.J. 73, 98 (1990).

Summary decision is appropriate when "the evidence . . . is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 541 [quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)]. In reviewing the proffered evidence to determine the motion, the judge must be guided by the applicable evidentiary standard of proof that would apply at trial on the merits.

The respondent contends that removal from employment was the appropriate response to appellant's absence from duty for five or more consecutive business days without approval. Under the regulations, such an absence is considered abandonment of the employee's position and is recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b). Further, the violation by an employee of a rule, regulation, policy, procedure, or order,

such as the DHS Disciplinary Action Program, provides the employer other sufficient cause to impose discipline, pursuant to N.J.A.C. 4A:2-2.3(a) (12).

Respondent argues that summary decision is appropriate here for two reasons, first Sheriff's appeal was not timely filed; and second, Sheriff was absent from work without permission for five or more consecutive work days, which by DHS policy constitutes job abandonment and for which automatic removal from employment is mandated.

With respect to respondent's first argument, it must prove that there is no genuine issue of material fact as to whether Sheriff had notice of the charges lodged against him—and of his recorded resignation not in good standing—more than twenty days prior to October 24, 2017. Respondent states that there is nothing in HDC's records suggesting that the FNDA was not delivered to Sheriff. But, to date, respondent has shown nothing in HDC's records to prove that either the PNDA or the FNDA were delivered to Sheriff prior to October 23, 2017. In fact, it appears that HDC staff wrote "returned unclaimed" on copies of both documents. See, Letter Br. of Resp't., Exhibits H, I, K, and L.

In its initial brief, respondent stated that the PNDA and FNDA were sent by regular and certified mail, but in its second brief changed this to registered and certified mail. A review of the exhibits raises even more uncertainty. The FNDA was issued on April 12, 2017, and sent by certified or registered mail on or about the same day, with a receipt numbered 7015 3010 000056941912. Id., Exhibit I. The green card which accompanied that mailing bears the same receipt number and was return to HDC with no delivery date indicated and no signature. Id., Exhibit J. Both the boxes for certified mail and registered mail are checked on the green card; both types of mail require a signature of the recipient. Both the FNDA and the green card bear the handwritten note, "sent reg mail 4/17/17." If the "reg" meant registered rather than regular, there should be a second green card with a new receipt number and respondent has not provided one.[3] I **CONCLUDE** that when considering the evidence in a light most favorable to appellant, questions remain as to whether he obtained

[3] A review of the PNDA exhibits shows the same issues.

actual notice of the PNDA and/or the FNDA prior to October 23, 2017, when he was given courtesy copies of both documents by HDC staff.

There is nothing from the CSC proving that the agency determined that the deadline for filing the present appeal was based on the date HDC gave Sheriff the courtesy copies of the PNDA and FNDA. However, the inference to be drawn from the CSC's transmittal of Sheriff's appeal to the OAL is that the CSC found the appeal timely. I **CONCLUDE** that when considering the evidence in a light most favorable to appellant, this appeal was timely filed with the CSC, less than twenty days from the date Sheriff had actual notice of the recording of his resignation not in good standing.

As to the second issue, whether Sheriff was absent from work without permission for five or more consecutive days, when the evidence is viewed in a light most favorable to appellant, there are genuine issues as to material facts but only as to the period prior to May 15, 2017.

Sheriff requested FMLA leave on February 8, 2017. Although respondent notified appellant less than one week later that this leave was not yet approved, respondent failed to advise Sheriff as to the basis for rejecting his application or what specific additional information was needed.[4] Prior to the deadline for responding, Sheriff's doctor sent additional information to HDC, specifically that Sheriff was recovering slowly and was advised not to travel prior to March 15, 2017. At that point, HDC knew why Sheriff was absent from work and knew when he was expected to return. As appellant argues, there are genuine issues as to whether HDC had sufficient reason to deny Sheriff's application for FMLA, or if HDC even did officially deny the application. Significantly, respondent provides no evidence of any response to either Sheriff or Kesselhe, raising the question of whether Sheriff was reasonable in presuming that his leave was approved through March 15, 2017.

[4] In its brief, respondent notes that Sheriff's FMLA application "does not explain how [diabetes and hypertension] prevented [him] from traveling or working," but respondent offers no proof that this information was requested by HDC at any time. Letter Br. of Resp't., p. 3.

On March 24, 2017, Kesselhe sent a new medical report to HDC, stating that Sheriff could not travel until May 15, 2017. Again, respondent provides no evidence of any response by HDC. By this time, of course, DHS had already issued the PNDA to Sheriff, but as he claims not to have had notice, he may have reasonably presumed that the second medical report was sufficient to extend his FMLA leave through May 15, 2017.[5] Sheriff has offered no evidence, however, to support the conclusion that he provided any notice to HDC of his intention to extend his medical leave after May 15, 2017, nor has Sheriff offered any evidence that HDC expressly or implicitly approved such an extension.

Even when considering the undisputed facts in the light most favorable to Sheriff, he has provided no reasonable explanation for his failure to report to work and/or to notify his supervisor of his inability to so report between May 15, 2017, and October 23, 2017. As respondent states, a twenty-four-hour facility like HDC relies on the diligence of its employees to remain in operation and, for this reason, DHS policy mandates removal for a first offense of job abandonment. Sheriff was absent without permission for much longer than five consecutive days; when considering the facts in the light most favorable to him, I **CONCLUDE** that Sheriff was absent without permission every work day over the course of five months, a violation of N.J.A.C. 4A:2-2.3(a)(6) and (12) and of the DHS Disciplinary Action Program.

For the reasons described above, I **CONCLUDE** that the decision of DHS to record Sheriff's resignation not in good standing is appropriate but modify the effective date of appellant's removal to May 16, 2017, the first work day after the date on which Kesselhe advised HDC that Sheriff could travel, a prerequisite for his return to work.

[5] Neither party provided any information regarding the amount of FMLA leave time that would have been available to appellant at the time of his initial application, or whether such leave time would have been exhausted prior to May 15, 2017.

ORDER

I hereby **ORDER** that the decision of the **DEPARTMENT OF HUMAN SERVICES** that Sheriff's absence from the job on five consecutive days without permission was job abandonment resulting in his resignation not in good standing is **AFFIRMED.**

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

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

August 1, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: August 2, 2018

Date Mailed to Parties: August 2, 2018

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STATE OF NEW JERSEY

In the Matter of John Stark
Mid-State Correctional Facility
Department of Corrections

CSC DKT. NO. 2018-3580
OAL DKT. NO. CSR 8696-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 5, 2018 BW

The Civil Service Commission, at its meeting of September 5, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 8696-18
CSC DKT. NO. 2018-358

IN THE MATTER OF JOHN STARK, MID-STATE CORRECTIONAL FACILITY.

Robert R. Cannan, Esquire, for appellant John Stark (Markman & Cannan, LLC, attorneys)

Aimee Blenner, Deputy Attorney for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 10, 2018 Decided: August 13, 2018

BEFORE **DEAN J. BUONO**, ALJ:

This matter concerns the appeal of John Stark from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on June 12, 2018, pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 13, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 8-14-18

Date Mailed to Parties: 8-14-18

mph

EXHIBITS:

J-1 Settlement Agreement

J-1

OAL DKT. NO. CSR 08696-18S
AGENCY DKT. NO.
SETTLEMENT AGREEMENT

IN THE MATTER OF
JOHN STARK
AND
DEPARTMENT OF CORRECTIONS,
MID-STATE CORRECTIONAL FACILITY

RECEIVED
2018 AUG 10 A 10:37
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated May 23, 2018 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, failure to perform duties – removal
2. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee – removal
3. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause
4. HRB 84-17, as amended, D-4 – Improper or unauthorized contact with an inmate – undue familiarity with inmate, parolees – removal
5. HRB 84-17, as amended, C-11 – Conduct unbecoming an employee – removal
6. HRB 84-17, as amended, C-17 Possession of contraband on State property or in State vehicle – Removal
7. HRB 84-17, as amended, E-1 Violation of a rule, regulation, policy, procedure, or administrative decision
8. HRB 84-17, as amended, D-7 Violation of Administrative Procedures and/or Regulations involving safety and security – Removal
9. HRB 84-17, as amended, C-8 Falsification; intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation, or other proceeding

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: 120 working days.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: No backpay to be received.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Unpaid suspension.

C. The Appellant John Stark withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Corrections agrees that the following result will occur with regard to each charge:

The charge of conduct unbecoming an employee (C-11), violation of a rule, regulation, policy, procedure, or administrative decision (E-1), and Violation of Administrative Procedures and/or Regulations involving safety and security (D-7) shall remain on Appellant's record and the penalty will be 120 day unpaid suspension. All other charges shall be withdrawn.

Appellant will return to work after 120 working days have passed, with a return date of September 21, 2018. Upon his return, Appellant will undergo undue familiarity training. Appellant will be reassigned from Mid-State Correctional Facility and will be reassigned to another facility in the Central/Southern region. The specific facility Appellant will be assigned to will be determined at a later point in time based on Department of Corrections personnel needs. Appellant will return to work on that date regardless of whether the Civil Service Commission has approved this settlement.

Appellant will be returned to active payroll on September 21, 2018, but will need to comply with and pass all CRU/CSTA reinstatement requirements before he is able to return to an active assignment. If Appellant fails any of the reinstatement requirements (such as background check, domestic violence check, PREA check) and deemed an inappropriate candidate for employment, he will not be returned to employment and his reinstatement will be denied.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of John Stark's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability

benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/3/18
DATE

John Stark

8/6/18
DATE

ON BEHALF OF Appellant

8/7/18
DATE

Respondent

OAL DKT. NO. CSR 08696-18S

CERTIFICATION

I, John Stark, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/3/18
DATE

John Stark

9-5-18

A-6

STATE OF NEW JERSEY

In the Matter of Sean Tonner, Edna Mahan Correctional Facility, Department of Corrections

CSC Docket No. 2017-646
OAL Docket No. CSV 12882-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 21, 2018 (ABR)

The appeal of Sean Tonner, a former Senior Investigator, Parole and Secured Facilities,[1] with the Edna Mahan Correctional Facility, Department of Corrections (DOC), of his 10 working day suspension, on charges, was heard by Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on August 2, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 5, 2018, did not adopt the ALJ's recommendation to uphold the 10 working day suspension. Rather, the Commission modified the penalty to a five working day suspension.

DISCUSSION

The appointing authority suspended the appellant for 10 working days on charges of neglect of duty and other sufficient cause. Specifically, it asserted that on July 2, 2016, the appellant, while assigned to be "on-call," failed to respond to emails and telephone calls from his supervisor which were made to his State-issued and personal cellular telephones during a two-hour period. The appellant was

[1] The appellant was demoted to the title of Correctional Police Sergeant, effective May 27, 2017, due to a subsequent disciplinary action. An appeal of that disciplinary action is currently pending before the Commission as a separate matter.

located after his supervisor contacted the Palmer Township,[2] Pennsylvania Police Department (PTPD) and had it check on the well-being of the appellant. PTPD officers located the appellant at his residence and directed the appellant to contact his supervisor. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ found that at the end of his shift on July 1, 2016, the appellant's supervisor informed him that due to scheduling changes, he was to be placed "on call" effective immediately. Prior to being placed "on call," the appellant planned to attend a party with M.M., his girlfriend, but after he was placed "on call" he stayed home and M.M. attended without him. Around midnight on July 2, 2016, the appellant was awakened when M.M. returned home, entered their bedroom and physically assaulted him with her fists and a metal beverage container. The appellant called the PTPD and reported the incident. However, M.M. left the premises before the PTPD arrived on scene. Later that night, M.M. returned to the home and the appellant placed a second call to the PTPD. The PTPD returned to the residence and arrested M.M. on a domestic violence charge. After M.M.'s arrest, the appellant drove M.M.'s daughter to the home of M.M.'s mother in Phillipsburg, New Jersey. When the appellant went back to sleep at approximately 4:30 AM on July 2, 2016, he had his State-issued cellular phone near him,[3] but not his personal cellular phone. Representatives of the PTPD notified the appellant's supervisor of the domestic violence incident. As a result, between 7:33 AM and 9:31 AM on July 2, 2016, the appellant's supervisor made seven attempts to contact the appellant; *i.e.*, three emails, two calls to his State-issued cellular phone and two calls to his personal cellular phone. After the appellant failed to respond, the appellant's supervisor requested that the PTPD check on the appellant's well-being. The PTPD reported to the appellant's home and told him to contact his supervisor, which he did at approximately 9:41 AM on July 2, 2016. The ALJ found that the appellant was aware of the appointing authority's directives requiring investigative personnel in possession of a State-issued communication device to carry it on their person and be able to respond to calls and emails within a "reasonable" or "immediate" timeframe. Based upon the foregoing, the ALJ found that the neglect of duty charge was supported by the appellant's failure to respond to his supervisor while "on call" due to his failure to turn his State-issued cellular phone to "on" or "ring" after a training session the previous day. Additionally, the ALJ sustained the charge of other sufficient cause, finding that the appellant failed to discharge his duties in accordance with DOC policy, as he did not respond to his supervisor within a "reasonable" or "immediate" timeframe while "on call."

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[2] The ALJ's mistakenly refers to the Palmer Township Police Department as the Northampton Township Police Department.

[3] The ALJ found that the appellant had put is ringer on his State-issued phone on vibrate during a training session he attended on July 1, 2016 and had not turned the ringer back on.

In weighing the appropriate penalty, the ALJ considered the appellant's employment record, which included three commendations and three disciplinary actions since he began his employment with the appointing authority in 1995. The ALJ noted that the appellant received an official written reprimand for reporting for duty late in December 1998, an official written reprimand for an "emergency comp day" request in December 2003 and a three working day suspension for charges related to his failure to properly complete a work assignment in September 2015.[4] The ALJ stated that although the nature of the domestic violence incident was a mitigating factor, neither it nor the commendations in his employment record warranted a reduction of the penalty. Therefore, the ALJ affirmed the 10 working day suspension.

In his exceptions, the appellant argues that his failure to respond to his supervisor's phone calls and emails do not support the disciplinary charges because he was the victim of a domestic violence attack and the calls from his supervisor had nothing to do with the appellant's work obligations or his "on call" status. The appellant argues that the neglect of duty charges were not warranted because the ALJ ignored several key facts, including that the appellant had two phones on him that night, but "temporarily" lost one during the domestic violence attack; that the applicable DOC directives did not prohibit "on call" employees from placing their phones on vibrate; and that the appointing authority had not previously disciplined other employees who failed to call back immediately while "on call." Additionally, the appellant argues that the ALJ failed to accord proper weight to the effect that the trauma of the domestic violence attack had on the appellant. Specifically, he contends that he did not violate the applicable DOC policies because his supervisor's calls on July 2, 2016 were made in the capacity of a friend wishing to check on his well-being, rather than involving a work incident. Furthermore, he argues that the timing of his response to his supervisor's calls was reasonable given the chain of events that stemmed from the domestic violence incident, which occurred shortly after midnight. He argues that his supervisor testified that other investigators had failed to respond to communications within 15 minutes while "on call," but were not subjected to disciplinary action and he notes that the appointing authority's Disciplinary Action Policy prescribes an official written reprimand as the appropriate sanction for a first neglect of duty violation. Finally, the appellant submits that the penalty was also unwarranted given the three commendations in his employment record and the lack of any disciplinary charges related to neglect of duty in his more than 20 years of service prior to this incident.

In reply, the appointing authority argues that the ALJ properly considered the impact of the subject domestic violence assault, having identified it as a mitigating factor in his initial decision. It argues that the appellant's actions following the assault show that he should have been able to, at minimum, respond

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[4] The ALJ's initial decision states that the appellant's three working day suspension occurred in September 2005. However, a review of the record indicates that this suspension occurred in 2015.

to his supervisor's emails on the morning of July 2, 2016. The appointing authority also contends that the DOC's rules and regulations make clear that an investigator assigned to be "on call" must respond in a "reasonable" or "immediate" timeframe, 24 hours per day, seven days per week, even if the call does not concern an incident at a facility. It argues that the appellant's response to his supervisor, more than two hours after he was initially contacted while "on call," was not "reasonable" or "immediate" as required. Further, it maintains that the appellant's failure to respond to his supervisor's calls under these circumstances is not a mistake that is justified by the assault. Accordingly, it maintains that the ALJ properly sustained the charges and the 10 working day suspension.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges but does not adopt the ALJ's recommendation to uphold the 10 working day suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). Further, the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). The Commission is particularly mindful of this standard when disciplinary action is taken against a supervisory law enforcement officer. Upon an independent review of the record and in consideration of the underlying incident, the Commission concludes that a 10 working day suspension is too severe of a penalty. In the instant matter, while the appellant failed to promptly respond to the appointing authority's attempts to contact him while he was "on call," the Commission is sympathetic to the fact that the appellant was the victim of the domestic violence incident which caused the attempts to contact him. As the officer "on call," it was the appellant's responsibility to ensure that he could be contacted by the appointing authority and that he respond within a reasonable amount of time, or that he request the appointing authority to have someone else be contacted for "on call" matters. However, while the facts of the underlying incident do not excuse the appellant's failure to promptly respond to his supervisor while "on call,"

they do offer mitigating circumstances. The Commission notes that after the appellant was assaulted around midnight on July 2, 2016, he had to address his injuries, call the PTPD to have it respond to his residence twice and ensure that his attacker's young daughter was placed into the proper care of a relative. The record indicates that he did not resolve these issues until approximately 4:30 AM. Moreover, the appellant was a long-term employee whose disciplinary history only included minor discipline. Given these circumstances, a more fitting penalty is a five working day suspension, which gives the appellant sufficient notice that similar conduct in the future could result in major discipline. Accordingly, the foregoing circumstances provide a sufficient basis to modify the 10 working day suspension imposed by the appointing authority to a five working day suspension. *See N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d).

Since the penalty has been modified, the appellant is entitled to five days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission agreed with the ALJ's determination sustaining all of the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Commission finds that the appointing authority's action in imposing a 10 working day suspension was not justified. Therefore, the Commission modifies the 10 working day suspension to a five working day suspension. The Commission further orders that the appellant be granted five days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13882-16
AGENCY DKT. NO. 2017-646

IMO SEAN TONNER, EDNA MAHAN CORRECTIONAL FACILITY, DEPARTMENT OF CORRECTIONS.

Matthew Areman, Esq., for Sean Tonner, appellant (Markowitz & Richman, attorneys)

Karen Campbell, Legal Specialist, appearing pursuant to N.J.A.C. 1:1-5.4(a) 2, for Edna Mahan Facility, Department of Corrections, respondent

Record Closed: March 19, 2018 Decided: August 2, 2018

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

Appellant, Sean Tonner, a Senior Investigator at the Edna Mahan Facility Correctional Facility for Women of the State of New Jersey, Department of Corrections (respondent, Mahan, or DOC), appeals disciplinary action seeking a suspension for ten (10) working days for neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7) and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically violations of Human Resource Bulletin (HRB) 84-17, as amended, "B.1. Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would not result in danger to persons or

property"; HRB 84-17, as amended, "D.7. Violation of administrative procedures and/or regulations involving safety and security"; and HRB 84-17, as amended, "E.1. Violation of a rule, regulation, policy, procedure, order or administrative decision" (R-1).

The appellant denies the allegations. He asserts that he neither neglected his duty nor violated these administrative procedures and or regulations involving safety and security; specifically, in relation to an incident which occurred on July 2, 2016. Tonner seeks back pay, benefits, seniority, interest, attorney's fees, costs and additional relief deemed appropriate.

PROCEDURAL HISTORY

On June 6, 2016, Mahan issued a Preliminary Notice of Disciplinary Action (PNDA) for the charges and specifications made against Tonner (R-1). This was served on Tonner on July 12, 2016. A disciplinary hearing was held on August 10, 2016 and on August 23, 2016 Mahan issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA.

On August 30, 2016 Tonner requested a hearing, and on September 6, 2016 the Civil Service Commission transmitted the contested case to the Office of Administrative Law (OAL) where it was filed on September 13, 2016. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. In October 2016, this matter was assigned to the Honorable Joseph Ascione, ALJ who entered a pre-hearing order on April 5, 2017 detailing the issues to be addressed. This matter was subsequently reassigned to the undersigned in October 2017. The hearing was conducted on October 26, 2018 and December 18, 2017. The record was left open for the parties to submit post-hearing briefs and responses following their receipt of the transcripts of the proceedings. The transcript was delayed, and briefs were to be submitted by both parties by March 9, 2018. The record closed on March 19, 2018 and extensions were requested by the undersigned and granted for the filing of this Initial Decision.

FACTUAL DISCUSSION AND FINDINGS

Tonner has been employed by the DOC in the Edna Mahan Correctional Facility for Women since 1995 (J-1). In 2001, he was promoted to the rank of Corrections Sergeant (J-2). He worked with the Special Operations Group from 2001 to 2005 and in 2005 he joined the Special Investigations Division (SID) and served with SID until the date of the incident (J-2).

On July 12, 2016 Tonner was served with a preliminary notice of disciplinary action (PNDA) recommending a ten (10) working day suspension for failure to respond to answer his telephone on July 2, 2016 (R-1). On July 15, 2016 Tonner filed notice of his desire to appeal the disciplinary action. On August 10, 2016 Tonner's appeal was heard by way of an internal disciplinary appeal proceeding with the employers OER legal specialist, Tamara Rudow, presiding(J-3). August 23, 2016 Rudow issued her decision, upholding the disciplinary decision (J-3). On August 23, 2016 Mahan issued a final notice of disciplinary action (FNDA) against Tonner upholding Tonner's ten (10) working day suspension (R-2). The present appeal was timely filed and challenges the employer's imposition of discipline against Tonner.

The preceding facts were stipulated to by the parties through the introduction of Joint Exhibits J-1 through J-4 and are not disputed and I **FIND** such as **FACT**. I also **FIND** the following "background synopsis" as **FACT**:

On July 2, 2016, Tonner was serving in an "on-call" capacity at Mahan. On that day, during an approximately two-hour period, he failed to respond to telephone calls and emails from his supervisor at Mahan, Principal Investigator Jerome Scott (Scott). These attempts at contact were made by email and by calling his work-issued and personal cellular telephones. Mahan then requested that the Palmer Township police department conduct a "well check" on Tonner, the result of which was that Tonner was notified to contact his supervisor, Scott.

Tonner relayed to Scott that Tonner's work issued cellular telephone was turned "off" the day before while Tonner attended a training class for the department.[1] They also discussed the domestic violence incident of the evening before.

Information on the domestic violence incident was detailed in a report prepared by Officer John Billiard of the Palmer Township Police Department (R-12) and in an arrest report regarding M.M.[2] (R-12). Information on the domestic violence incident was also provided through an email submitted by Tonner to Scott at 10:16 a.m. on July 2, 2016 (R-11).9

TESTIMONY

Jerome Scott

Principal Investigator Jerome Scott testified on behalf of respondent. He has been employed with the DOC since April 1995. He testified to his employment with the Special Investigations Division (SID) ultimately becoming a supervisor at Mahan in August 2015.

Scott testified to the following:

On July 2, 2016, at approximately 7:30 a.m., he was contacted by Mahan Administrator William Anderson. Anderson notified Scott that the shift commander at Mahan, Lieutenant Ricky Nestor, was contacted by the Northampton County (Pennsylvania) jail. The jail notified Nestor that M.M., a civilian employee at Mahan, had been arrested on a domestic violence charge which involved Tonner. Because of receiving that information, Scott contacted the jail in Northampton County and attempted to contact Tonner.

[1] The parties refer to the state issued telephone as being "off" and on "vibrate" the result being that the telephone did not issue an aural notice of an incoming message or incoming telephone call.
[2] Initials are used as "M.M." is the subject of a criminal complaint.

Scott was concerned for Tonner's well-being, as the information he had received was regarding a domestic violence incident. He was Tonner's supervisor and considered himself to be a friend to Tonner. Again, he related his concern about Tonner's well-being. He contacted Tonner by email on July 2, 2016 at 7:36 a.m. stating "I need you to call me as soon as possible" (R-4). He sent Tonner another email at 8:26 a.m. stating "Sean, please call me immediately" (R-5). At 9:31 a.m. he sent a third email with the same message as the 8:26 email (R-6). These email messages were sent on July 2, 2016.

Scott attempted to call Tonner, several times, using both Tonner's state issued cellular telephone and personal cellular telephone. During this period, Scott was in communication with Chief Manuel Alfonso (Alfonso), Chief at the time of the incident, and the Assistant Chief (at the time of the incident) Duane Grade and relayed to them the he (Scott) could not reach Tonner. Scott expressed to them that he was concerned, as Scott was unable to reach Tonner by telephone or email. At a certain point Scott contacted the Palmer Township Police Department and spoke with Sergeant Thomas Cardell and requested a "well check" at Tonner's residence.

Thereafter, Scott was advised by Sergeant Cardell that two officers had contacted Tonner at approximately 9:41 a.m. Scott was then contacted by Tonner who informed Scott that his state issued cellular telephone was on silent because Tonner had attended a training class the previous day (turning his work cellular telephone on silent as to avoid a disruption to the class) and forgot to turn the cellular telephone back "on." Scott stated that turning your state issued cellular telephone off for more than nine hours constituted a violation, as investigators need to be accessible and it could further constitute a violation if you are on-call.

During the telephone call, Scott and Tonner discussed the domestic violence incident of the night before.

Scott identified interoffice communications relating to answering telephone calls while "on call". Specifically, relating information contained in an Inter-Office

Communication (communication) from Chief Alfonso, dated November 6, 2014. That communication related what constitutes an "immediate timeframe" for a response (R-10). Scott state that after the issuance of that communication he called a meeting of his staff to discuss the Internal Management Procedure (IMP) Policy IMP-001 (policy). At that meeting Scott advised Tonner, and others, of the employee's responsibility regarding response to a message or contact. These events occurred before the incident which led to the disciplinary charges Tonner is facing here.

At the point Scott was contacted by Tonner, Scott was not concerned about a potential violation of an IMP but was solely concerned about Tonner's well-being. Shortly after speaking with Tonner, Scott wrote an email to Chief Alfonso at 10:31 a.m. detailing the background of the incident and his contact with Tonner (R-2). Scott stated that he was directed by Alfonso to prepare a second email, sent at approximately 12:16 p.m., detailing his conversation with Tonner and the time frame between the ending of the training class (12:00 p.m. July 1, 2016) and his contact with Tonner (9:41 a.m. July 2, 2016). During this time Tonner's state issued cellular telephone was on "vibrate" mode (R-3).

Scott further testified that he wrote two emails, the second of which would be sent to the State Commissioner of Corrections (to whom the SID unit reported directly). He testified that he was specifically told by Alfonso to prepare the second email as this would be sent to the Commissioner. Scott further discussed the IMP policy as issued on November 6, 2014 (R-10) and a follow-up email sent by Scott on November 24, 2015 (R-7) at the direction of Alfonso to guarantee that members of the investigative staff were aware of the policy and that it needed to be adhered to. The meeting of November 24, 2015, occurred several months before the incident date.

Scott stated that the "immediate timeframe" as mentioned in the IMP and the communication previously mentioned, constituted a period of fifteen minutes. The period of fifteen minutes was taken from Scott's interpretation of what constitutes "immediate." He also testified that there is not a policy or memorandum or any other documentation which states that an immediate timeframe period is fifteen minutes.

Scott stated that Tonner had been involved in two prior incidents where Tonner had not responded to a call within a fifteen-minute time frame. On one occasion Tonner was able to be reached on his personal cellular telephone. The second was an incident when Tonner did not report to work. In this those two incidents Tonner was not disciplined for not responding; however, there was a letter of counseling issued to Tonner (although from the testimony it was not clear as to whether the letter was issued for the nonresponse call incident or for another incident relating to an inappropriate language contained in an email).

On cross-examination, Scott changed his statement regarding the number of times he attempted to contact Tonner by telephone. Scott originally testified that he attempted to contact Tonner a total of seven times by telephone but modified his statement that he attempted to contact Tonner a total of seven times; three times by email and four times by telephone. Scott called Tonner's state issued cellular telephone twice and his personal cellular telephone twice.

Chief Investigator Duane Grade (Grade) then testified for the respondent. He testified to his background and experience with the DOC going back to January 1994. He left the DOC in 2008 for a position with an outside company, returning to DOC in 2010. He was promoted to Assistant Chief (now "Deputy Chief") in 2013 and served in that title until June 2017 when he was promoted to Chief Investigator. As Chief Investigator he supervises 110 persons, 83 of which are investigators and reports directly to the Commissioner of the DOC.

Grade testified to the following:

He identified IMP 001 for the SID (R-14) and the content of the document, the timeframe needed for immediate response regarding contact and he addressed the supplement to the internal management procedure. The supplement was a notification put out by former chiefs regarding cellular devices assigned to investigative staff. He related his knowledge and opinion regarding "immediate timeframe" - that being not a minimum timeframe; but stating that a two-hour and eight-minute time frame (the time

frame involved here as the first attempted contact was at 7:36 a.m. and Scott was contacted by Tonner at 9:41 a.m.) is unacceptable. Grade further detailed Tonner's work history. He stated that in reviewing discipline, an evaluation of the incident and determination as to what constitutes appropriate discipline, is to be considered. He was aware that chiefs have consulted with the Office of Employee Relations (OER) for advice and guidance in disciplinary matters and that SID only recommends a sanction. SID does not determine the number of days or whether a person should be removed. They consult with the OER and make a recommendation.

On cross-examination, Grade testified that he was not involved in this disciplinary matter. As Deputy Chief, he was appointed as management's representative for the disciplinary hearing at the departmental level. Also, on cross-examination, he was question on the issues of "reasonable timeframe" and "immediate timeframe." He stated that, in his consideration, they were the same thing.

Grade also testified to the testimony of Chief Alfonso at the departmental hearing. Specifically, Chief Alfonzo's statement that he reviews cases regarding failure to call on a case-by-case basis, considering the totality of the circumstances. Chief Grade also stated that it was his practice to follow the same type of review and look at the totality of the circumstances in each case involved. He then testified as to prior disciplinary actions of Tonner.

Grade further testified to the practice of maintaining contact through his cellular telephone, specifically his cellular Blackberry, as provided by the DOC.

Appellant

Sean Tonner

Senior Investigator Sean Tonner testified on his own behalf.

Tonner testified that he had been employed with the DOC for approximately twenty-two years. He currently holds the rank of Sergeant and on July 2, 2016, had the title Senior Investigator. He had that title for approximately twelve and half years. He stated that, on the date in question, he was the senior investigator assigned to be on call.

Tonner testified to the following:

The protocol for being "on call' was that the institution would reach out to you if there was an event or something which required an investigator to be present. During the twelve and half years he had been at Mahan, he said there had not been a meeting or direction regarding the issue of "timeframe." Tonner stated that he did not recall the specifics of the meeting that investigator Scott testified to, which occurred in November 2015. There were a number of meetings, which were frequently conducted around lunch, where a number of matters could be discussed. He did not recall specifically discussing the contents of IMP-001 during one of those meetings.

Prior to the July 2016 event, Tonner had not been charged with failing, refusing or not responding, in a timely fashion, to a telephone call or email while he was "on call."

He then discussed the events which occurred in the evening of July 1, 2016 into July 2, 2016. He was informed that he was on call effective July 1, 2016. The call schedule calendar (put out six months in advance) stated that he was to begin call duty on July 4, 2016. Renée Caldwell, the individual scheduled to be on call on July 1, had told Scott she felt she had too many holidays included in her "on call" time; therefore, Scott changed Tonners "on call" status and Tonner was told this on July 1.

On that date he resided with his girlfriend who was a civilian employee of the DOC, M.M. He also resided with M.M.'s twelve-year-old daughter. Tonner and M.M. had planned to go to a birthday party for a relative of M.M. on Friday night, July 1. However, Tonner informed M.M. that he was on call and felt it would be best for him to

stay home - rather than traveling forty-five minutes to an hour away. M.M. was not happy and went to the party. He contacted her by text several times and ultimately went to bed. After falling asleep he was awakened by the door opening, the lights coming on and being hit by M.M. M.M. struck Tonner with her fists and struck Tonner in the head and face with a stainless-steel object[3]. He identified a photograph of the metal container he was struck with (P-1(1)).

At that point he jumped out of bed and separated himself from M.M. and told her that he was going to call the police department. He did call the police, but by that time the police arrived, M.M. had left. The police arrived, saw the condition of the house, saw the metal container that caused Tonner's injuries and called a first aid squad.

Tonner identified a picture of his head after the event, although he did not recollect who held the camera or took the picture (P-1(2)-(5)). Tonner refused to go to the hospital and told the police that he would contact them if M.M. returned. He felt embarrassed. He then cleaned up the bedroom and at some point, thereafter, M.M. returned to the house. Tonner discovered her asleep and called the police who returned to the house and took M.M. into custody. This was approximately 1:30 a.m. on July 2, 2016.

Tonner then identified the police report from the Palmer Township Police Department (P-2). The document stated that M.M. was turned over to staff at approximately 3:00 a.m. She was charged with simple assault and harassment and released. Charges were pressed by the police department. After the arrest, Tonner felt that M.M.'s twelve-year-old daughter should be in the care of a family member, not him. He contacted M.M.'s mother and informed her what occurred. He then drove M.M.'s daughter to her grandmother's home in Phillipsburg.

He then returned to his house at approximately 4:30 a.m. He went to bed after affixing his CPAP device. He did not have both his telephones with him when he went

[3] This appears to be a YETI brand stainless-steel thermos or coffee cup.

to bed at 4:30 a.m., but he did have his work issued telephone with him.[4] He was unable to locate his personal cellular telephone (which he found the next day downstairs). He presumed that his personal telephone had been thrown at some point.

He stated the telephone was on vibrate. He fell asleep and stated that the next thing he recalled was pounding at the door and the dog barking. He went downstairs to answer the door and saw two police officers from Palmer Township. They were not same officers who had responded to the incident the night before. They asked his identity and told him that his office was looking for him and that his supervisor wanted Tonner to reach out to him.

He then contacted Scott. Scott asked if Tonner was all right - as Scott had received word that a domestic violence incident had occurred at the house. Tonner explained to Scott what happened, Scott discussed the domestic violence protocol and a number of other issues and Scott stated that the Chief wanted a report on what occurred. Tonner told Scott that as he only had his Blackberry, and it would be difficult to type a report on the Blackberry, that the report could wait until Monday; but Scott stated that the Chief wanted the report "now" to which Tonner replied that he would do his best.

Scott did not mention any violation of the on-call policy and they did not discuss the on-call policy. When Scott asked why Tonner did not answer the telephone, Tonner's response was that he went to training yesterday (July 1) and he was talking on the telephone now (meaning as he was speaking with Scott). When he went to the training he might have put the telephone on vibrate - but he was not certain. He checked the telephone after speaking with Scott and the telephone had battery content and was on vibrate.

On July 12, 2016, Tonner was served with a PNDA. Between July 2, 2016 and July 12, 2016, no one asked him about the on-call issue nor was he interviewed as part

[4] He stated he had both telephones with him when going to sleep initially before the domestic violence event.

of an investigation. On July 12, 2016, he was scheduled to see a therapist and, as the therapist had an earlier availability, Tonner asked his supervisor (Scott) if he could leave early to go to his therapy session. As Tonner was leaving, Scott took the document (the PNDA) out of the printer signed it and handed it to Tonner. Tonner stated he was flabbergasted when receiving this as his experience in SID was that the "call back" timeframe was not strictly enforced. Tonner has, in the past, taken more than fifteen minutes return a telephone call while he was "on call" and had never been disciplined for such delay. On questioning, he stated that others he worked with, such as Renee Caldwell and Michael Kubik had taken longer than fifteen minutes to return calls and without disciplinary consequences.

On cross-examination it was established the Tonner still resides with M.M.

Respondent

Michael Kubik

Senior Investigator Michael Kubik (Kubik) testified for the respondent. Kubik testified to his background and experience since joining the DOC in April 1996. Kubik testified to his experience in SID.

Kubik testified to the following:

He was question to his opinion as to an "immediate timeframe". Kubik's position was that "immediate" meant "immediate". A two-hour delay was not reasonable. His interpretation of when an officer is on call a "reasonable timeframe" was the same thing as "immediate". In this context the two were the same. A reasonable delay would be if an individual was cutting the grass and did not hear a telephone or if there was something drastic which occurred - such as a death in the family. The purpose of "on call" was for the facility and the necessity of having an officer available.

After reviewing the evidence presented at the hearing as well as having the opportunity to observe the witnesses and assess their credibility, I **ALSO FIND** the following:

1. Tonner is an employee of the Edna Mahan Correctional Facility under the New Jersey Department of Corrections. He has been employed by the Department of Corrections since 1995 and has held the title of senior investigator with SID for twelve and one-half years.

2. Tonner was scheduled to be "on call" for the period commencing July 4, 2016. Due to scheduling changes he was informed at the end of his shift on July 1, 2016, that he was to be assigned as the "on call" officer effective immediately.

3. During that day he had attended a work training session during which he had placed his state issued cellular device on vibrate or off.

4. He had scheduled with his live-in girlfriend M.M. to attend a birthday party that evening. On the date of the event, Tonner resided with M.M. and M.M.'s twelve-year-old daughter.

5. On the evening of July 1, 2016, M.M. left to attend the birthday party. The parties had some contact via text message during the evening and Tonner went to sleep with both his cellular telephones.

6. Tonner was awakened by M.M. who proceeded to physically assault him with her fists and a metal tube object.

7. Tonner called the Northampton Township Police Department who responded to the scene and ultimately, during a second visit to the house, arrested M.M. on a domestic violence charge.

8. Tonner declined to be transported to a hospital.

9. Tonner decided that M.M.'s twelve-year-old daughter would be better suited by staying with a relative. Tonner contacted M.M.'s mother and drove the twelve-year-old to M.M.'s mother in Phillipsburg.

10. Tonner returned to the house at approximately 4:30 a.m., at which point he affixed his CPAP device and went to bed.

11. Tonner had his work issued cellular telephone with him but did not have his personal cellular telephone.

12. During the evening Scott was notified by representatives of the Northampton Township Police Department of the domestic violence incident which occurred at Tonner and M.M.'s residence. Scott attempted to contact Tonner three times by email and four times by telephone call (twice each to his work cellular telephone and to his personal cellular telephone) between the timeframe 7:33 a.m. and 9:31 a.m. on July 2, 2016.

13. Tonner did not respond to the emails or telephone calls.

14. Scott requested that the Northampton Township police conduct a well check at Tonner's house and the police did conduct a well check and informed Tonner to contact his superior, Scott.

15. Tonner contacted Scott at approximately 9:41 and recounted that the evening's events. The issue as to violation of the on-call policy was not discussed.

16. On September 12, 2016, Tonner was served with a PNDA for the charges detailed therein.

17. On August 10, 2016, a disciplinary hearing was held during which the notices of violation measures issued in the PNDA of September 12, 2016, were upheld.

18. A FNDA was issued to Tonner on August 23, 2016.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

N.J.A.C. 4A:2-2.3(a)(7)

Neglect of Duty

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

In the within matter, the record reflects that appellant did not respond to several attempts to reach him by his supervisor, Scott. Scott sent three emails between 7:41 a.m. and 9:31 a.m. He called appellant's personal cellular telephone twice and appellant's work issued cellular telephone twice – all attempts at contact going unanswered. As a senior investigator, appellant was aware of his duties and obligations of being "on call." When appellant turned his work issued cellular telephone to "off" or "vibrate" during a training class, appellant should have returned the telephone to "ring" or taken steps to be aware if the telephone was being used in an attempt to contact him. This behavior from a supervisor clearly could adversely affect a situation at the facility in the event that appellant was needed.

While much of the testimony at the hearing revolved around the domestic violence incident which occurred overnight of July 1, 2016 to July 2, 2016; however, the nexus to the incident is Tonner's turning his state issued cellular device to "off" or "vibrate" during the training session on July 1, 2016, and neglecting to return the device

to an "on" or position where it would issue an aural notice of an incoming message or incoming telephone call. This action (or here, inaction) constitutes neglect.

Based upon the foregoing, I **CONCLUDE** that the DOC has proven by a preponderance of the credible evidence that the charge of neglect of duty, N.J.A.C. 4A:2-2.3(a)(7), should be and hereby is sustained.

Appellant has also been charged with violating HRB 84-17, as amended; "B.1. Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would not result in danger to persons or property"; "D.7. Violation of administrative procedures and/ or regulations involving safety and security"; and "E.1. Violation of a rule, regulation, policy, procedure, order or administrative decision."

Human Resource Bulletin (HRB) 84-17

HRB 84-17, as amended, provides in pertinent part as follows:

> The penalty imposed must be within the range of sanctions set forth in this bulletin for the particular type of offense, unless consideration of mitigating or aggravating factors would cause it to be inappropriate. Mitigating or aggravating factors that may be considered are length of service, total employment record and/ or other legitimate circumstances.
>
> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

B1 Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would not result in danger to persons or property

First, pursuant to HRB 84-17, as amended, the appellant was required to follow the IMPs established. IMP #001 Unit Coverage and Hours of Work policy required that "Investigators shall provide twenty-four-hour coverage via on-call status utilizing an air pager or cellular telephone... Therefore, an Investigator at each institution shall be available as needed twenty-four hours per day, seven days per week throughout the entire year. While on-call, Investigators shall report to the institution if necessary within a reasonable time."

Appellant had been made aware of directives from the Chief Investigator of SID regarding the use of Blackberry devices; specifically the Inter-Office Communication from Chief Manuel Alfonso of November 6, 2014, which states, in part, "[a]ll SID Investigative personnel who are in possession of a Blackberry device must carry the communication device on their person and be able to respond to telephonic and email communications within an immediate timeframe."

I **CONCLUDE** that appellant violated HRB 84-17, as amended by failing to discharge his duties in accordance with B.1., "B1. Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would not result in danger to persons or property".

D.7. Violation of administrative procedures and/ or regulations involving safety and security

Second, pursuant to HRB 84-17, as amended, the appellant was required to follow the IMPs established. IMP #001 Unit Coverage and Hours of Work policy required that "Investigators shall provide twenty-four-hour coverage via on-call status utilizing an air pager or cellular telephone... Therefore, and Investigator at each institution shall be available as needed twenty-four hours per day, seven days per week

throughout the entire year. While on-call, Investigators shall report to the institution if necessary within a reasonable time."

I **CONCLUDE** that appellant violated HRB 84-17, as amended by failing to discharge his duties in accordance with D.7., "D.7. Administrative procedures and regulations involving safety and security" and IMP #001 and Inter-Office Communication of November 6, 2014.

E.1. Violation of a rule, regulation, policy, procedure, order or administrative decision

Third, appellant failed to return telephone calls and email messages within an "immediate timeframe." Notwithstanding that testimony was given to show that "immediate timeframe" constitutes a period between "immediately", "fifteen minutes" and "as soon as possible", it is irrefutable that a period in excess of two hours is unacceptable. Further the terminus of that period only came at the intervention of police officers conducting a "well check." Pursuant to HRB 84-17, as amended, the appellant was required to follow the IMPs established. IMP #001 Unit Coverage and Hours of Work policy required that "Investigators shall provide twenty-four-hour coverage via on-call status utilizing an air pager or cellular telephone Therefore, and Investigator at each institution shall be available as needed twenty-four hours per day, seven days per week throughout the entire year. While on-call, Investigators shall report to the institution if necessary within a reasonable time."

Appellant did not respond to inquiries made to him within a "reasonable" or "immediate" timeframe. Such is unacceptable in a situation where he is "on call."

I **CONCLUDE** that appellant violated HRB 84-17, as amended by failing to discharge his duties in accordance with E.1., "E.1. Violation of a rule, regulation, policy, procedure, order or administrative decision" and IMP #001 and Inter-Office Communication of November 6, 2014.

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

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a) (12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

That an incident which violated the directives of IMP-001 is not in question. Having concluded that an incident occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of an employee's potential.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for

removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

For his actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, N.J.A.C. 4A:2-2.3(a) (12), other sufficient cause, and NJDOC rules, regulations and policies. Appellant was charged with a ten-working-day suspension. This suspension is consistent with the disciplinary process outlined in NJDOC's table of offenses which shows discipline ranging from an "Official Written Reprimand" to "Removal" for the offences violated here (R-16). Within that range a determination as to appropriate discipline must be made.

In this matter, a mitigating factor was present in that petitioner was the subject of a domestic violence incident the evening before. Although the memorandum submitted by appellant's supervisor Scott to Chief Alfonso states, in part:

> SI Tonner stated that he had just woke up when the police department had knocked on his door at approximately 9:35 AM. SI Tonner continued that he did not want to wake my (sic) up in the middle of the night to advise me of the incident and the he was going to contact me upon awakening. SI Tonner stated that he did not hear any of the notifications because he had notification sounds turned off due to him attending the ECDR Training class and had forgotten to turn it back on. It should be noted that ECDR Training concluded at 12:00 PM, July 1, 2016. SI Tonner state he did not turn the notification sounds back on after completing ECDR Training.
>
> Upon being informed of SI Tonner's explanation, I reminded him that he was "On-Call" and that he needed to make all necessary arrangements to make himself available should be needed.

No testimony at the hearing detailed appellant's desire to spare Scott from being woken up in the middle of the night, so that Tonner could advise Scott of the unique circumstances which had befallen Tonner although information to that effect was contained in Scott's report to Chief Alfonso.

In the present case, there are three instances of prior disciplinary action against appellant. On December 7, 1998, appellant received an official reprimand on a "late for duty" charge. On December 29, 2003, appellant received an official reprimand on for an "emergency comp day" request. On September 15, 2005, appellant was suspended for three working days following charges relating to completion of an assignment.

It should also be noted that appellant's work history also details three commendations. Do the three disciplinary actions and three commendations weigh out? I think not. Testimony was given by Chief Grade which stated that cases regarding "on call" violations shall be reviewed on a "case by case" basis and so I have taken that approach in my review and determination.

After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the action (or inaction) by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are sufficient to warrant a penalty, which, in part, is meant to impress upon him, as well as others, the seriousness of any further infractions by him in that regard.

Here, the respondent is seeking the imposition of a ten-day working suspension. A review of appellant's disciplinary history informs that this would be a fourth infraction to the date of the incident – although not on this specific charge. In consideration of the foregoing, along with appellant's disciplinary records, a ten-day suspension appears to be a reasonable penalty consistent with progressive discipline. Appellant's arguments that he is being penalized when others have not for the committing the same offense, or that leeway should be given considering the domestic violence event, are unpersuasive. Although this incident progressed over a several-hour period, appellant had the presence of mind to clean up his house after the "first" encounter, call the police after the "second" encounter, and then call M.M.'s mother and drive M.M.'s daughter to her grandmother's house. Appellant at any point could have called his supervisor to request relief from his duty due to the events which occurred - but he did not.

A ten-day penalty serves to impress the importance of the seriousness of these infractions and significance of the duties required of the appellant, and others, in the position of Senior Investigator and while "on call" and given the conduct exhibited here and the circumstances surrounding this event, I **CONCLUDE** that the imposition of a ten working day suspension is consistent with the range of penalties specified in NJDOC's table of offenses and is **AFFIRMED**.

ORDER

I **ORDER** that the respondent has met its burden of proof as to the charges of violation of N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a) (12), other sufficient cause; and HRB 84-17, as amended, B.1. Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would not result in danger to persons or property; HRB 84-17, as amended, D.7. Violation of administrative procedures and/or regulations involving safety and security; HRB 84-17, as amended, E.1. Violation of a rule, regulation, policy, procedure, order or administrative decision and that these charges be and are hereby sustained.

I **ORDER** that the action of the appointing authority in imposing a ten-working day suspension on appellant shall be **AFFIRMED**.

I **FURTHER ORDER** that petitioner's request for payment of interest, attorney's fees, costs and additional relief is **DENIED**.

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

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

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

August 2, 2018
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 8/2/18

Date Mailed to Parties: 8/2/18

/lam

LIST OF EXHIBITS

Joint:

J-1 Preliminary Notice of Disciplinary Action, dated July 6, 2016
J-2 Appeal of Major Disciplinary Action
J-3 Disciplinary Appeal Proceeding decision, dated August 23, 2016
J-4 Final Notice of Disciplinary Action, dated August 23, 2016

For appellant:

P-1 Photographs of Sean Tonner
P-2 Palmer Township Police Incident Report form (No: 16-032669)
P-3 Palmer Township Police Incident Report form (No: 16-03278)
P-4 Email communication, dated July 2, 2016, from Sean Tonner to Investigator Jerome Scott

For respondent:

R-1 Preliminary Notice of Disciplinary Action
R-2 Email from Jerome Scott to Manuel Alfonso, dated July 2, 2016
R-3 Email from Jerome Scott to Manuel Alfonso, dated July 2, 2016
R-4 Email from Jerome Scott to Sean Tonner, dated July 2, 2016
R-5 Email from Jerome Scott to Sean Tonner, dated July 2, 2016
R-6 Email from Jerome Scott to Sean Tonner, dated July 2, 2016
R-7 Email from Jerome Scott for the Weekly Meeting, dated November 24, 2015
R-8 Emails from Kevin Bolden, dated October 16, 2012, October 31, 2012 and November 8, 2012
R-9 Inter-Office Memorandum from Kevin Boden, dated November 8, 2012
R-10 Inter-Office Memorandum from Manuel Alfonso, dated November 6, 2014
R-11 Email from Sean Tonner to Jerome Scott, dated July 2, 2016
R-12 Palmer Township Police Report, dated July 2, 2016

R-13 Palmer Township Police Incident Report, Wellness Check, dated July 2, 2016

R-14 Internal Management Procedure #001, Level 1

R-15 Law Enforcement Rules and Regulations

R-16 Human Resources Bulletin 84-17

R-17 Work History

LIST OF WITNESSES

For appellant:

Jerome Scott, Principal Investigator

Duane Grade, Chief Investigator

Michael Kubik, Senior Investigator

For appellant:

Sean Tonner, Senior Investigator

9-5-18

A-7

STATE OF NEW JERSEY

In the Matter of Eric Warren
Burlington County Jail

CSC DKT. NO. 2018-1234
OAL DKT. NO. CSR 07100-18
(ON REMAND CSR 16796-17)

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 7, 2018 BW

The appeal of Eric Warren, County Correction Officer, Burlington County Jail, removal effective October 16, 2017, on charges, was heard by Administrative Law Judge Joseph A. Ascione, who rendered his initial decision on July 23, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Eric Warren.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DKT. NO. CSR 07100-18 (ON Remand CSR 16796-17)
AGENCY REF. NO. 2018-1234

IN THE MATTER OF ERIC WARREN, BURLINGTON COUNTY JAIL.

Daniel M. Rosenberg, Esq., for appellant Eric Warren (Daniel M. Rosenberg & Associates, LLC, attorneys)

Andrew C. Rimol, Esq., for respondent Burlington County Jail (Capehart Scatchard, P.A., attorneys)

Record Closed: June 8, 2018 Decided: July 23, 2018

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Eric Warren (appellant) appeals from the decision of the Burlington County Jail (BCJ) to remove him from his position as a correction officer at the BCJ on charges of violation of N.J.A.C. 4A:2-2.3(a)(1), (3), (6), (7), and (12), incompetency, inefficiency or failure to perform duties, inability to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, relating to the failure to conduct ten required general security checks during his shift commencing at 18:00 hours on July

2, 2017, and terminating at 06:00 hours on July 3, 2017, and the improper entry in the logbook of ten security tours during that shift. Additional charges include violation of Policy & Procedure Manual Sections 1007, 1023, 1030, 1031, 1038, 1065, 1066, 1172, 1190, and 1250. Appellant does not deny the charges. Appellant asserts that removal is not the appropriate sanction.

On September 7, 2017, a Preliminary Notice of Disciplinary Action was filed seeking appellant's removal. The appellant requested a departmental hearing, which was held on September 21, 2017. On October 19, 2017, a Final Notice of Disciplinary Action was issued, sustaining the disciplinary charges and removing appellant from his position with the BCJ effective October 16, 2017. Appellant appealed that removal action under cover letter dated October 31, 2017. The matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), where it was stamped received on November 2, 2017, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November 30, 2017, the matter was assigned to me. On December 6, 2017, I convened a telephonic case-management conference to discuss discovery requirements and schedule the evidentiary hearing. The hearing was scheduled for January 26 and January 31, 2018. Appellant requested an adjournment of the January 26, 2018, hearing date. On January 31, 2018, the hearing was held. At the hearing, appellant waived his right to reinstitute pay under N.J.S.A. 40A:14-201 et seq., until April 2, 2018. A separate Order regarding salary is being issued simultaneously with this Initial Decision. At the close of the plenary hearing, counsel for both sides presented written closing statements and briefs. The record closed on January 31, 2018 and an initial Decision was rendered on July 23, 2018.

On May 4, 2018, the Civil Service Commission remanded the matter to the OAL, for the entry into the record of the appellant's disciplinary record. After receipt of the appellant's disciplinary record, the record in this matter closed on June 8, 2018.

FACTUAL DISCUSSION

Administrative Captain Matthew Leith was precluded by the tribunal from testifying at the initial hearing regarding the prior disciplinary matters. The parties at the initial hearing represented to the tribunal that the prior disciplinary matters were not significantly related to the violations charged, and the prior disciplinary record was not sought to be introduced under seal pending the ALJ's determination of the violations and penalty. It is the ALJ's practice to avoid the appearance of improperly considering the prior disciplinary matters to determine the violations, and only consider them after the violations have been found and the penalty imposed.

As the order of remand requested the prior disciplinary history for completeness. The ALJ requested the prior disciplinary history from the respondent. Appellant made no objection to accepting the history as an exhibit and the ALJ accepted it into evidence on June 8, 2018, as J-13. No additional hearing was schedule to allow the respondent to address that history. Appellant reserved the right to file additional exceptions to the ID on Remand, which is granted.

Based upon the submission of the respondent of the prior disciplinary history without objection, **I FIND AS FACT** that J-13 is the prior disciplinary history of the appellant.

ANALYSIS AND CONCLUSIONS OF LAW

The introduction of the prior disciplinary history, does not alter the initial decision issued in this matter. The previous analysis and conclusions of law are incorporated herein by reference.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action against appellant Eric Warren is hereby **AFFIRMED**.

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

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

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

July 23, 2018

Joseph A. Ascione

DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 7/23/18

Mailed to Parties: 7/23/18

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

None

LIST OF EXHIBITS IN EVIDENCE

Joint:

J-13 Employee Discipline History

For Appellant:

None

For Respondent:

None

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Eric Warren,
Burlington County

CSC Docket No. 2018-1234
OAL Docket No. CSR 16796-17

ISSUED: May 4, 2018 (SLD)

The appeal of Eric Warren, a County Correction Officer with Burlington County, of his removal effective October 16, 2017, on charges, was before Administrative Law Judge Joseph A. Ascione (ALJ), who rendered his initial decision on February 28, 2018. Exceptions were filed on behalf of the appellant and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 18, 2018 ordered that this matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA), dated October 19, 2017 which charged him with incompetency, inefficiency or failure to perform duties: inability to perform duties; neglect of duty; conduct unbecoming a public employee; and other sufficient cause and removed him from employment, effective October 16, 2017. Specifically, the appointing authority asserted that on July 2 and 3, 2017, the appellant neglected to conduct required security tours. It also asserted that the appellant had entered false and misleading entries into the official logbook by documenting 10 security tours that he did not actually conduct. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as contested case.

In his initial decision, the ALJ found that the appellant did not dispute that he violated departmental policies. The ALJ noted that although the appellant did not testify, one witness confirmed that a County Correction Sergeant "may have acted similarly" in misreporting security checks, but had not been disciplined. Specifically, the appointing authority indicated that it was too late to discipline that County Correction Sergeant, but that six individuals, including the appellant, had been identified as having committed similar violations. The appointing authority further noted that none of the six identified employees were currently employed by the appointing authority. As the appellant essentially admitted to the infractions, the ALJ upheld the charges.

With regard to the issue of the penalty, the ALJ noted that the appellant's disciplinary history was not made part of the record, as "such history reflected attendance or lateness issues, which would be of slight values to either positively or negatively affect the determination of the issue of penalty" in the instant matter. The ALJ found that the appellant had failed to establish that the charges against him were the result of disparate treatment, as the exercise of some selectivity in enforcement is not an issue unless it was based on an improper reason. The ALJ found that the appellant's failure to perform security checks and his falsification of records was egregious misconduct and warranted removal.

In his exceptions, the appellant argues that the Supreme Court and Appellate Court's decisions in *In the Matter of John E. Warren and Gerald Sowa*, 117 *N.J.* 295 (1989), *In the Matter of Nolan Cox*, Docket No. A-2471-14T4 (App. Div. Dec. 7, 2016) and *In the Matter of Ramona Carter*, Docket No. A-3105-14T4 (App. Div. March 7, 2017) establish that the removal is an excessive penalty for the charges alleged. In this regard, he maintains that although his conduct was negligent, it did not warrant removal.

In its reply to the exceptions, the appointing authority argues that the appellant's actions were particularly egregious as he knew he was required to perform a security check every 30 minutes, he failed to perform 10 of those required checks and that 10 of his 15 logbook entries corresponding to the security checks were knowingly false. Moreover, it argues that the decisions cited by the appellant do not support his assertion that removal is not an appropriate penalty. Furthermore, it notes that the appellant was a sworn law enforcement officer that knowingly and willfully made false entries into an official logbook to cover up his misconduct in not completing the required security tours.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's findings to uphold the charges. However, with regard to the issue of the penalty, the Commission finds it necessary to remand this matter to the OAL. In this regard, the Commission notes that although the ALJ references a disciplinary history, he decided not to admit that history into the record. However, the

Commission notes that even when there is no dispute as to the charges, and an ALJ has determined that the claimed behavior was egregious, the disciplinary history must be admitted into the record to allow the Commission to have a complete record so that it may make its decision. In this regard, it cannot be assumed that the Commission, which has *de novo* review of both the underlying charges and the penalty imposed, will automatically agree with an ALJ's conclusions as to the severity of the misconduct or the penalty determination. Thus, an appellant's prior disciplinary history may provide the Commission with a more complete record for it to determine the appropriate penalty. Further, while the ALJ noted that the appellant's prior disciplinary history was apparently for dissimilar conduct, that, in and of itself, does not mean that such a history cannot be considered in determining the proper penalty.[1] The Commission notes that the inclusion of an appellant's disciplinary history is **essential**, even in matters where the Commission ultimately agrees with an ALJ's assessment of the severity of the misconduct or determines that the alleged misconduct is so egregious that the penalty imposed is appropriate even without regard for that history. This is the case, since, if the Commission does not agree, it is left without a critical piece of information in the record which will hamper its ability to impose a proper penalty. Moreover, notwithstanding the appellant's admission of the conduct, one witness did give testimony. However, the ALJ failed to summarize that witness' testimony. Therefore, the Commission remands the matter to the OAL so that the appellant's disciplinary record may be entered into the record, the witness' testimony may be summarized and a new initial decision may be issued.

ORDER

The Commission orders that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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[1] Of course, the Commission agrees with the ALJ that any disciplinary history may be ignored when the misconduct is of such an egregious nature that removal may be imposed regardless of an employee's history. However, it does not agree that the history should, therefore, not be included as part of the underlying record.

9-20-18

A-1

STATE OF NEW JERSEY

In the Matter of Luis Andujar
Cumberland County

CSC DKT. NO. 2018-3309
OAL DKT. NO. CSR 08107-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 08107-18

AGENCY DKT. NO. N/A
2018-3309

IN THE MATTER OF LUIS ANDUJAR,
CUMBERLAND COUNTY.

Nathan J. Mammarella, Esq., for appellant, Luis Andujar (Daniel L. Rosenberg and Associates, L.L.C., attorneys)

Theodore E. Baker, County Counsel, Cumberland County, for respondent, Cumberland County

Record Closed: August 14, 2018 Decided: August 17, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter concerns the appeal of Luis Andujar, from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on May 24, 2018, pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

8/17/18
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 8-22-18

Date Mailed to Parties: 8-23-18

Attachment

/dm

OAL DKT. NO. CSV

AGENCY DKT. NO. 20 –

SETTLEMENT AGREEMENT

IN THE MATTER OF

OAL - CSR08107-2018-S

Luis Andujar

AND

Cumberland Cty Hoc.

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 5/23/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	Chronic or Excessive Absenteeism		Removal
2.	Other Sufficient Cause		Removal
3.			
4.			
5.			

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: 30.

2. The total number of days of back pay, if any, to be paid by the Department to the Appellant is as follows: 7 (12 hr) days.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: waived.

OAL DKT. NO. CSV 08107-18

C. The Appellant Luis Andujar. withdraws his/her appeal and request for a hearing, and the Respondent Department of Cumberland County DOC. agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. Chronic or Excessive Absenteeism	30 days
2. Other Sufficient Cause	Dismissed
3.	
4.	
5.	

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. County of Cumberland (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of 30 days, Andujar 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the ~~New Jersey Department of~~ Cumberland County Dept of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 08107-18

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8-14-18
DATE

Appellant
Luis Anchijan

DATE

Respondent County of Cumberland

DATE

ON BEHALF OF
Theodore E. Baker
County Counsel

8/14/18
DATE

ON BEHALF OF
Luis Anchijan
by Nathan Mamaclla

OAL DKT. NO. CSV 08107-18.

CERTIFICATION

I _____, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8-14-2018
DATE

_____
NAME

A-1

STATE OF NEW JERSEY

In the Matter of Mikeyah Cheek
Ann Klein Forensic Center
Department of Human Services

CSC DKT. NOS. 2018-1360
OAL DKT. NOS. CSV 17567-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20th DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17567-17

AGENCY DKT. NO. 2018-1360

IN THE MATTER OF MIKAYAH CHEEK,
DEPARTMENT OF HUMAN SERVICES,
ANN KLEIN FORENSIC CENTER.

William A. Nash, Esq., for appellant (The Nash Law Firm, LLC, attorneys)

Shareef Omar, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney General, State of New Jersey, attorney)

Record Closed: August 16, 2018 Decided: August 16, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 29, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties appeared before me on August 16, 2018, and stated that they have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1.) After appellant put the terms of the settlement on the record, I conducted a voir dire of appellant to confirm that she understands and agrees to the settlement terms, that she is doing so

voluntarily and is not suffering from any impairment that would interfere with her judgment to enter into this agreement.

Based on the above and my review of the Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

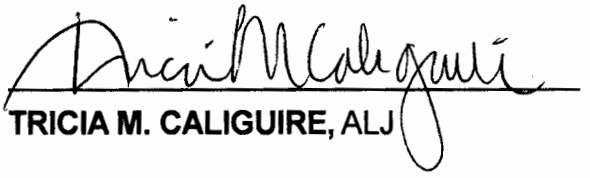
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 16, 2018
DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 8-22-18

Date Mailed to Parties: 8-23-18
nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

OAL DKT. NO. CSV 17567-2017 S
CSC DKT. NO. 2018-1360

LAST CHANCE
SETTLEMENT AGREEMENT

J-1

MIKEYAH CHEEK

v.

DEPARTMENT OF HUMAN SERVICES,
ANN KLIEN FORENSIC CENTER

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final Notice of Disciplinary Action** dated October 24, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(6) - Conduct unbecoming a state employee – removal effective 5/10/17; and
2. N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause – removal effective 5/10/17.

B. The parties have agreed to the following:

1. The Appellant withdraws her appeal and request for a hearing with OAL Docket No: CSV 17567-2017 S.
2. Respondent acknowledges that this agreement resolves all outstanding disciplinary actions pending against Appellant as of the date of this agreement. Any outstanding Preliminary Notices of Disciplinary Action and Final Notices of Disciplinary pending as of the date of this Agreement are resolved herein.

3. The Appellant has agreed to return to work in her former position as follows:
    a. Appellant will return to her position as a part-time employee; and
    b. Appellant will complete a four-month working test period to begin upon reinstatement.
4. The **Final Notices of Disciplinary Action** dated October 24, 2017 will be modified as follows:
    a. The Penalty of Removal shall be modified to a **thirty (30) day suspension** - having already been served. The remaining time between Appellant's suspension and reinstatement shall be marked as an approved leave of absence.
5. Appellant understands that termination will be sought if a similar incident occurs.
6. The Appellant will not receive any back pay or attorney's fees from the appointing authority.
7. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records will be kept intact. Nothing herein shall preclude Respondent from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

E. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. The parties have read and understood the terms of this Last Chance Settlement Agreement and freely and voluntarily agree to be bound by each term in the Last Chance Settlement Agreement.

G. Appellant agrees that, pursuant to this Last Chance Settlement Agreement, any subsequent disciplinary charge as related to an arrest or failure to report an arrest shall result in: (a) a sanction of removal, and (b) no further settlement agreement between the parties.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose

prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/16/18
DATE

Mikeyah Cheek

8/16/18
DATE

William A. Nash, Esq.
ON BEHALF OF Appellant

7/31/18
DATE

Charles Moore AKFC
Charles Moore
ON BEHALF OF Respondent

CERTIFICATION

I, Mikeyah Cheek, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/14/18
DATE

Mikeyah Cheek

9-2

A-1

STATE OF NEW JERSEY

In the Matter of Michelle Copeland
Woodbine Developmental Center
Department of Human Services

CSC DKT. NO. 2018-1465
OAL DKT. NO. CSV 17730-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17730-17

AGENCY DKT. NO. 2018-1465

IN THE MATTER OF MICHELLE COPELAND,
NEW JERSEY DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER

William A. Nash, Esq., for Maxine Manning (Nash Law Firm, LLC, attorneys)

Jana R. DiCosmo, Deputy Attorney General, for New Jersey Department of Human Services, Woodbine Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 14, 2018 Decided: August 16, 2018

BEFORE **CATHERINE A. TUOHY,** ALJ:

This matter concerns the appeal of Michelle Copeland from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of an in-person prehearing that was held on July 19, 2018, on the record, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement that was received on August 14, 2018, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 16, 2018
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 8.22.18

Date Mailed to Parties: 8.23.18

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2018 AUG 14 P 1:26
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 117
TRENTON, NJ 08625-0117

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Director

August 14, 2018

VIA FACSIMILE NO. 609-689-4100
Honorable Catherine A. Tuohy, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Building 9
3444 Quakerbridge Road, P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Michelle Copeland v. Department of Human Services, Woodbine Development Center
OAL Docket No.: CSV-17730-17

Dear Judge Tuohy:

We represent the Department of Human Services, Woodbine Development Center in the above referenced matter. I enclose a copy of the fully executed Settlement Agreement for Your Honor's Initial Decision on the matter.

Thank you for Your Honor's consideration regarding this matter.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: Jana R. DiCosmo
Jana R. DiCosmo
Deputy Attorney General

cc: William A. Nash, Esq. (via email only)
Angela Santandrea, DHS (via email without encls.)

OAL DKT. NO. CSV 17730-17

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

OAL DKT. NO. CSV 17730-17
AGENCY DKT. NO. 2018-1465

SETTLEMENT AGREEMENT

J-1

IN THE MATTER OF
MICHELLE COPELAND, APPELLANT

AND

DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER,
RESPONDENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated October 17, 2017 contained the following charges and proposed discipline:

	Charge	Discipline	Date Effective
1.	A.O.4:08; A3.1 Abandonment of job as a result of absence from work as scheduled without permission for five (5) consecutive days	Removal	August 18, 2017
2.	N.J.A.C. 4A:2-6.2(b) Resignation Not In Good Standing	Removal	August 18, 2017

B. The Appellant Michelle Copeland withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services, Woodbine

OAL DKT. NO. CSV 17730-17

Developmental Center agrees that the following result will occur with regard to each charge:

Modified to a General Resignation as resolution to the disciplinary appeal pursuant to N.J.A.C. 4A:2-6.3(b).

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. The parties have agreed to the following:

1. To date, appellant has served a total of (Not Applicable) days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: zero (0).
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: (Not Applicable).
4. The Appellant agrees to not seek reemployment with the New Jersey Department of Human Services or the New Jersey Department of Health, and contracted subsidiaries at any time in the future.

D. The Department of Human Services, Woodbine Developmental Center (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services, Woodbine Developmental Center will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

OAL DKT. NO. CSV 17730-17

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 17730-17

CERTIFICATION

I, MITCHELLE CEGLIO, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7-19-2018 Michelle Ceglio

DATE

OAL DKT. NO. CSV 17730-17

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7/19/2018	Michelle Copeland
DATE	Appellant
7/19/2018	
DATE	ON BEHALF OF Appellant
7/23/18	
DATE	ON BEHALF OF Respondent
DATE	Respondent

9-20-18

A-2

STATE OF NEW JERSEY

In the Matter of Gamaliel Cruz
City of Vineland Police Department

CSC DKT. NO. 2016-1020
OAL DKT. NO. CSR 17703-15
(ON REMAND CSR 8054-11)

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 21, 2018 BW

The appeal of Gamaliel Cruz, Police Officer, City of Vineland Police Department, removal effective May 22, 2012, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on August 20, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Gamaliel Cruz.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20th DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 17703-15

AGENCY DKT. NO. N/A

IN THE MATTER OF GAMALIEL CRUZ,
CITY OF VINELAND, POLICE DEPARTMENT.

Timothy C. Alexander, Esq., for appellant, Gamaliel Cruz (Jacobs & Barbone, P.A., attorneys)

Michael E. Benson, Esq., for respondent, City of Vineland Police Department (Buonadonna & Benson, P.C., attorneys)

Record Closed: July 6, 2018 Decided: August 20, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

City of Vineland Police Officer, Gamaliel Cruz, (appellant) appeals the decision of the City of Vineland Police Department (respondent, City) to remove him from employment effective March 14, 2011, in connection with charges that he had given false testimony to a Superior Court Judge on a telephonic application for a search warrant.

PROCEDURAL HISTORY

An Amended Preliminary Notice of Disciplinary Action, (PNDA) dated March 11, 2011, seeks the removal of appellant based on the following charges: N.J.A.C. 4A:2-2.3(a)1— Incompetency, Inefficiency, or Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)6— Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)3— Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)11— Other Sufficient Cause; Vineland Police Department (VPD) Rules & Regulations 4:1.4, Abide by all Rules, Regulations and Departmental Procedures; 4:1.7, Officers Will Conduct Themselvese in Accordance with high Ethical Standards; 4:9.2, Performance of Duty; 5:5.6, Truthfulness While Under Oath; 5:5.1, Duty of Employee to Appear and Testify.

After a departmental hearing, charges against appellant were sustained and incorporated into a Final Notice of Disciplinary Action (FNDA) 31-C with a proposed penalty of removal from employment. The appellant appealed his removal to the Civil Service Commission (CSC) and the matter was transmitted to the Office of Administrative Law (OAL), where it was received on June 4, 2012. N.J.S.A. 40A:14-202d. A first hearing was held before the Honorable Bruce M. Gorman, Administrative Law Judge (ALJ) under OAL Docket Number CSR 08054-12 and five hearing days were consumed with testimony. On May 21, 2014, an Amended FNDA was executed by then Vineland City Mayor Ruben Bermudez providing for dismissal of all charges against the appellant. On June 4, 2014, appellant withdrew the appeal and Judge Gorman entered an initial decision permitting the withdrawal pursuant to N.J.A.C. 1:1-19. By Judge Gorman's Order, the file was returned to the CSC. On July 11, 2014, appellant filed a Complaint in Superior Court seeking to enforce the Appointing Authority's dismissal of the charges pursuant to the May 21, 2014, Amended FNDA. On September 30, 2014, Vineland City Council filed a Complaint in Superior Court against Mayor Bermudez and appellant seeking the Court's declaration that the Mayor's dismissal of the charges was ultra vires. On August 28, 2015, the Superior Court entered an Order dismissing both lawsuits without prejudice and retaining jurisdiction to all and permitted the appellant to reopen his de novo appeal before the OAL. The CSC remanded the matter to the OAL where it was filed on November 4, 2015. Transcripts of

the five hearing dates conducted before Judge Gorman were submitted to the undersigned and considered so that the testimony would not have to be reproduced. Due to a defect in the transcript of the previous testimony of the City's witness, Special Agent Ronald Cuff of the Cumberland County Prosecutor's Office, Mr. Cuff's testimony was taken a second time before the undersigned. Additioanl hearings were conducted in this matter on March 5, 2018, March 6, 2018, and April 11, 2018. The parties filed post hearing briefs with the court and the record closed on July 6, 2018.

FACTUAL DISCUSSION

Appellant was employed as a Police Officer for approximately sixteen years. As of August 3, 2010, appellant was assigned to the Detective Division of the Vineland Police Department (VPD). He had previously worked on numerous drug related investigations utilizing information provided by a particular confidential informant named "Ryan Howard", a pseudonym ordered by the court for confidential reference in this case. Mr. Howard had communicated frequently with appellant by cell phone as well as in-person meetings, as needed. A "confidential informant" is aspecific classification of informant in a range that basically includes entirely anonymous "tipsters" who are, in fact, unknown, in any respect, to law enforcement; "tipsters" who identify themselves but otherwise have no relationship to law enforcement; and confidential informants who have a formal relationship with law enforcement by way of established use and experience, and may, as in the case of Ryan Howard, have been formally registered with an agency, such as the VPD. Mr. Howard was also a confidential informant for the U.S. Division of Alcohol, Tobacco, and Firearms (ATF). On August 3, 2010, appellant engaged in numerous phone contacts with Ryan Howard. Appellant denies knowing to whom he was speaking during any of those contacts.

As of August 3, 2010, Mr. Howard had been working with appellant as a confidential informant for the preceding six years and had almost daily phone contact with him. Howard, as of that date, had been using a cell phone, registered in the name of his mother, to communicate with appellant. That cell phone's number was (856) 776-XXXX. Appellant used a VPD issued cell, with phone number (856) 297-XXXX. On

August 3, 2010, Howard called appellant on three occasions in the afternoon. The first two calls were listed on the call detail for the CI's mother's phone (R-21 for 08/03/10), at 1:22 and 2:48 PM for one minute each. The third was at 3:27 PM for three minutes. That night at 8:54 PM, Ryan Howard called appellant's cell phone, and the call was listed as a two minute call. It was followed by a return call , listed as "Incoming Call, from appellant's phone at 8:57 PM for one minute and at 9:01 PM listed as a two minute call. At 9:10 PM, appellant called Howard, the call was listed as a two minute call and at 10:08 PM, appellant called Howard, and call was listed as a two minute call. At 10:17 PM Howard called appellant for four minutes and then for the last time on August 3, at 10:38 PM for three minutes. There were ten calls all together; six from Howard to appellant and four from appellant to Howard. Appellant, nevertheless, maintains that he did not know to whom he was speaking. In addition to being a long time confidential informant for appellant, he describes Howard as being a "testifying informant", and that he is someone who has been especially useful to him and law enforcement.

During the evening of August 3, 2010, at approximately 9:00 PM, Ryan Howard was visited at his home by three men in a Cadillac with Pennsylvania tags whom he understood to be members of a criminal gang. He observed that they were armed, in possession of drugs and planning a home invasion of a Vineland resident named H.L. Howard, using his mother's cell phone, called appellant on his department issued cell phone.

Ryan Howard was interviewed, under oath, by the Cumberland County Prosecutor's Agent Ron Cuff, on November 1, 2010, in connection with a criminal investigation into false swearing charges against appellant. He stated to Agent Cuff that the gang members called him on his cell phone to say that they were in Vineland to "... run in H.L.'s house" (Transcript of Hearing on February 18, 2014; 29/14-24.); i.e. to do a home invasion. They wanted Ryan Howard "to drive them out there." (Transcript of February 18, 2014; 30/14-24.) When asked by Agent Cuff what he told appellant on that date, Howard related that when the three gang members left his house"...I called Gami and I said... 'Yo, these guys from Philly they're down here to turn over H.L.'s

house,' and he said ' Where are they at?' And I gave him the description of the car." Cruz responded "All right. I'm going to go out now and see if I can find the car." Cruz later "... ended up finding the car... and ... wanted a little more than I was telling him." At that point, Howard gave more details concerning their descriptions, that the "fat guy" has a gun, where the gun was in the car, who was driving, who was in the back, who was the passenger, that one of them rolled a joint or a "dutch", that they were "very particular" about going over to H.L.'s house, and that one of them, named "Dink", was a high ranking member in the Crips gang. At that point Howard stated to Cuff, in reference to what Howard had been telling appellant: "I told him [Cruz] about that dude Dink is supposed to be a high ranking man in the Crips and I said whatever he [Cruz] does don't blow my cover and he said 'No, no, no, I ain't going to blow your cover.' Howard further stated that "I talk to him [Cruz] like every day...whenever he's working" and acknowledged being a confidential source for Cruz for three years. (Transcript of Hearing on February 18, 2014; 39, 40/1-25) According to affidavits given by both appellant's supervisor, Sergeant Paul Shadinger (Sgt. Shadinger) (R-33) and one of his co-officers, Gary Mollik (R-34), appellant reported to them, after taking the call, the nature of the call and specifically identified Ryan Howard as the caller and source of the information.

Upon informing Sgt. Shadinger of the call from Mr. Howard, appellant was advised by Sgt. Shadinger to issue a BOLO (Be on the look-out). Shortly afterwards, Officer Wallace reported seeing the subject Cadillac on Park Avenue and intercepted it at the driveway of XXX West Park Avenue. At that time, appellant pulled into the driveway of the adjacent property and made observations. Marijuana and handcuffs were found in the possession of two of the subjects, marijuana and latex gloves were observed in plain view, and the subjects were arrested, handcuffed and transported to VPD headquarters. Their vehicle was towed to headquarters where appellant made arrangements to make a telephonic search warrant application.

Appellant first contacted the on-call Assistant Prosecutor (AP), John Jesperson, for permission to make an application to a judge. He did not advise AP Jesperson that he knew his informant or request any advice concerning the nature of his earlier contact

with the informant. Upon making phone contact with Superior Court Judge Walter Marshall, and being placed under oath, appellant, in commencing his recitation of probable cause, stated "...I got a phone call from an anonymous subject...". Judge Marshall shortly after, during appellant's account, asked specifically "Alright uhh, the subject you said was anonymous, you did not know this person?" Appellant responded "Correct. Correct." (R-6.)

Appellant denies he definitively knew during any of the multiple calls of August 3, 2010, that he was speaking to Ryan Howard. He states he only thought it was Howard. It was not until the next day, August 4, 2010, in a follow-up call from Howard, that he claims he realized definitively it was Howard. Appellant executed a confirmatory affidavit (R-27e) for review and approval by the warrant judge and AP Jesperson after he made this realization. That affidavit referenced to appellant's source as "a subject who wished to remain anonymous." He also executed a Search Warrant Approval Form (R-16), with box number twelve (12) marked "NO" to the question whether the investigation involved a confidential informant or source. He also prepared a police report (R-27c) stating that his source was a "subject who wished to remain anonymous." Upon realizing that the caller was Ryan Howard, appellant did not correct the record or prepare a supplemental police report to reflect that his source was a known confidential informant.

AP David Branco, prepared an Inter-Office Correspondence of October 18, 2010, to Cumberland County Prosecutor, Jennifer Webb McRae (R-13) while in the midst of preparing a Pre-Indictment Referral Report Form (PIRRF) in connection with the charges against the suspects arrested on August 3, 2010. AP Branco had read a memorandum, dated August 24, 2010, (R- 29) prepared by AP Katie Wilson. It stated at the outset "This is a brand new case. Vineland Police (Gami Cruz) received info from an individual who wished to remain anonymous (possibly someone who knows Gami?)..." Ms. Wilson concluded her memo, noting "Also, we need to find out...whether caller is truly anonymous or known to Detective Cruz." In his interview with Special Agent Cuff, AP Branco explained the significance of the phrase "subject who wishes to remain anonymous" to someone in law enforcement:

> "When [Cruz] stated in his police report that he received a tip from a caller who wished to remain anonymous, that choice of words to me means something very different than I got an anonymous tip. (J-1 and P-5, p.8.)

Before completing his PIRFF, AP Branco spoke to appellant while he happened to be in the Prosecutor's Office. At the outset of that conversation, Branco asked appellant if he had known the "tipster" and he admitted that he knew the tipster and admitted that he had intentionally "... worded his affidavit as described herein to protect the identity of the caller."(R-13 p.2) Thus, Branco's assessment of the phrase "a person who wished to remain anonymous" was what appellant had used it to shield the identity of and protect his confidential informant.

Branco explained his concerns with the statement made by the appellant:

> "I also explained to him that this would have to be brought to the attention of the court as well as in the discoverable material to the defense attorney, should the case move forward. He understood the gravity of my concerns with the procedures that he had utilized. He also asked what else he could have done to protect the identity of the informant so as not to have fatal consequences visited upon him and still maintain the integrity of the case. Without getting into the specifics with him, I told him that there was a legal process that we may have been able to use. However, that option may now be closed to us because Sr. Trial Attorney John Jesperson, who had received the advice call on this search warrant, was unaware of the informant category. As such, he could not explore other options with the detective. I was very open to Det. Cruz and told him he was going to have to take his lumps on this when it came to court." (R-13, p.2.)

The County opened a criminal investigation on October 26, 2010. Special Agent Cuff interviewed AP David Branco on October 27, 2010. On Novemebr 1, 2010, Agent Cuff also interviewed appellant's confidential informant, Ryan Howard, who acknowledged his long history with appellant and the information he had given to him. Among other things, he stated that he told appellant "Don't blow my cover." He did not

interview appellant since his investigation was criminal in nature and not a disciplinary proceeding.

The County Prosecutor, on November 8, sent a letter to VPD Chief Codispoti (R-23) advising that the Prosecutor was declining prosecution of appellant for false swearing and any related charges arising out of the events of August 3, 2010. The letter specifically noted there was ". . . more than sufficient evidence to support criminal charges" but noted ". . . obtaining a conviction at trial could have catastrophic effect on the safety of other persons." The letter further stated "... this Office shall be required from this date forward to disclose Detective Cruz's integrity issue to the defense in all future criminal prosecutions. So please consider this when taking administrative action." (R-23, p.1.)

Upon receipt of the Prosecutor's declination letter, the City of Vineland Internall Affairs (IA) unit, headed by Leutenant Lene Bowers (Lt. Bowers) and Sergeant Andrew Catti (Sgt. Catti), re-opened its investigation of appellant's conduct. The City conducted an interview of appellant on November 12, 2010. During the interview, (see Interview Transcript as recorded during testimony of Sgt. Catti, Transcript of Hearing on April 23, 2014; 109-123) appellant acknowledges that he knew the caller was Ryan Howard when he took the call, even though Mr. Howard did not state his name:

> "DETECTIVE CRUZ: I got a call stating that there were three subjects in a red car with Pennsylvania tags... We towed the car back to the station and I just called in for a telephonic wanant based on that.
>
> SERGEANT CATTI: You did.
>
> DETECTNE CRUZ: I did. I did it myself, correct.
>
> SERGEANT CATTI: Okay. The information you received concerning this it was a confidential informant.
>
> DETECTNE CRUZ: Yes.
>
> SERGEANT CATTI: That you have dealt with in the past.
>
> DETECTIVE CRUZ: Yes.

SERGEANT CATTI: Okay. And you know his name, correct.

DETECTIVE CRUZ: Well, I know his name, correct.

SERGEANT CATTI: Okay. And then you went for the telephonic search warrant?

DETECTIVE CRUZ: Yes

(Transcript of Hearing on April 23, 2014; 112-13.)

Appellant then explains his reasons for stating the nature of his caller to the judge: "I went for the search warrant and my big-my big thing was when I was talking to the Judge even prior to even calling him up and so forth was protecting this informant, that was my main concern was protecting the informant." (Transcript of Hearing on April 23, 2014; 113/13-18) Appellant recalled the judge stated " 'You do not know who the subject was' or something like that and I said "Correct, correct,' and I went along with that." (Transcript of Hearing on April 23, 2014; 115/1-5) Appellant went on to note that although "obviously the guy never gave me his name but, you know, I had-you know, I dealt with him and I'm-... you know, familiar.." (Transcript of Hearing on April 23, 2014; 115/1-13) appellant stated in his IA interview that he had never been asked by a Superior Court Judge for a confidential informant's name, so it " ... caught me off guard."

Upon conclusion of the interview of appellant on November 12, 2010, a PNDA, dated November 12, 2010, and executed by Chief Tim Codispoti, was served on appellant, charging, among other things, violations of truthfulness standards and conduct unbecoming a public employee, and seeking a ninety-day suspension. While a hearing on the November 12, 2010, charges was pending, by letter, dated March 11, 2011, the Cumberland County Prosecutor's Office, through First AP, Harold Shapiro (see R-27i) advised Chief Codispoti that appellant's false testimony had led the Prosecutor's Office, as of March 8, 2011, to dismiss with prejudice eleven cases, involving twenty defendants. In thirteen instances, first or second degree charges had been dismissed, mostly involving appellant as the affiant on the respective search warrant applications. Following receipt of the March 11, 2011, letter from the

Prosecutor, the City prepared a new PNDA (R-27j), dated March 11, 2011, and served it on appellant on March 14, 2011. It stated additional charges related to the impact of the Prosecutor's decision to not proffer future testimony of appellant and sought removal of appellant.

During his testimony before this tribunal, appellant explained that on August 3, 2010, he was a Dectective of Narcotics with VPD. Ryan Howard had been a Confidential Informant with whom he had worked with for six years prior and spoke to him approximately three or four times each week. Ryan Howard called appellant on his VPD issued cell phone from a number he did not recognize. Appellant spoke to him three times on August 3, 2010, but asserts that he did not recognize his voice. Ryan Howard asked him not to "blow his cover" and appellant knew that Ryan Howard was one of just a few informants that would give him this type of information. Appellant ran the situation by one of his supervisors, Sgt. Shadinger and appellant told him he thought it might be Ryan Howard. Sgt. Shadinger stated he was informed by appellant that he had received a call, the evening of August 3, 2010, from his confidential informant, "Ryan Howard." He recalled that appellant "... specifically identified "Mr. Howard" by name. Ryan Howard had never wished to remain anonymous in any of appellant's prior dealings with him. Appellant could not tell Judge Marshall that he had a hunch about the identity of the caller but did not discuss his "hunch" with AP Jesperson when discussing the possibility of calling for a telephonic search warrant.

At the time he spoke to Judge Marshall, appellant's main concern was protecting the identity of his informant. He had no ill intent. Judge Marshall caught him off guard when he asked him if he knew the identity of the caller so he went along with the Judge and followed his questions. On cross-examination, Cruz stated that he felt he had a duty to the identity of Ryan Howard and that was his intent when he spoke to Judge Marshall on August 3, 2010.

In view of the contradictory testimony and evidence presented by appellant and the respondent witnesses, the resolution of the charges against appellant requires that I make a credibility determination with regard to the critical facts. The choice of

accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses and compairing the transcripts of the testimony of all of the witnesses in this proceeding, I deem appellant's testimony, that he did not know the identity Ryan Howard when he called Judge Marshall for the telephonic search warrant, is not credible. Appellant testified that he had spoken to Ryan Howard approximately three to four times each week for the previous six years. He also testified that his main concern was to protect the identity of his informant. This contradicted his testimony that he did not know the identity of the individual that gave the tip. During his IA interview appellant stated that he had never been asked by a Superior Court Judge for a confidential informant's name in any other telephonic search warrant applications, so it " ... caught me off guard." If appellant did not know the identity of the caller, he would not have been caught off guard. Accordingly, I **FIND** as **FACT** that appellant knew that the individidual with whom he was speaking, on August 3, 2010, was his confidential informant, Ryan Howard. I also **FIND** as **FACT** that he knew Ryan Howard's identity prior to speaking to Judge Marshall during his application for a telephonic search warrant.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter: As of August 3, 2010, appellant had been employed by VPD for approximately sixteen years. On August 3, 2010, appellant received a call from his confidential informant advising that he had been visited at his home by three men in a Cadillac with Pennsylvania tags whom he understood to be members of a criminal gang. He observed that they were armed, in possession of drugs and planning a home invasion of a Vineland resident named H.L. As a result of this information, three individuals fitting the description given where arrested. Appellant contacted Superior Court Judge Marshall to obtain a telephonic search warrant of the Cadillac. Appellant did not inform Judge Marshall that he knew the identity of the informant. By letter, dated March 11, 2011, the Cumberland County Prosecutor's Office advised Chief Codispoti that appellants's false testimony had led the Prosecutor's Office, as of March 8, 2011, to dismiss with prejudice eleven cases, involving twenty defendants. In thirteen instances, first or second degree charges had been dismissed, mostly involving appellant as the affiant on the respective search warrant applications. Following the receipt of the March 11, 2011, letter from the Prosecutor, the City prepared an amended PNDA dated March 11, 2011, and served it on appellant on March 14, 2011. It stated additional charges related to the impact of the Prosecutor's decision to not proffer future testimony of appellant and sought removal of appellant.

LEGAL ANALYSIS AND CONCLUSION

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent,

relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Respondent has sustained charges of violations of N.J.A.C. 4A:2-2.3(a)1— Incompetency, Inefficiency, or Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)6— Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)3— Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)11— Other Sufficient Cause; VPD Rules & Regulations 4:1.4, Abide by all Rules, Regulations and Departmental Procedures; 4:1.7, Officers Will Conduct Themselves in Accordance with high Ethical Standards; 4:9.2, Performance of Duty; 5:5.6, Truthfulness While Under Oath; 5:5.1, Duty of Employee to Appear and Testify.

Appellant argues that the charges against him should be dismissed because he did not know the identity of the caller and therefore was not untruthfull.

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (Note: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a County treasurer who could not balance the books, after the auditors tried three times to show him how.)

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "'of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.

[In re Herrmann, 192 N.J. 19 at 35-36.]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what

> she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

In the present matter, the record reflects that appellant failed to perform several of his duties specifically involving how to respond to questions of a Superior Court Judge during a telephonic search warrant and by not disclosing his "hunch" as to the identity of the anonymous called to AP Jasperson. He clearly demonstrated an absence of judgment in a sensitive position requiring public trust in the agency's judgment. Accordingly, I **CONCLUDE** that the charges of a violation of N.J.A.C. 4A:2-2.3(a)(1) (incompetence, inefficiency, failure to perform duties) must be and is hereby **SUSTAINED**.

Respondent also sustained charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). To the extent that appellant is charged with violation of VPD Rules and Regulations 4:1.7, which addresse an Officers Conduct, consideration of such violation will be addressed in concert with the current analysis.

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that "adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atlantic City, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off duty. In re Emmons, 63 N.J. Super. 136 at 140.

In the present matter, the record reflects that appellant failed to perform duties required of him in his handling of the call to Judge Marshall for a telephonic search warrant. Appellant knew the identity of the caller and failed to advise the Judge of this fact when asked. Even though appellant's intent was to protect the identity of his informant and was not done with ill intent, his untruthfulness creates issues whereby he cannot testify in any criminal court without a prosecutorial disclosure of his "Brady Issue," thereby, reducing his ability to serve as a police officer. This clearly constitutes behavior which could not only adversely affect the morale of the facility and undermine public respect in the services provided. The refusal of the Cumberland County Prosecutor's Office to call appellant as a witness in any criminal trial serves to eleiminate appellant's ability to perform central functions of his job; namely making arrests and testifying in court. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charges of N.J.A.C. 4A:2-2.3(a)6 (conduct unbecoming a public employee), and VPD Rules and Regulations 4:1.7, as well as Inability to Perform Duties, N.J.A.C. 4A:2-2.3(a)3, and VPD Rules and Regulations 5:5.1 should be and are hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause). Specifically, appellant is charged with violations of VPD Rules & Regulations 4:1.4, Abide by all Rules, Regulations and Departmental Procedures; 4:1.7, Officers Will Conduct Themselvese in Accordance with high Ethical Standards; 4:9.2, Performance of Duty; 5:5.6, Truthfulness While Under Oath; 5:5.1, Duty of Employee to Appear and Testify. I **CONCLUDE** that the consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(11) (other sufficient cause) have been addressed and **SUSTAINED** within the discussion of violations of N.J.A.C. 4A:2-2.3(a)(1),(3) and (6).

Accordingly, I further **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) must be and is hereby **SUSTAINED**.

PENALTY

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

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

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

[In re Herrmann, 192 N.J. at 30-33.]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. at 486.

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

To determine whether a lesser penalty than the respondent's termination of appellant is appropriate, the concept of progressive discipline is generally examined. Our courts uniformly have upheld the concept in a long line of cases, beginning with West New York v. Bock, 38 N.J. 500, 523 (1962): (an employee's past record of both discipline and commendations can be considered). See also In re Hermann, 192 N.J. 19, 21 (2007). However, the judiciary also agrees that progressive punishment can be waived when the offense involved is sufficiently egregious. In re Stallworth, 208 N.J. 182, 196-197 (2011). However, the Court in Hermann also declared that progressive discipline can be used to mitigate the penalty where there is a substantial record of

employment that is largely or totally unblemished by significant disciplinary infractions. In re Hermann, 192 N.J. at 32-33.

I am satisfied that appellant's conduct in this case was egregious such that progressive discipline need not be considered. The public who is served, and other employees, deserve to be able to expect that police officers are able to make arrests that will lead to convictions of those deserving such punishment. Appellant's inability to testify in a criminal court proceeding within Cumberland County eliminates his efectivness to serve the public as a Police Officer within the respondent. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from his position was justified.

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against appellant with violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency; Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause, and I **ORDER** that these charges be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that the penalty of removal is hereby **AFFIRMED**.

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

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

I

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

8/20/18
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: August 20, 2018

Date Mailed to Parties: August 20, 2018.

JSK/dm

APPENDIX

WITNESSES

For appellant:

Appellant
Charles Capelli
Joseph Valentine

For respondent:

Ernest Ronald Cuff, Jr.
Timothy Cadispoti

EXHIBITS

Transcripts from testimony taken before Judge Gorman considered by this tribunal

Hearing, date September 12, 2012

No witnesses

Hearing, date February 14, 2014

Ronald Cuff

Hearing, date February 18, 2014

Ronald Cuff

Hearing, date April 23, 2014

Ronald Cuff
Andrew Catti

Hearing, date April 24, 2014

David Branco
Andrew Catti
Ryan Howard

Joint Exhibits

J-1 CD of Branco interview, dated October 27, 2010
J-2 Hand Written statement of Confidential Informant, dated January 25, 2012
J-3 Transcript of Cruz Deposition, dated February 11, 2014

For appellant:

P-1 Not Moved
P-2 AP Wilson's IOC (Also marked as R-29)
P-3 Statement of Ryan Howard, dated January 25, 2012 (Also marked as J-2)
P-4 Civil Service Job Description
P-5 AP Branco Interview Transcript
P-6 CD and transcript of telephone conversation between Cruz and Shadinger on May 27, 2014
P-7 Map of area surrounding Vineland Police Department
P-7a Officer Rodriquez discipline action, dated July 1, 2008
P-7b Officer Rodriquez discipline action, dated August 16, 1994
P-7c Officer Rodriquez discipline action, dated March 29, 2007

For respondent:

R-1 Redacted CCPO Investigation
R-2 Property Inventory
R-3 Witness Acknowledgment (Branco)
R-4 Search Warrant – Redacted
R-5 Search Warrant Affidavit – Redacted
R-6 Transcript (Judge Marshall and Cruz, dated August 3, 2010)
R-7 Search Warrant Approval Form
R-8 Search Warrant Return – Redacted
R-9 Evidence Log – Redacted
R-10 Witness Protection Declination (Redacted)
R-11 Witness Protection Declination for C.I.'s Mother
R-12 Original Redacted Branco IOC to Webb-McRae, dated October 18, 2010
R-13 Unredacted Branco IOC
R-14 Email Transmittal of IOC to Benson, dated February 10, 2014
R-15 Second Version of Redacted Branco IOC
R-16 Signed Search Warrant Approval Form
R-17 CD Recording of Cruz and Judge Marshall
R-18 Signed Search Warrant
R-19 Cruz Report, dated August 3, 2010
R-20 Confidential Informant's telephone records
R-21 Phone Records from August 2, 2010 through August 10, 2010
R-22 CD of Cuff interview of CI on November 1, 2010
R-23 Prosecutor Declination Letter to Codispoti not to prosecute, dated November 8, 2010
R-24 Cuff Report – Unredacted, dated November 17, 2010
R-25 Shapiro letter to Cadispoti, dated March 11, 2011
R-26 Shapiro letter to Codispoti, dated April 26, 2011
R-27a Critical Incident Sheet, dated October 27, 2010
R-27b Webb-McRae letter to Codispoti, dated October 27, 2010
R-27c Vineland Police Department Case Report

R-27d Telephonic Search Warrant Application Transcript, dated August 3, 2010

R-27e Search Warrant Affidavit

R-27f Webb-McRae letter to Codispoti, dated November 8, 2010

R-27g Critical Incident Sheet, dated November 12, 2010

R-27h PNDA, dated November 12, 2010

R-27i Shapiro letter to Codispoti regarding dismissed cases, dated March 11, 2011

R-27j PNDA, dated March 11, 2011

R-27k Shapiro letter to Codispoti regarding dismissed cases, dated April 26, 2011

R-27l Critical Incident Sheet, dated March 15, 2011

R-27m Critical Incident Sheet, dated May 25, 2012

R-28 CD of Vineland Internal Affairs interview of Cruz, dated November 12, 2010

R-29 AP Wilson's IOC

R-30 Audio Recording of Cuff interview of AP Branco, dated October 27, 2010

R-31 Transcript of telephone call between Cruz and Shadinger, dated February 12, 2018

R-32 Deposition transcript of Cruz, dated February 4, 2014

R-33 Affidavit of Sgt. Shadinger, dated March 20, 2014

R-34 Affidavit of Officer Mollik, dated March 14, 2014

R-35 Email from Cruz to Robert MaGee, dated August 5, 2010

STATE OF NEW JERSEY

In the Matter of Mahogani Ennals
Woodbine Developmental Center
Department of Human Services

CSC DKT. NO. 2018-3723
OAL DKT. NO. CSV 10134-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10134-18

AGENCY DKT. NO. 2018-3723

IN THE MATTER OF MAHOGANI ENNALS,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Robert C. Little, for appellant, Mahogani Ennals, pursuant to N.J.A.C. 1:1-5.4(a)6

Anita Pinkas, for respondent, Woodbine Developmental Center, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: August 30, 2018 Decided: August 31, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Mahogani Ennals from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and Chief ALJ

Date Received at Agency: 9-5-18

Date Mailed to Parties: 9-5-18

mph

OAL DKT. NO. CSV 10134-2018 10135-2018
AGENCY DKT. NO. 20 – 2018 3723 2018-3724

SETTLEMENT AGREEMENT

IN THE MATTER OF

Mahogani Ennals

AND

Woodbine Devel. Center
Dept. of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 5/24/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	E.1.2, 4A:2-2.3(a)6, 12	Removal	6/3/2017
2.			
3.	E.1.3, 4A:2-2.3(a)6, 12	Removal	6/3/2017
4.			
5.			

B. The Appellant Mahogani Ennals withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	E.1.2, 4A:2-2.3(a)6, 12	Sustained	60 days susp.
2.			
3.	E.1.3, 4A:2-2.3(a)6, 12	Withdrawn	

OAL DKT. NO. CSV 10134-2018
10135-2018

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of 5 Mos 6/4/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Dept. of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Mahogani Evans's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges that as a direct care worker she is required to be drug free and is subject to random drug testing. Appellant commits to conform to this requirement.

OAL DKT. NO. CSV 10135-2018

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/30/18
DATE

Mahogani Swails
Appellant

8/30/18
DATE

Respondent

8-30-18
DATE

ON BEHALF OF APPELLANT

DATE

ON BEHALF OF

OAL DKT. NO. CSV 10134-2018, 10135-2018

CERTIFICATION

I, Mahogani Ennals, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/30/18
DATE

Mahogani Ennals
NAME

A-1

STATE OF NEW JERSEY

In the Matter of Mahogani Ennals
Woodbine Developmental Center
Department of Human Services

CSC DKT. NO. 2018-3724
OAL DKT. NO. CSV 10135-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10135-18

AGENCY DKT. NO. 2018-3724

IN THE MATTER OF MAHOGANI ENNALS,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Robert C. Little, for appellant, Mahogani Ennals, pursuant to N.J.A.C. 1:1-5.4(a)6

Anita Pinkas, for respondent, Woodbine Developmental Center, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: August 30, 2018 Decided: August 31, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Mahogani Ennals from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and Chief ALJ

Date Received at Agency: 9.5.18

Date Mailed to Parties: 9.5.18

mph

10134-2018
OAL DKT. NO. CSV 10135-2018
AGENCY DKT. NO. 20 – 2018 3723 2018-3724

SETTLEMENT AGREEMENT

IN THE MATTER OF

Mahogani Ennals

AND

Woodbine Devel. Center
Dept. of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 5/24/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	E.1.2, 4A:2-2.3(a)6, 12	Removal	6/3/2017
2.			
3.	E.1.3, 4A:2-2.3(a)6, 12	Removal	6/3/2017
4.			
5.			

B. The Appellant Mahogani Ennals withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	E.1.2, 4A:2-2.3(a)6, 12	Sustained	60 days susp.
2.			
3.	E.1.3, 4A:2-2.3(a)6, 12	Withdrawn	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of since 6/4/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Dept. of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Mahogani Ennals 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges that as a direct care worker she is required to be drug free and is subject to random drug testing. Appellant commits to conform to this requirement.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/30/18 DATE	Mahogani Evans Appellant
8/30/18 DATE	Respondent
8-30-18 DATE	Robert P Little III ON BEHALF OF APPELLANT
DATE	ON BEHALF OF

OAL DKT. NO. CSV 10135-2018

CERTIFICATION

I, Mahogani Ennals, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/30/18
DATE

Mahogani Ennals
NAME

9-20-18

A-3

STATE OF NEW JERSEY

In the Matter of Melissa Johnson Passaic County Sheriff's Department	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2017-1323 OAL DKT. NO. CSV 16886-16 OAL DKT. NO. PTC 03938-16 **(Consolidated)**	

ISSUED: SEPTEMBER 21, 2018 BW

The appeal of Melissa Johnson, County Correction Officer, Passaic County Sheriff's Department, removal effective February 29, 2016, on charges, was heard by Administrative Law Judge Ellen S. Bass, who rendered her initial decision on June 1, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 20, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. However, the Commission modifies the removal to a resignation in good standing.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MELISSA JOHNSON, Petitioner, v. **MORRIS COUNTY PUBLIC SAFETY TRAINING ACADEMY,** Respondent.	OAL DKT. NO. PTC 03938-16
IN THE MATTER OF MELISSA JOHNSON, PASSAIC COUNTY SHERIFF'S DEPARTMENT.	OAL DKT. NO. CSV 16886-16 AGENCY DKT. NO. 2017-1323

Jeffrey S. Ziegelheim, Esq., for petitioner/appellant Melissa Johnson (Alterman and Associates, attorneys)

Robert Greenbaum, Esq., for respondent Morris County Public Safety Training Academy

Jose Santiago, Assistant County Counsel, for respondent Passaic County Sheriff's Department (William J. Pascrell III, County Counsel, attorney)

Record Closed: May 2, 2018 Decided: June 1, 2018

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

In this consolidated proceeding, petitioner/appellant Melissa Johnson appeals both her dismissal from the Morris County Public Safety Training Academy (the Academy) and her removal from employment with the Passaic County Sheriff's Department (Passaic), for inability to perform her duties. N.J.A.C. 4A:2-2.3(a)(3).

PROCEDURAL HISTORY

On February 29, 2016, the Academy dismissed Johnson for failing to fully participate in and complete more than 20 percent of the required physical-training sessions. On October 11, 2016, Passaic issued a Final Notice of Disciplinary Action (FNDA) removing Johnson as a correction officer effective February 29, 2016, citing her probationary status and her failure to complete the required Academy course.

Johnson appealed to the Police Training Commission (PTC) by letter dated March 3, 2016, and the contested case was transmitted to the Office of Administrative Law (OAL) on March 11, 2016. She appealed Passaic's decision via letter dated October 18, 2016, and the Civil Service Commission transmitted her appeal to the OAL on November 4, 2016. An order consolidating the two appeals was entered on December 21, 2016. That order directed that, in accordance with N.J.A.C. 1:1-17.6 and N.J.A.C. 1:4A-17.1, the PTC has the predominant interest in reviewing Johnson's appeal of her termination.

After several unsuccessful attempts to achieve an amicable resolution, the matter proceeded to hearing on May 2, 2018. Via letter dated April 4, 2018, counsel for Passaic advised that "the Passaic County Sheriff's Department will not be appearing or participating in the hearing." Accordingly, only the Academy and the petitioner/appellant appeared.

FINDINGS OF FACT

The underlying facts are uncontroverted, and I **FIND**:

Johnson was hired by Passaic as a county correctional officer in April 2015. Between April and September 2015 she worked as a probationary officer pending her entry into the Passaic County Training Academy. Johnson worked out regularly prior to beginning her course at the Academy; she ran on a treadmill and used an elliptical machine at the gym, and went to CrossFit. She passed a physical assessment at the Passaic Academy on or about September 10, 2015. Her time there was progressing well when, on October 5, 2015, she injured her foot during a run.

Johnson was sent to a doctor via Workers' Compensation, who restricted her activity; advised her to limit pressure on her foot; and advised that she neither run nor jump. She was given an air cast and soft boot. Johnson testified that her injury was ultimately diagnosed as a stress fracture, although the medical documentation that she shared spoke only to a foot and ankle sprain. But in any event, it is uncontroverted that Johnson was placed on light duty on October 9, 2015, which a memorandum defined as "no inmate contact/sedentary duty." A medical report of that date confirmed various activity restrictions, to include limits on lifting and carrying, limits on pushing and pulling, and the continued directive that Johnson engage in "no running."

A doctor's note dated October 20, 2015, indicated that Johnson could return to full duty, "with [the] exception of no running or jumping." She did return to full duty the next day, but continued to wear her air cast. And after a day of work, she could engage in no further physical activity; rather, she went home and rested. Johnson continued to be followed by physicians into December 2015. As late as December 1, 2015, a doctor's note indicated that she should continue to refrain from running and jumping. On December 15, 2015, Johnson was released to full duty with no restrictions. But, she continued to use the air cast until January 12, 2016, when she was advised that Passaic was sending her to the Morris County Academy to resume her training. Johnson stressed that she had not been to the gym, or otherwise prepared herself physically for the work she would need to perform at the Academy, due to her injury.

Johnson began her course at the Academy with an orientation on January 25, 2016. She readily admitted that she was not ready for the physical aspects of her work

at the Academy; she did not successfully complete the required physical-training component. Indeed, Johnson stated quite unequivocally that her dismissal was appropriate, and that her only complaint against the Academy was that its personnel should not have accepted her in the first place, in light of her personal circumstances.

Lt. Mark Meehan is the lead fitness instructor at the Academy. He explained that there are several components of training, to include academics, shooting, and fitness. To pass the fitness component a recruit must fully participate in 80 percent of the sessions; a recruit would be terminated after eight sessions if she had not fully participated. Meehan clarified that "fully participate" means demonstrating an ability to correctly perform the required exercise drills.

Meehan spoke well of Johnson, describing her as an earnest, hard-working recruit whom he would welcome back to the Academy at any time. He indicated that he and his staff tried to assist Johnson, and were anxious for her to succeed. But from the first day, Johnson presented with strength and endurance limitations that impeded her ability to keep up with the Academy program. She could not run at the required pace, and could not perform the required push-ups and sit-ups. Meehan was in communication with Passaic, and alerted the personnel there that Johnson was struggling. Meehan did not receive any information about Johnson's medical history, nor was he made aware about her withdrawal from the prior academy in Passaic County. But Meehan implied that this background would have been of no moment, as the fitness requirements cannot be waived, regardless of the reason. Meehan did confirm that physical conditioning is critical prior to starting the Academy, and that without such conditioning a recruit is unlikely to succeed. He moreover confirmed that a recruit like Johnson, who was just recovering from an injury, would have a very difficult time with the physical aspects of the Academy program.

CONCLUSIONS OF LAW

Discharge from the Training Academy

The Police Training Act mandates successful completion of a basic training course at a school approved by the PTC as a prerequisite to permanent appointment as a correction officer. N.J.S.A. 52:17B-68.1. The PTC prescribes standards for approval of police training schools and the minimum qualifications for their instructors, and "prescribe[s] the curriculum, the minimum courses of study, attendance requirements, equipment and facilities, and standards of operation for such schools." N.J.S.A. 52:17B-71(a)–(d).

A recruit is eligible for certification by the PTC when the Academy director affirms that "[t]he trainee has achieved the minimum requirements set forth in the basic course applicable to his or her appointment and has demonstrated an acceptable degree of proficiency in the performance objectives contained in the particular basic course." N.J.A.C. 13:1-5.1(a)(1). The Academy has the power and responsibility "[t]o implement the required curriculum" and "[t]o dismiss a trainee who has demonstrated that he or she will be ineligible for Commission certification, for unacceptable behavior or for other good cause." N.J.A.C. 13:1-7.2(a)(8). "Good cause" has been defined as protection from arbitrary discharge, and requires that termination be motivated by legitimate performance-related concerns. See Greenwood v. State Police Training Ctr., 127 N.J. 500 (1992).

I **CONCLUDE** that good cause existed for Johnson's termination by the Academy. Although by all accounts Johnson tried her best, and was an otherwise excellent and desirable recruit, she was simply not physically prepared to successfully complete the Academy's course of study. She does not contend otherwise. An inability to perform the physical aspects of Academy training constitutes good cause for termination. See DeRogatis v. Jersey City Police Dep't, CSV 9557-95 and PTC 4576-95, Initial Decision (September 7, 2000), adopted, Merit Sys. Bd. (October 24, 2000), http://njlaw.rutgers.edu/collections/oal/; Martin v. Jersey City Police Acad., PTC 11501-06, Initial Decision (October 3, 2007), http://njlaw.rutgers.ed/collections/oal/; Pantoliano

v. Bergen Cty. Police Acad., PTC 9806-02, Initial Decision (November 27, 2006), http://njlaw.rutgers.edu/collections/oal/.

I **CONCLUDE** that the Academy's action in dismissing Johnson from the basic training course was consistent with applicable law and should be upheld.

Discharge from the Passaic County Sheriff's Department

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined are whether the employee is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Passaic terminated Johnson's employment due to her inability to perform her duties. That inability was a direct result of her failure to successfully complete the training course at the Academy. N.J.A.C. 4A:2-2.3(a)(3). I **CONCLUDE** that Passaic's action was consistent with the statutory scheme. In Gottlieb v. Monmouth County Sheriff's Office, 95 N.J.A.R. 2d (CSV) 573, the administrative law judge held:

> The controlling statute, N.J.S.A. 52:17B-68.1 leaves no room for discretion. Before permanent appointment, there must be completion of the Basic Police Training Commission course for correction officers . . . . [C]ivil Service rules do not anticipate continued employment of law enforcement officers who do not complete the Police Training Commission course, if so required. . . .
>
> . . . [T]he New Jersey Department of Personnel and the Merit System Board may only look to the fact, or not, of course completion. Here, there was none. For that reason, with a threshold condition unmet, the appointment must cease.

The training laws establish a classification of temporary or probationary employment until successful completion of the mandatory program of training. Borger v. Borough of Stone Harbor, 178 N.J. Super. 296, 301–02 (Ch. Div. 1981).

Johnson urges that Passaic treated her unfairly because its personnel sent her back to the Academy immediately after recovery from an injury, and without affording her the time needed to become physically prepared for the rigors of the training course. But, she offered no legal support for the notion that Passaic, having withdrawn her from a prior Academy due to an injury and placed her on light duty, was further obliged to afford her time to physically prepare to re-enroll in the required Academy course. Indeed, to the contrary, the case law is clear that Passaic was under no obligation to "recycle" Johnson, or provide her with multiple chances to successfully complete her training at the Academy. See Crespo v. Passaic Cty. Police Acad., PTC 7453-05 and CSV 3476-05, Initial Decision (July 14, 2006), adopted, PTC (August 21, 2006), http://njlaw.rutgers.edu/collections/oal/; see also DeRogatis, CSV 9557-95 and PTC 4576-95, Initial Decision (September 7, 2000), adopted, Merit Sys. Bd. (October 24, 2000), http://njlaw.rutgers.edu/collections/oal/; McGorty v. Cty. of Hudson, CSV 9567-05, Initial Decision (March 14, 2006), adopted, MSB (May 12, 2006), http://njlaw.rutgers.edu/collections/oal/.

Accordingly, I **CONCLUDE** that Passaic's determination to terminate petitioner's employment for failure to complete the Academy, a sine qua non to a permanent appointment, was within the scope of its authority. But, notwithstanding Passaic's clear authority to end its relationship with Johnson, under the totality of the circumstances presented here, removal is too severe a result. The proper outcome can be found by reference to Gottlieb, where, under analogous facts, the administrative law judge acknowledged that although the matter before him was a disciplinary appeal, the appellant there had not been charged with any wrongdoing. The judge noted that "[t]he appointing authority acted only on what it perceived, correctly, to be a compulsion of law. Appellant failed to meet a threshold requirement because of injury, rather than because of a culpable act or omission." Gottlieb, 95 N.J.A.R. 2d (CSV) at 574. In its final decision, the Merit System Board determined that the "harsh consequences of a

removal which would preclude the appellant from seeking future public employment should be modified . . . [and] changed to a resignation in good standing." Id. at 575.

Here too, I **CONCLUDE** that "[t]he interests of all parties are better protected and a proper decision is effected by [a] change in termination status." Ibid.; see also Raymond v. Cty. of Hudson, CSV 1224-05, Initial Decision (November 7, 2005), adopted, Merit Sys. Bd. (February 9, 2006), http://njlaw.rutgers.edu/collections/oal/. I **CONCLUDE** that while Passaic's actions found full support in the law, a fairer, more equitable, result is one that will permit Johnson to pursue public employment in the future.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the action of respondent Morris County Public Safety Training Academy dismissing Johnson from the basic training course for good cause is **AFFIRMED**.

I further **ORDER** that the action of respondent Passaic County Sheriff's Department removing Johnson is **MODIFIED** to reflect a resignation in good standing.

I hereby **FILE** my initial decision with the **POLICE TRAINING COMMISSION** for consideration.

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

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **POLICE TRAINING COMMISSION** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may

subsequently render a final decision on any remaining issues and consider any specific remedies that may be within its statutory grant of authority.

Upon transmitting the record, the **POLICE TRAINING COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 1, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 1, 2018

Date Mailed to Parties: JUN 5 2018

sej

APPENDIX

WITNESSES

For petitioner/appellant:

Melissa Johnson

For respondent Morris County:

Mark Meehan

For respondent Passaic County:

None

EXHIBITS

For petitioner/appellant:

P-1 Medical records

For respondent Morris County:

R-1 Memorandum

For respondent Passaic County:

None

9-20-18

A-1

STATE OF NEW JERSEY

In the Matter of Desire Lee
New Jersey Veterans Memoral Home, Vineland, Department of Military and Veterans Affairs

CSC DKT. NO. 2018-3202
OAL DKT. NO. CSV 7906-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 7906-18

AGENCY DKT. NO. 2018-3202

IN THE MATTER OF DESIRE LEE, NEW JERSEY VETERANS MEMORIAL HOME, VINELAND, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS.

Robert C. Little, for appellant, Desire Lee, pursuant to N.J.A.C. 1:1-5.4(a)6

Susan C. Sweeney, for respondent, New Jersey Veterans Memorial Home, Vineland, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: August 28, 2018 Decided: August 31, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Desire Lee from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and
Chief ALJ

Date Received at Agency: 9.5.18

Date Mailed to Parties: 9.5.18

mph

OAL DKT. NO. CSV 7906-18

AGENCY DKT. NO. 20__

SETTLEMENT AGREEMENT

IN THE MATTER OF

Desire Lee

AND

NJ Veterans Vineland

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The ~~Final~~ final ~~PRELIM~~ Notice of Disciplinary Action dated ~~3/14/18~~ 4/24/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	4A:2-2.3(a)4	RNGS	
2.	(a)6		
3.	(a)12		
4.	4A:2-6.2(b)		
5.	(a)3		

B. The Appellant Desire Lee withdraws his/her appeal and request for a hearing, and the Respondent appointing authority NJ DMAVA agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	4A:2-2-3(a)4	Resig. GOOD Standing	
2.	(a)6		
3.	(a)12		
4.	4a:2-6.2(b)		
5.	(a)3		

OAL DKT. NO. CSV 7906-18

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of — days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: —.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of — days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: —.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: —.
4. (Strike if not applicable) The appellant agrees to a

X resignation in good standing

____ general resignation

which shall be effective 8/29/18 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

—

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority DMAVA will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Dyne Lee 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 7906-18

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/28/18
DATE

Appellant

9/28/18
DATE

Respondent DMAVA

8-28-18
DATE

ON BEHALF OF Appellant

DATE

ON BEHALF OF

OAL DKT. NO. CSV 7906-18

CERTIFICATION

I, Dusie Lee, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/29/18 Dusie Lee

DATE NAME

Messina, JoAnn

From: Sweeney, Susan
Sent: Monday, September 10, 2018 12:53 PM
To: Angiulo, Nicholas; blittle@afscmenj.org
Cc: Messina, JoAnn
Subject: RE: IMO Desire Lee - CSC Docket No. 2018-3202 - SETTLEMENT

An approved leave of absence without pay for personal reasons is fine.

Thanks,

Susan C. Sweeney, Esq.
Administrator, Office of Employee Relations
101 Eggerts Crossing Road
Lawrenceville, New Jersey 08625
(609) 530-6820

From: Angiulo, Nicholas
Sent: Monday, September 10, 2018 12:44 PM
To: Sweeney, Susan <Susan.Sweeney@dmava.nj.gov>; blittle@afscmenj.org
Cc: Messina, JoAnn <Joann.Messina@csc.nj.gov>
Subject: IMO Desire Lee - CSC Docket No. 2018-3202 - SETTLEMENT
Importance: High

Mr. Little and Ms. Sweeney:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Desire Lee from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Ms. Lee, in exchange for a rescission of her resignation not in good standing effective April 25, 2018, is agreeing to a resignation in good standing effective August 28, 2018. However, the settlement does not account for the time from the effective date of her resignation not in good standing to the effective date of her resignation in good standing. In that regard, we need to know how that time should be reflected in her official personnel record. Should it be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An email reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director

STATE OF NEW JERSEY

In the Matter of Kia Lemmon
Greystone Park Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-3733
OAL DKT. NO. CSV 9927-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 9927-18

AGENCY DKT. NO. 2018-3733

IN THE MATTER OF KIA LEMMON, DEPARTMENT OF HEALTH, GREYSTONE PARK PSYCHIATRIC HOSPITAL.

Robert C. Little, for appellant, Kia Lemmon, pursuant to N.J.A.C. 1:1-5.4(a)6

Danna Brown, for respondent, Greystone Park Psychiatric Hospital, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: August 28, 2018 Decided: August 31, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Kia Lemmon from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and Chief ALJ

Date Received at Agency: 9-5-18

Date Mailed to Parties: 9-5-18

mph

OAL DKT. NO. CSV 09927-2018 S
AGENCY DKT. NO. 2018-3733
SETTLEMENT AGREEMENT

IN THE MATTER OF

Kia Lemmon
AND

Department of Health / Greystone Park Psychiatric Hospital

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 6/8/18 is rescinded contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective	
A	1. NJAC 4A:2-2.3(a)4	Excessive Absenteeism w/o pay (4th inf)	6/8/18	(Removal)
B	2. 4:08 A4	Excessive absenteeism from work w/o pay (4th	6/8/18	
	3.			
	4.			
	5.			

B. The Appellant Kia Lemmon withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
A	1. NJAC 4A:2-2.3(a)4	Excessive Absenteeism w/o pay (2nd inf)	20 Day
B	2. 4:08 A4	Chronic or excessive absenteeism from work w/o pay (2nd inf)	

C 3. NJAC 4A:2-2.3(a)12 Other Sufficient Cause

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of 20 days based upon the above charges. Note: Employee has been out for 58 days (starting 7/9/18)

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 6/8/18 – 7/8/18 (30 days).

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Remaining days until her return to work will be recorded as a leave of absence.

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Kia Lomax 's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims. and except ODES No: 2018-50 EEOC Charge No.: 524-2018-01257 which appeal will continue pursuant to applicable law.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8.28.2018
DATE

K. [signature]
Appellant

DATE

Respondent

8-28-2018
DATE

Robert C Little IV
ON BEHALF OF APPELLANT

8/28/18
DATE

Dawn Braun
ON BEHALF OF HEALTH

CERTIFICATION

I, Kim Lemmon, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8-28-2018
DATE

NAME

STATE OF NEW JERSEY

In the Matter of Weyldon Lindsey New Jersey Veterans Memorial Home, Vineland, Department of Military and Veterans Affairs CSC DKT. NO. 2019-108 OAL DKT. NO. CSV 10439-18	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10439-18

AGENCY DKT. NO. 2019-108

IN THE MATTER OF WEYLDON LINDSEY, NEW JERSEY VETERANS MEMORIAL HOME, VINELAND, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS.

Robert C. Little, for appellant, Weyldon Lindsey, pursuant to N.J.A.C. 1:1-5.4(a)6

Susan C. Sweeney, for respondent, New Jersey Veterans Memorial Home, Vineland, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: August 28, 2018 Decided: August 31, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Weyldon Lindsey from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and
Chief ALJ

Date Received at Agency: 9.5.18

Date Mailed to Parties: 9.5.18

mph

LOCAL

OAL DKT. NO. CSV 10439-2018
AGENCY DKT. NO. 2019-108

SETTLEMENT AGREEMENT

IN THE MATTER OF

Weyloon Linosey

AND

DMAVA NJ Vets Home @ Vineland

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated Release @ end of WTP dated 7/3/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.			
2.			
3.			
4.			
5.			

B. The Appellant Weyloon Lindsey withdraws his/her appeal and request for a hearing, and the Respondent appointing authority DMAVA agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.		Resignation in good Standing effective 7/3/18	
3.			
4.			
5.			

OAL DKT. NO. CSV 10439-2018

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

__X__ resignation in good standing effective 7/3/18

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority DMAVA will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Weyloon Lindsey 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 10439-2018

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/28/2018
DATE

Appellant

8/28/18
DATE

Respondent DMAVA

DATE 8-28-18

ON BEHALF OF Appellant

DATE

ON BEHALF OF

OAL DKT. NO. CSV 10439-2018

CERTIFICATION

I, Weylon Lindsey, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/28/18
DATE

NAME

A-1

STATE OF NEW JERSEY

In the Matter of Maxine Manning
Woodbine Developmental Center
Department of Human Services

CSC DKT. NOS. 2018-678 & 2018-679
OAL DKT. NOS. CSV 13339-17 & 13342-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20th DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13339-17 and CSV 13342-17

AGENCY DKT. NO. 2018-678 and 2018-679

CONSOLIDATED

IN THE MATTER OF MAXINE MANNING, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, WOODBINE DEVELOPMENT CENTER.

William A. Nash, Esq., for Maxine Manning (Nash Law Firm, LLC, attorneys)

Nicholas Logothetis, Deputy Attorney General, for New Jersey Department of Human Services, Woodbine Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 9, 2018 Decided: August 16, 2018

BEFORE **CATHERINE A. TUOHY,** ALJ:

This matter concerns the appeal of Maxine Manning from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference that was held on August 9, 2018, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 16, 2018
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 8.22.18

Date Mailed to Parties: 8.23.18

13339

OAL DKT. NOs. CSV ~~18270~~2017S and 13342-2017S
AGENCY DKT. Nos. 2018-678 and 2018-679

J-1

IN THE MATTER OF
MAXINE MANNING

AND **SETTLEMENT AND LAST CHANCE AGREEMENT**

DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement and Last Chance Agreement, which fully disposes of all issues in controversy between them.

A. The **Final Notice of Disciplinary Action** in Agency Docket No. 2018-678 dated **August 8, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C.4A:2-2.3(a)6	Removal	2/17/17
2. N.J.A.C.4A:2-2.3(a)12	Removal	2/17/17
5. A.O. 4:08 B2.1	Removal	2/17/17
6. A.O. 4:08 B3.1	Removal	2/17/17

B. The **Final Notice of Disciplinary Action** in Agency Docket No. 2018-679 dated **August 8, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.O. 4:08 C7.1	20 Days Suspension	TBD
2. A.O. 4:08 C4.1	20 Days Suspension	TBD

C. The **Preliminary Notice of Disciplinary Action** dated **September 26, 2016** contained the following charge and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.O. 4:08 A1.2	10 Days Suspension	TBD

D. The **Preliminary Notice of Disciplinary Action** dated **September 20, 2016** contained the following charge and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.O. 4:08 B7.1	10 Days Suspension	TBD

E. The parties have agreed to the following:

1. Appellant shall be reinstated to the position of Cottage Training Technician ("CTT") at Woodbine Developmental Center, but will not be permitted to work in Cottage C-7 as directed by management.

2. The Final Notice of Disciplinary Action, dated August 8, 2017 and listed in paragraph A shall be modified as follows: six (6) months consecutive suspension without pay (time already served).

3. The 20-day suspension listed in the Final Notice of Disciplinary Action, dated August 8, 2017, in paragraph B shall be sustained (time already served).

4. The 10-day suspension listed in the Preliminary Notice of Disciplinary Action, dated September 26, 2016 and listed in paragraph C shall be sustained (time already served).

5. The Preliminary Notice of Disciplinary Action, dated September 20, 2016 and listed in paragraph D shall be modified as follows: six (6) days consecutive suspension without pay (time already served).

6. Appellant waives any and all claims for back-pay or attorney's fees from Respondent.

7. Any other days from the time of the last suspension day until reinstatement shall be recorded as Approved Leave of Absence Without Pay.

8. This settlement constitutes a final warning and last chance agreement arising from Appellant's conduct in this matter. Appellant must recognize the importance of diligence while on duty and shall be subject to discharge and/or removal by Respondent for any future conduct that results in a violation of any of the regulations, policies or procedures cited in Paragraph A of this Agreement, including any violations of Respondent's policies regarding client abuse and neglect.

9. Appellant must provide proof that she is authorized to work within the United States within 60 days of this agreement. In the event that she fails to provide such timely proof, the parties have agreed that Appellant will accept a general resignation.

10. Upon the parties' signing of this Agreement, and only after the Civil Service Commission approves this Agreement, Respondent shall begin procedures for reinstatement of Appellant.

11. After her reinstatement, Appellant shall be re-trained with regard to her job duties and responsibilities and applicable Departmental policies and procedures, including training on client abuse and neglect. Prior to her re-training, appellant will be subject to pre-employme physical exam, drug testing and fingerprinting. Upon successful completion appellant will be schedul for orientat

F. The Appellant withdraws her appeal and request for a hearing.

G. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

H. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

I. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

J. Except for the assessment of Maxine Manning's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

K. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the

Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending worker's compensation claims.

L. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

M. The parties waive the right to file exceptions and cross exceptions.

N. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/9/2018
DATE

Maxine Manning
ON BEHALF OF

8/9/2018
DATE

ON BEHALF OF

8/9/18
DATE

ON BEHALF OF

CERTIFICATION

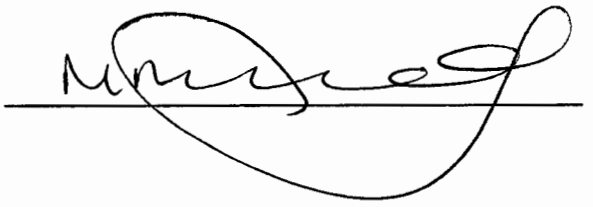
I, Maxine Manning, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/9/2018

DATE



STATE OF NEW JERSEY

In the Matter of Jose Mendez-Ordonez
Camden County, Department of Corrections

CSC DKT. NO. 2018-2042
OAL DKT. NO. CSV 1779-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 1779-18

AGENCY DKT. NO. 2018-2042

IN THE MATTER OF JOSE MENDEZ-ORDONEZ, CAMDEN COUNTY DEPARTMENT OF CORRECTIONS.

Mark A. Gulbranson, Esq., for appellant Jose Mendez-Ordonoez

Antonieta P. Rinaldi, Assistant County Counsel, for respondent Camden County Department of Corrections (Christopher A. Orlando, County Counsel)

Record Closed: August 7, 2018 Decided: August 21, 2018

BEFORE **JOSEPH LAVERY,** ALJ (Ret., on recall):

This matter concerns the appeal of Jose Mendez-Ordonez from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on February 1, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 21, 2018
DATE

JOSEPH LAVERY, ALJ (Ret., on recall)

Date Received at Agency: 8.22.18

Date Mailed to Parties: 8.23.18

mph

LOCAL

OAL DKT. NO. CSV 01779-2018-S
AGENCY DKT. NO. 2018-2042
SETTLEMENT AGREEMENT

IN THE MATTER OF

JOSE MENDEZ-ORDONEZ
Appellant
AND

Camden County Department of Corrections
Respondent

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 1-5-18 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1.		
2.		
3.	(see attached)	
4.		
5.		

B. The Appellant Jose Mendez-Ordonez withdraws his/her appeal and request for a hearing, and the Respondent appointing authority Camden County Department of Corrections agrees ~~that the following result will occur with regard to each charge:~~ to accept a voluntary resignation, in consideration of that resignation. → see attached Exhibit A

Charge	Disposition	New Penalty
1.		
2.		
3.		
4.		

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authortly to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Camden County Department of Corrections (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority CCDOC will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Jose Mendez-Orclonez's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, Camden County Department of Corrections their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age

Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 001 729 2018

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

7 Aug 2018
DATE

Appellant Jose Mendez-Ordonez

7 Aug 2018
DATE

SGT 413 SGT James R Richei 413
Respondent, CCDOC

7 AUG 2018
DATE

ON BEHALF OF Appellant
MARK GULBRANSON, ESQ.

Aug 7, 2018
DATE

Antoneta R. Ginaldi Esq
ON BEHALF OF the
Camden County Department of Corrections

OAL DKT. NO. CSV 01779-2016-S

CERTIFICATION

I, Jose Mendez-Ordonez, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7 Aug 2018
DATE

NAME

Ex A: Resignation Letter

I, Jose Mendez-Ordonez, in consideration of the promises made to me pursuant to the Settlement Agreement between me and the Camden County Dept. of Corrections, dated Aug. 7, 2018, hereby resign from my position with the Camden County Department of Corrections effective as of January 5, 2018.

To the extent there are any open matters relating to the above mentioned Settlement Agreement not otherwise addressed in Paragraph G of said Agreement, I agree to withdraw, to the extent I am able, any such open matter.

Date: 7 Aug 2018

Jose Mendez-Ordonez

STATE OF NEW JERSEY

In the Matter of Shawn Popwell
City of Vineland, Department of Municipal Utilities

CSC DKT. NO. 2018-1388
OAL DKT. NO. CSV 17565-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2018 BW

The Civil Service Commission, at its meeting of September 20, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17565-17

AGENCY DKT. NO. 2018-1388

IN THE MATTER OF SHAWN POPWELL, CITY OF VINELAND, DEPARTMENT OF MUNICIPAL UTILITIES.

David F. Watkins, Jr., Esq., for appellant Shawn Popwell (O'Brien, Belland & Bushinsky, LLC, attorney)

Michael E. Benson, Esq., for respondent Department of Municipal Utilities, City of Vineland (Buonadonna & Benson, attorney)

Record Closed: August 17, 2018 Decided: August 24, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on November 29, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 24 , 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 8-29-18

Date Mailed to Parties: 8-30-18

tat/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

J-1

OAL DKT. NO. CSV 17565-17

AGENCY DKT. NO. 2018-1388

SETTLEMENT AGREEMENT

IN THE MATTER OF

AUG 17 2018

Shawn Popwell

AND

City of Vineland, Dept. of Municipal Utilities

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 11/6/2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-2.3(a)(3)(6)(12)	Removal	3/27/2012
2. City Policy (4)(7)(12)	"	"
3.		
4.		
5.		

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: Removal.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: Ø.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. The City agrees to convert the removal to a resignation in good standing

5. The City will provide a neutral reference upon request. No other information will be provided other than job title, dates of employment and, if Mr. Popwell requests, salary history. to the extent

6. The City will cooperate with Mr. Popwell in good faith and to the extent

OAL DKT. NO. CSV 17565-17

7. Mr. Popwell agrees not to seek employment with the City in the Future.

C. The Appellant Shawn Popwell withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority City of Vineland Dept. of Mun. Utilities agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. NJAC 4A:2-2.3(2)(3)(6)(12)	withdrawn
2. City Policy (4)(7)(12)	withdrawn.
3. resignation in good standing	
4.	
5.	

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. City of Vineland - Dept. of Mun. Ut. (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority City of Vineland - Dept of Mu will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Shawn Popwell 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, City of Vineland - Dept. of Mun. Utilities, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 17565-17

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8-17-18
DATE

Appellant SHAWN POPWELL

8/17/18
DATE

Respondent Robert A. Napier
Superintendent Distribution
City of Vineland

DATE

ON BEHALF OF

DATE

ON BEHALF OF

OAL DKT. NO. CSV 17565-17

CERTIFICATION

I, SHAWN POPWELL, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8-17-18

DATE

NAME

A-1

STATE OF NEW JERSEY

In the Matter of Luis Barros City of Paterson, Department of Business Administration CSC DKT. NO. 2018-1434 OAL DKT. NO. CSV 17729-17	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 3, 2018 BW

The Civil Service Commission, at its meeting of October 3, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 17729-17
AGENCY DKT. No. 2018-1434

LUIS BARROS,

Appellant,

v.

CITY OF PATERSON, DEPARTMENT OF BUSINESS ADMINISTRATION,

Respondent.

Seth Gollin, Field Representative, AFSCME NJ Council 63, for Appellant pursuant to N.J.A.C. 1:1-5.4(a)6

Steven Glickman, Esq., for Respondent

Record Closed: September 6, 2018 Decided: September 10, 2018

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

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) where it was filed on December 1, 2017, for determination as a contested case. A telephone prehearing conference was held on December 13, 2017 and a prehearing order was issued on December 20, 2017 scheduling hearing dates for May 16 and 17, 2018. On May 16, 2018, the parties conferred during a recess and when

testimony resumed they advised the Court that they had reached a Settlement. In the meantime, the parties worked on the terms of settlement. On September 6, 2018 the undersigned received the fully executed Memorandum of Agreement of the disciplinary appeal.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Sept 10 2018
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

AFSCME
New Jersey
Council 63

Northern Regional Office
1099 Wall St West, Suite 396
Lyndhurst, NJ 07071
Phone: (201) 933-3987
Fax: (201) 933-4151

Central Regional Office
Nottingham Village Square
2653A Whitehorse-Hamilton Sq. Rd.
Hamilton, NJ 08690
Phone: (609) 586-9093
Fax: (609) 586-7499

Southern Regional Office
321 Leonard Cake Rd
P.O. Box 207
Franklinville, NJ 08322
Phone: (856) 512-2000
Fax: (856) 512-2193

Steve Tully
Executive Director

Debbie Parks
Associate Director

Ronald McMullen
President

Kevin B. Williams
Vice President

Frances Cintron
Secretary Treasurer

Linda Bethea
Recording Secretary

Executive Board:
Gerald Murray
David Griffin
Michael Jackson
Coral Dayon
Tara Myers
Lennox Peters
Shirley Suddoth-Lewis
Giennis Foiks
Lamar Lewis
Erich Sodtalbers
Matthew Gemenden
Yesenia Lopez
Ramona Thomas
Michelle Del Vecchio
Michael Messner
William Murawski
Elijah Addison

Trustees:
Edwin Perez
Ivette Sanchez
Robert Turner

2018 SEP -6 P 4:01

September 4, 2018

The Honorable John Scollo, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Luis Barros v. City of Paterson
OAL Docket No. CSV 17729-17N

2018 SEP -6

Dear Judge Scollo:

I represent Luis Barros in the above referenced matter. Please find enclosed the Memorandum of Agreement dated June 22, 2018 resolving the above referenced matter. As Mr. Barros has agreed in paragraph 7 of the enclosed Memorandum of Agreement to withdraw his disciplinary appeal under OAL Docket Number CSV 17729-17N, please process this matter as a withdrawal. Thanks for your attention to this matter.

Yours truly,

Seth Gollin
Organizer/Field Representative

encls.
cc: Luis Barros
Steven S. Glickman, Esq.

RECEIVED
2018 SEP -6 P 4:01
STATE OF NEW JERSEY

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT, made and executed this 22nd day of June, 2018, by and between the City of Paterson (hereafter referred to as the "City") and Luis Barros (hereafter "Barros"), represents the full and final understanding between the City and Barros regarding all outstanding employment issues between the City and Barros, including his disciplinary appeal, OAL Docket No. CSV 17729-2017N.

1. The City and Barros agree that the disciplinary charges brought against Barros by the City pursuant to a Preliminary Notice of Disciplinary Action dated August 2, 2017 will be withdrawn.

2. The City agrees to return Barros to active status as of June 25, 2018 as a Laborer in the Department of Public Works.

3. The City and Barros agree that the time served by Barros without pay due to his disciplinary action will be converted to a leave of absence without pay.

4. Barros agrees that for the remainder of his employment with the City he will be subject to random drug testing at the discretion of the City at any time(s) the City, at its sole discretion, deems appropriate.

5. Barros agrees and understands that if he tests positive for any controlled dangerous substance, Barros shall be entitled to an administrative disciplinary hearing regarding same. However, the **sole** issue at the administrative disciplinary hearing shall be whether the alleged misconduct occurred. If the said alleged misconduct is substantiated, Barros consents to a penalty of termination. If Barros does not request a hearing within the requisite five (5) calendar day period as set forth in N.J.A.C. 4A:2-2.5(c), after receiving notice of the adverse administrative action, Barros agrees to the imposition of termination immediately thereafter.

6. Barros agrees and understands that if another allegation of misconduct is made for any of the same reasons as expressed in the Specifications of the above-referenced Preliminary Notice of Disciplinary Action, or for any other misconduct where major discipline is recommended, Barros shall be entitled to an administrative disciplinary hearing regarding same. However, the **sole** issue at the administrative disciplinary hearing shall be whether the alleged misconduct occurred. If the said alleged misconduct is substantiated, Barros consents to a penalty of termination. If Barros does not request a hearing within the requisite five (5) calendar day period as set forth in N.J.A.C. 4A:2-2.5(c), after receiving notice of the adverse administrative

action, Barros agrees to the imposition of termination immediately thereafter.

7. Based on the above, Barros agrees to withdraw his disciplinary appeal, OAL Docket No. CSV 17729-2017N.

8A. GENERAL RELEASE

In consideration of the Agreement described above, Barros waives, releases and gives up any claim he, his heirs, executors, administrators, successors and assigns may have against the City and any of its present or past representatives, administrators, supervisors, employees, officers, directors, agents, contractors, etc., and each of their predecessors, successors and assigns, based upon any event arising out of any and all outstanding employment issues between the City and Barros, including but not limited to his disciplinary appeal, OAL Docket No. CSV 17729-2017N.

For and in consideration of the release, representations, and agreements contained above, the City releases and forever discharges Barros from any and all claims which could have been asserted by the City against Barros arising out of any and all outstanding employment issues between the City and Barros, including but not limited to his disciplinary appeal, OAL Docket No. CSV 17729-2017N.

As an inducement for the City to enter into this Agreement, Barros hereby withdraws any requests for a hearing on any and all outstanding employment issues between the City and Barros, including but not limited to his disciplinary appeal, OAL Docket No. CSV 17729-2017N.

8B. KNOWING AND VOLUNTARY WAIVER

Barros acknowledges that in the execution of this Agreement he is affecting a knowing and voluntary waiver of any claims, liabilities or causes of action against the City and any of its members of the governing body, employees, agents, successors and assigns of the City by reason of any and all outstanding employment issues between the City and Barros, including but not limited to his disciplinary appeal, OAL Docket No. CSV 17729-2017N. Barros further acknowledges that he has discussed the terms of this Agreement with his union and/or legal representatives and that any questions he may have regarding this matter have been answered to Barros's full satisfaction. Barros also hereby agrees and acknowledges that he has been fully, fairly and adequately represented in this matter.

9. This Memorandum of Agreement is not precedent setting on either party in that the Union and the employee cannot interpret and construe this Memorandum of Agreement or the terms of this

settlement as a waiver of the City of Paterson's policy and procedures, or interpret and construe this settlement as a waiver of the parties' contract and applicable labor laws. The parties and the Union agree that the terms of this Agreement are specific to the facts and circumstances of this particular action and binding only as to this matter.

10. This Agreement may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

11. This Agreement supersedes all prior agreements and understandings between the parties; it contains the full understanding of the parties with respect to this subject matter; and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement.

12. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

13. Barros acknowledges that this Agreement does not constitute and shall not be construed as an admission, violation

of any law, rule or regulation, breach of any contract or commitment of any wrongdoing whatsoever on the part of the City.

14. Should any of the provisions of this Agreement be declared or determined by a court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals the day and year first above written.

WITNESS

LUIS BARROS

AFSCME LOCAL NO. 3724

ATTEST

By:

CITY OF PATERSON

ATTEST

By:

Reviewed as to form:

Steven S. Glickman

A-2

STATE OF NEW JERSEY

In the Matter of Fatima Beatty,
Hudson County, Department of
Health and Human Services

CSC DKT. NO. 2017-3564
OAL DKT. NO. CSV 07810-17

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 5, 2018 BW

The appeal of Fatima Beatty, Omnibus Operator, Hudson County, Department of Health and Human Services, 90 working day suspension, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered his initial decision on August 24, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 3, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 90 working day suspension to a 60 working day suspension.

Since the penalty has been modified, the appellant is entitled to 30 working days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained and major discipline was

imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 90 working day suspension to a 60 working day suspension. The Commission further orders that appellant be granted 30 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07810-17
AGENCY DKT. NO. 2017-3564

IN THE MATTER OF FATIMA W. BEATTY, HUDSON COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES— MEADOWVIEW PSYCHIATRIC HOSPITAL.

Samuel B. Wenocur, Esq., for appellant Fatima W. Beatty (Oxfeld Cohen, attorneys)

Nidyara Y. Rourk,[1] Assistant County Counsel, for respondent Hudson County Department of Health and Human Services (Donato J. Battista, Hudson County Counsel, attorney)

Record Closed: June 11, 2018 Decided: August 24, 2018

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Hudson County (County) Department of Health and Human Services/Meadowview Psychiatric Hospital (Meadowview or hospital) suspended

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[1] **Georgina Giordano Pallitto**, Assistant County Counsel, appeared at the hearing.

omnibus operator Fatima Beatty for ninety working days for neglect of duty, insubordination, conduct unbecoming a public employee, misuse of public property, and other sufficient cause.

PROCEDURAL HISTORY

On or about February 28, 2017, the County served Beatty with a Preliminary Notice of Disciplinary Action (PNDA), charging her with neglect of duty (x5), incompetency and inefficiency, insubordination (x4), conduct unbecoming a public employee (x7), misuse of public property, and other sufficient cause. (C-1.) A departmental hearing was held on March 28, 2017, and the charges of neglect of duty, insubordination, conduct unbecoming a public employee, misuse of public property, and other sufficient cause were sustained. (J-1.) On or about April 4, 2017, the County served Beatty with a Final Notice of Disciplinary Action (FNDA), suspending her for ninety working days, beginning April 10, 2017, and ending August 17, 2017. (J-1.)

Beatty appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on June 2, 2017. The hearing was held on April 13, 2018, and the record remained open for post-hearing submissions. The record closed on June 11, 2018.

FACTUAL DISCUSSION

Walt Boraczek, Patricia McCarthy, and Noel Garriga testified on behalf of the County. Fatima Beatty testified on her own behalf.

Background

I **FIND** the following preliminary **FACTS** in this case:

Beatty began working as an omnibus operator (driver) for the County in 2003. She was initially assigned to the County welfare department, where she drove a bus. On June

15, 2015, she was reassigned to Meadowview, an eighty-four-bed inpatient psychiatric hospital for adults operated by the County. Beatty works Monday through Friday, from 8:30 a.m. to 4:30 p.m. Meadowview had two other drivers: Albert Gunnell, whose shift was 7:00 a.m. to 3:00 p.m., and Francis Torres, whose shift was 7:30 a.m. to 3:30 p.m. There are no drivers at Meadowview scheduled to work before 7:00 a.m. or after 4:30 p.m. Shifts are staggered because sometimes there are early-morning or late-afternoon trips or "runs," and Meadowview tries to always have a driver available. Generally, early runs were assigned to Gunnell and late runs were assigned to Beatty. Meadowview has three twelve-to-fifteen-seat passenger vans for transportation. The Meadowview emblem appears on the front and rear doors of each van. Each driver was assigned a specific van, for which the driver was responsible.

Noel Garriga has been employed at Meadowview as a maintenance supervisor for almost ten years. From November 2016 to March 2017, the transportation-department supervisor was out due to illness, so Garriga was the acting supervisor of the transportation department. Garriga's supervisor was Joanne Reilly.

The main task of the drivers is transporting patients to and from medical appointments, the Social Security office, and group homes. There are also occasions where the drivers drive patients to retail stores, but there would be an order and it would be coordinated with the transportation department. Specifically, the doctor, social-services worker, or therapist requesting transport would complete a transportation form and take it to the transportation office. Garriga would then write the trip on a white board in the transportation office and assign the trip to a specific driver, noting the driver on the white board. Meadowview policy requires that travel first be approved by the patient's psychiatrist, and that the patient be accompanied by a minimum of one hospital attendant. Drivers are not attendants.

Walt Boraczek is employed at Meadowview as a systems analyst. Patricia McCarthy has been employed at Meadowview as a principal account clerk for almost twenty years. Among her responsibilities are handling commitment papers as a liaison between the court and Meadowview.

While employed at the County welfare department, Beatty was previously suspended for three days. While employed at Meadowview, Beatty was previously suspended for twenty days for refusing to make a trip. (C-20.)

Testimony

December 27, 2016, Meadowview-Van Incident

Walt Boraczek

On December 27, 2016, while on his lunch break, Boraczek saw Beatty at around 1:00 p.m. in the parking lot of Walmart in Secaucus. As he parked his personal vehicle, he noticed a Meadowview van parked approximately ten feet away. He had an unobstructed view of the van and saw Beatty walking toward it carrying several Walmart bags. She loaded the bags into the van and drove off in the direction of Walmart. Boraczek looked for the van again as he walked toward Walmart, but he did not see it. Upon entering Walmart, Boraczek sent a text message to Garriga, asking if there was a patient trip or legitimate business purpose for the Meadowview van to be at Walmart at that time. Garriga advised that there was not, and he requested that Boraczek document what he had observed. Boraczek emailed Garriga on January 5, 2017. (C-2.)

Noel Garriga

There was no trip to Walmart assigned to Beatty on December 27, 2016. There had been no written request for such trip, and there was no such trip written on the white board. Garriga only became aware that Beatty's van was at Walmart via text from Boraczek, and he asked Boraczek to memorialize the incident in writing. Garriga spoke with Beatty later that day and asked her to tell the truth about whether she had been at Walmart with the Meadowview van. Beatty denied that she had, and asked him why he would ask her that. Garriga emailed Reilly about the incident on December 28, 2016. (C-3.) He received an email from Boraczek on January 5, 2017. (C-2.)

Fatima Beatty

Beatty went to Walmart with the Meadowview van that day as a last-minute substitute for Gunnell. She drove a client to Walmart to get some personal items because he was being discharged. Beatty, the client, and an attendant, Anthony Braxton, had gone into Walmart together. After the client purchased his items, he had to wait on a special line to purchase cigarettes. Beatty told the client and Braxton that she would put the items in the van and pull the van in front of Walmart.

Beatty had a conversation with Garriga later that day. Garriga asked if she had driven the Meadowview van to Walmart for personal use during her lunch hour. Beatty told him that she had not, and asked him why would he ask her that. She never denied going to Walmart. She only denied that she had driven to Walmart for personal use, because that was the only question Garriga had asked.

Drivers are not required to assist patients. On trips, Beatty sometimes goes inside and sometimes remains in the van. Braxton might ask her to come in to speed up the process if something needed to be picked up on the other side of the store. Beatty might also leave the van to use a restroom or something of that nature, but nine out of ten times she remains in the van.

January 9, 2017, Snow Incident

Noel Garriga

On January 9, 2017, it had snowed, and there was approximately three inches of snow on the vans. It is the responsibility of each driver to remove the snow from his or her assigned van. A snow brush is kept at the back of each van, behind the last seat. Additionally, there is a broom located in the front-entry vestibule of the hospital to reach any high areas. The vans are parked in the rear hospital parking lot at night, and each driver is responsible for moving his or her assigned van to the front of the building. Snow must be removed before the vans are moved to the front of the hospital.

Beatty came to Garriga's office and asked who was responsible for removing snow from the vans. Garriga advised her that it is the driver's responsibility, which Beatty disputed. Garriga obtained a copy of the Civil Service Commission job specification for omnibus driver and provided Beatty with a copy of it. (C-6.) Garriga also contacted Transcend, the County's separate department of drivers, to confirm that it is the driver's responsibility. Even after providing the job description to Beatty she did not remove the snow from the van. Beatty said that she did not have tools or gloves, and she walked toward the van with the patient and the attendant. Garriga told Beatty there was a broom in the vestibule, but Beatty did not make any attempt to remove the snow. The patient, the attendant, and Beatty all got into the van, and Beatty drove away with the snow on the roof and on the windshield, except for where the wipers had cleared it. The view out the front window was still partially obstructed when she drove away.

Garriga checked all three vans after the incident, and there was a snow brush in each van. Gunnell and Torres had each removed the snow from their vans before moving the vans to the front of the hospital. Torres is approximately Beatty's height, possibly a little shorter. Garriga emailed Reilly about the incident on January 9, 2017. (C-5.) Meadowview utilizes closed-circuit-television cameras, which captured this incident. (C-21.)

Fatima Beatty

Beatty had never previously worked during a snow storm and no one ever told her she would need to remove snow from the van. When she worked for the welfare department, she drove a twenty-passenger bus that was almost double the size—taller and wider—than her Meadowview van. When it snowed, maintenance personnel removed the snow from the bus. She had never previously removed snow from a County vehicle.

That day, she went into Garriga's office and asked who was responsible for removing snow from the vans. Garriga told her it was the driver's responsibility. She responded that she had never removed snow from a vehicle and did not have gloves, and she checked the van, but there were no tools, such as an ice scraper or brush, in her van.

Garriga made a call, and he also obtained a job description and gave it to her. Garriga never told Beatty to use a broom or the location of a broom. Beatty went to the van, which was preheated, turned on the windshield wipers, and left with the patient and the attendant. Beatty asked Torres how she had cleaned her van, and Torres said she used her personal equipment from her car.

January 17, 2017, Welfare-Division Incident

There was no testimony from any witness relative to this incident, and therefore it is not considered herein.

January 19, 2017, Assignment-Refusal Incident

Patricia McCarthy

On January 19, 2017, at approximately 2:00 p.m., McCarthy received a request to deliver a patient's re-commitment papers to a judge. McCarthy completed a civil-commitment order and made copies for the judge, which took approximately ten minutes. McCarthy put the paperwork into an envelope and contacted Garriga to arrange delivery. She spoke to Garriga in person, with Gunnell present, about the delivery because a new court process required that the paperwork be delivered to Superior Court in Jersey City for signature by a Superior Court judge, rather than to municipal court. Since that was the first time delivering the papers to Superior Court, McCarthy did not know how long it would take. She wrote down the names of several Superior Court judges whom the driver could ask for on arrival. Eventually Beatty showed up, and McCarthy explained to Beatty what she had already explained to Garriga and Gunnell. McCarthy handed the envelope to Beatty. McCarthy explained that she did not know whether any judges would be available to sign the papers, so the driver might have to wait. Beatty was not happy about that, and stated, "Oh, what am I going to have to wait there?" Beatty did not seem to want to go. Gunnell volunteered to deliver the papers, so Beatty handed the envelope to Gunnell, and said "Okay, good, you take them then." Beatty was not cooperative in taking the assignment. Beatty did not say that she would not take the assignment, but it seemed

to McCarthy that she was unwilling. Beatty was not yelling and did not use profanity. McCarthy prepared a written statement on February 7, 2017. (C-11.)

Noel Garriga

McCarthy requested the run at approximately 2:00 p.m. Garriga reached out to Beatty because it was a late trip. Gunnell's shift ended at 3:00 p.m., so he would have been paid overtime thereafter. When he was going over the trip with Beatty and McCarthy, it was obvious that Beatty did not want to make the run. She was verbally defiant, and was not cooperating or being a team player. Beatty said she did not want to go on a wild-goose chase. Beatty had the papers, but because she was being difficult and uncooperative, Garriga took the papers from her and assigned the trip to Gunnell. Beatty's voice was raised, but she did not say she would not do the trip or refuse to do the trip. A driver is not required to accept a run that would require work beyond his or her scheduled work hours. Overtime or comp time would be offered. Garriga wrote an email to Reilly on January 19, 2017. (C-9.)

Fatima Beatty

The assignment was to go to the judge's chambers to get re-commitment papers signed. McCarthy said she did not know which judge to go to because it was a new courthouse and new procedure. Beatty asked McCarthy what she was supposed to do when she arrived at the courthouse, or if she was supposed to just go there and stand around. McCarthy was trying to explain and Beatty was asking questions, like what floor she should go to and whom she would have to see. McCarthy told Beatty she would give her a list of judges. Beatty asked McCarthy if she was sure the judges were there, and then turned to Garriga and advised him that she gets off work at 4:30 p.m. and asked him if she would have time to get back to sign out at 4:30 p.m. so she could pick up her daughter. Her husband is not able to pick up her daughter. McCarthy was talking in a regular tone, but Garriga was getting irritated because Beatty was asking questions. Garriga got irritated and he took the packet out of Beatty's hand and gave it to Gunnell, who said he would make the trip. Beatty never said she would not do the job. She never yelled or used any obscenities.

January 20, 2017, Microwave Incident

Noel Garriga

Garriga had a microwave in the transportation office that was left by a prior supervisor. Garriga asked Gunnell to move the microwave to the locker room because it had become an excuse for non-driver employees to hang out in the transportation office. The transportation office is intended for use only by the three drivers and Garriga, and there was no reason for other employees to be in there. The next morning Garriga was advised by Gunnell that Beatty had moved the microwave back into the transportation office. Garriga wrote emails to Reilly on January 19, 2017, and January 20, 2017. (C-9; C-10.)

Fatima Beatty

Beatty was not told why the microwave was removed from the transportation office until after she brought it back. Beatty did not check with anyone before moving it back to the transportation office.

January 23, 2017, January 25, 2017, January 26, 2017, January 27, 2017, January 30, 2017, February 3, 2017, and February 21, 2017, Attendance Incidents

Noel Garriga

Timesheets are kept on a sign-in table to the right of the hospital entrance. Employees sign in and out for the day and for lunch breaks on the timesheets. At the end of each two-week pay period, Garriga reviews the timesheets and signs off on them. Garriga also notes and initials any exceptions and overtime. Beatty's Bi-Weekly Attendance Sheet reflects that on January 23, 2017, January 25, 2017, and January 26, 2017, she signed out for lunch at 3:30 p.m., and signed in from lunch at 4:30 p.m. However, Beatty left at 3:15 p.m. on January 23, 2017, as observed on the video cameras, and at 3:30 p.m. on January 25, 2017, and January 26, 2017, and never returned

thereafter on any of those days to sign in from lunch or out for the day. (C-12.) On January 23, 2017, Garriga emailed Reilly and advised that Beatty left at 3:15 p.m. without approval when her shift was to end at 4:30 p.m. (C-13.) On January 27, 2017, the timesheet reflects that Beatty signed out for lunch at 3:30 p.m., signed in from lunch at 4:30 p.m., and signed out for the day at 4:30 p.m., but the exceptions reflect Garriga's note that Beatty was approved to do so on that day because she had not been able to take a lunch due to a work trip. Sometimes a trip causes a driver to miss lunch, so the driver contacts Garriga to seek approval, which Garriga would grant, though he does not always physically sign the book after they call in. However, Garriga noted the January 27, 2017, approval on the timesheet that same day, so Beatty would have seen the approval when she signed in on January 30, 2017.

Garriga did not recall if he spoke to Beatty about her unapproved early departures on January 23, 2017, January 25, 2017, and January 26, 2017. On January 30, 2017, Beatty signed out for lunch at 12:30 p.m., signed in from lunch at 1:00 p.m., and signed out for the day at 4:00 p.m. However, cutting her lunch in half and leaving half an hour early was not approved by Garriga. On February 3, 2017, Beatty signed out for lunch at 2:30 p.m., signed in from lunch at 3:30 p.m., and signed out for the day at 3:30 p.m. Leaving an hour early was not approved by Garriga.

Beatty's Bi-Weekly Attendance Sheet reflects that on February 21, 2017, Beatty wrote "no lunch" and "no breaks" and signed out at 4:00 p.m. (C-14.) Garriga noted and initialed in the exceptions that this was not approved. Drivers are supposed to call on their County-issued cell phone if they are going to work through lunch. Not taking a lunch and signing out early or taking lunch at the end of the day must be approved by a supervisor. It defeats the purpose of the staggered schedule to not have a driver on duty after 3:30 p.m. Garriga addressed the early departures with Beatty. Signing in and out for lunch and out for the day at the same time is a falsification of the time sheet. The driver is expected to return to sign out, even if lunch is taken the last hour of the day.

Fatima Beatty

She completed her time sheets. Her understanding of when she was supposed to take lunch was that if she was inside the building without any specific runs, drop-offs, or pickups, she was to take lunch between 11:00 a.m. and 2:00 p.m. Meadowview provides a free lunch for everybody from 11:00 a.m. to approximately 2:00 p.m. Once lunch is over, the cafeteria closes. If out on a trip during lunch, it has been past practice that the driver gets lunch on the back end of the day, or the driver could request in writing an hour of comp time.

Beatty either called Garriga or went to his office on January 23, 25, and 26 to request approval to take lunch late because she had no lunch and no breaks, and Garriga approved the requests. She did not see Garriga sign the exceptions on January 27, and he did not speak to her that week or the following about her having taken lunch at 3:30 on January 23, 25, and 26. No one spoke to her about signing out prior to the time listed.

At the end of the day, she usually signs out at 4:15 or 4:30, but does not actually leave the premises. It takes five to ten minutes for her to walk out, drive her van to the rear of the hospital, clean any garbage out of the van, and mark her mileage. Past practice for all drivers was to sign out first and then do final van checks.

January 27, 2017, Uniform Incident

The County provides the drivers with a uniform consisting of a light-blue shirt, dark-blue pants, and a jacket. The shirt and jacket both have the County logo on them. It is required that the uniform be worn daily. Beatty was provided with uniforms—five shirts, five pants, and one jacket. It was an ongoing problem that Beatty did not report to work in uniform. Garriga emailed Reilly on January 27, 2017, about Beatty not wearing a uniform or any clothing identifying her as a County employee. It is important that drivers wear the uniforms to easily identify them, especially when out with patients. For warmer months, a light windbreaker is provided.

Fatima Beatty

She received uniforms when she started. However, she was approximately seventy pounds heavier than she is now, so her uniform became too big. So she had to wear her regular clothes for the first two weeks while they ordered her new uniforms. She received the new uniforms in December, but the new pants did not fit properly. She spoke to the office clerk, but was advised that she would have to wait for new pants because orders are only placed at certain times. Beatty purchased her own navy-blue pants in the same color as the uniform. Other drivers also wore their own personal pants.

February 21, 2017, Assignment-Refusal Incident

Noel Garriga

On February 21, 2017, at approximately 3:00 p.m., he assigned Beatty a trip to Hoboken to pick up a resident from a group home, but she was defiant and refused to make the trip. There were no other drivers available. The trip was then reassigned to an aide, but the aide did not have a commercial driver license so he could not drive the van, and instead drove a sport-utility vehicle with another attendant to accompany him. Garriga wrote an email to Joanne Reilly about the incident on February 21, 2017. (C-18.) In addition to refusing the trip, Beatty signed out at 4:00 p.m. without approval.

Fatima Beatty

Before she started the job she let her interviewers know that she could not work overtime because she has a small child who must be picked up at 5:30 p.m. They advised that overtime was not mandatory. During rush hour it would have been thirty to forty-five minutes to get to Hoboken, and she would have had to pick up the patient and return to the hospital. Additionally, the time for the attendant to assist a patient to the van depends on the patient, and could take five minutes or up to twenty minutes. She did not believe she would have time to pick up her child, so she said it was late and her shift ends at 4:30 p.m. and she could not do overtime. Garriga said he would find someone else to do it and walked away. Beatty walked back to the transportation office. It was then

approximately 3:30 p.m. and she had not gotten lunch or breaks that day due to trips. She sat in the transportation office. She left at 4:00 that day. She spoke to Garriga before she left and advised that she did not get any breaks or lunch, but he just walked away from her.

Additional Findings of Fact

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

As set forth below, appellant's testimony was inconsistent with and overborne by the record, including the documentary evidence and the concise, consistent, and credible testimony of the County's witnesses.

December 27, 2016, Meadowview Van Incident

Charge:

> On December 27, 2016, [Beatty] was observed utilizing a Hudson County Vehicle not in furtherance of any work related activity. Said Hudson County van was viewed parked in the Walmart Secaucus parking lot during lunch hours. The driver, Beatty was observed approaching the parked van alone and entering the van with multiple Walmart bags. There were no patients or other MPH staff observed to be with Beatty at the time. An email was received from the MPH staff person, [Boraczek], who observed Beatty's acts. Later that day,

> supervisor [Garriga] spoke to Beatty regarding the matter. She denied using the County van to conduct personal shopping. This constitutes misuse of Hudson County public property, specifically the MPH transportation van, and is a violation of the County Standards of Conduct.

Beatty does not dispute that she was at Walmart on December 27, 2016, and now claims that it was on an assigned trip. She testified that she had never previously explained to anyone what she was doing at Walmart because she was never specifically asked if she was on a client trip, and had only been asked if she drove the van to Walmart for personal use. However, it is not probable under the circumstances that Beatty, after being questioned about the incident by her supervisor and after disciplinary charges were filed, would not simply have explained that it was an assigned work trip. Further, Beatty presented no evidence of an order or assigned trip, presented no witness, such as Braxton, to corroborate the trip, and she did not recall the client's name, physical description, or the location to which he was discharged. Beatty also testified that she typically remains in the van, and her general demeanor left the impression that she would not likely accept work outside her job description, so it is not credible that she would have been shopping with or carrying bags for a patient. In short, Beatty's testimony was not probable under the circumstances and was overborne by Garriga's testimony that she had not been assigned a trip to Walmart that day and there was no order for such trip.

I **FIND** the following **FACTS** with respect to this incident:

The County Handbook Standards of Conduct reflect that "No employee should use or allow the use of County property . . . for other than officially-approved activities." (C-4.) Beatty was aware of the prohibition on the use of County property for other than officially-approved activities. Nevertheless, on December 27, 2016, Beatty used the Meadowview van to take a personal trip to Walmart and then was not truthful about the incident with her supervisor. Beatty was not assigned a work trip to Walmart on December 27, 2016.

January 9, 2017, Snow Incident

Charge:

> On January 9, 2017, Beatty inquired with Garriga as to who is responsible for cleaning snow off the transportation van. Garriga provided her with a copy of the job description, highlighting pertinent information and reviewing her responsibilities as Omnibus Driver. Beatty disagreed, stating that she did not have tools or gloves. Garriga provided her with a broom which is used for that purpose and kept in the front lobby of the hospital. Beatty continued to refuse to remove the snow from the van assigned to her. This constitutes neglect of duty and insubordination.

Although Garriga testified that State law requires that the van windshield and roof be cleaned, the charges do not stem from any summons or adjudicated statutory violation. Nevertheless, Garriga advised Beatty that she was responsible for cleaning the snow off the van, and provided her with a copy of her job description. That Beatty was not required to clean the much larger bus she drove at the County welfare department is of no moment. Beatty's testimony that there was no snow brush and that Garriga did not tell her about the broom was overborne by Garriga's testimony to the contrary, and by the video showing that the other two drivers had cleaned their vans.

I **FIND** the following **FACTS** with respect to this incident:

Gunnell and Torres had cleaned the snow off their vans. A snow scraper/brush and broom were available to Beatty to clean the snow off the van. Beatty was advised by her supervisor that she was responsible for cleaning the snow off the van, but she refused to clean the snow off the van. The omnibus-operator definition reflects, "may also clean, service, and make minor repairs to such vehicles; does other related duties as required"; examples of work reflect, "[c]hecks, cleans, and performs minor servicing of vehicles"; and knowledge reflects, "[k]nowledge of State Motor Vehicle regulations" and "[k]nowledge of the care, maintenance, and competent/safe/efficient operation of vehicles, including cleaning, [and] lubricating . . . ." Per Beatty's job description, she is

responsible for cleaning and safe operation of the van, but she refused to clean the snow off the van.

January 19, 2017, Assignment-Refusal Incident
& January 20, 2017, Microwave Incident

Charge:

> On January 19, 2017, Garriga asked a transport worker to remove the microwave from the transportation office and place it in the locker room for all employees to have access. It became apparent that traffic into the transportation office had increased. The same afternoon, at or around 2:00 P.M., a hospital worker asked if Garriga could send a driver over to 595 County Avenue to have commitment papers signed by a judge. Garriga called Beatty and asked her to make the run and she immediately went on a rant about the microwave. Garriga explained that it was his decision to remove microwave. She denied that there is increased traffic in the office, at which point Garriga mentioned that she also hangs out by the security desk and in the kitchen dining area, all of which she denied.
>
> Beatty and Garriga both then met in [McCarthy's] office. Beatty impatiently questioned McCarthy as to who she needs to see to have the papers signed because she did not want to go on a "wild goose chase," at which point Garriga grabbed the envelope back and asked another driver to make the run. McCarthy tried to explain the process to her but Beatty was less than cooperative.
>
> On January 20, 2017, the microwave needed to be removed from the Transportation Office, as Beatty had returned it despite prior direction. This constitutes neglect of duty and insubordination.

The charges reflect that Beatty "went on a rant" about the microwave being removed, and that Garriga had explained his decision to remove it to Beatty, but she disregarded his decision and moved the microwave back to the transportation office. Given the overall lack of credibility, Beatty's testimony that she did not know why the microwave had been removed was not probable under the circumstances, and one would expect that even absent an explanation she should ask her supervisor before moving a

microwave from a locker room to the transportation office. However, there was no testimony in the record about a "rant" or that Garriga had explained his decision to remove it before it was moved back to the transportation office to corroborate the hearsay in the charges and Garriga's email to Reilly about the incident.

Additionally, while Beatty may have seemed unwilling and obviously did not want to make the trip, neither Garriga nor McCarthy testified that Beatty had actually refused to accept the assignment, and not being a "team player" does not amount to assignment refusal.

I **FIND** the following **FACTS** with respect to the assignment-refusal incident:

A driver is not required to accept a run that would require work beyond his or her scheduled work hours.[2] Beatty did not refuse to take the trip. Beatty did not use profanity or yell.

January 23, 2017, January 25, 2017, January 26, 2017, January 27, 2017, January 30, 2017, February 3, 2017, and February 21, 2017, Attendance Incidents

Charge:

> On Monday, January 23, 2017, Beatty left MPH early, at 3:15 P.M., without prior approval from her supervisor. Her work schedule is Monday through Friday, 8:30 A.M. to 4:30 P.M. Beatty signed out of work at 3:30 P.M., but is viewed on the surveillance leaving at 3:15 P.M. She wrote on her timesheet that she took her lunch break from 3:30 P.M. to 4:30 P.M. This is not her assigned lunch period, nor did she receive permission to change her lunchbreak to the end of her shift, creating an early dismissal. Beatty repeated the same unauthorized alteration of her schedule on January 25, January 26, January 27, January 30, February 3, and February 21, 2017. This is a violation of MPH and County Policy on Standards of Conduct: Attendance and Punctuality. Thus, constitutes falsification of time sheets, theft of services and neglect of duty.

[2] It was not established whether the trip would have required that Beatty work beyond 4:30 p.m.

It is evident that Beatty was signing out for lunch at 3:30 p.m. and not returning to the hospital at 4:30 p.m. to sign in from lunch and out from work. Garriga credibly testified that not taking a lunch and signing out early or taking lunch at the end of the day would have to be approved by a supervisor, and it only stands to reason that Beatty would not be permitted to take her lunch and leave for the day at 3:30 p.m. without approval because she is the only driver on shift after 3:30 p.m. Beatty's testimony that she had spoken to Garriga and obtained permission to leave early or take her lunches at the end of the day was not credible and was overborne by Garriga's credible testimony to the contrary.

I **FIND** the following **FACTS** with respect to these incidents:

The County Handbook reflects under Attendance & Punctuality: Employees must sign their own time sheets or punch their own time cards upon arrival to and departure from work. Employees who falsify time records or who sign a time sheet or punch a time card for another employee are subject to discipline, including immediate termination. (C-15.) Beatty did not speak to Garriga or obtain permission to leave early, or to skip lunch and leave early on any of the dates not noted as approved.

January 27, 2017, Uniform Incident

Charge:

> On January 27, 2017, Beatty reported to work not wearing the County provided uniform. This constitutes violation of MPH Policy HR-010, neglect of duty, and insubordination.

Notwithstanding Beatty's alleged issue with the uniform pants, Garriga testified, consistent with his January 27, 2017, email to Reilly, that contrary to Meadowview policy, Beatty had reported to work without a uniform identifying her as a County employee.

I **FIND** the following **FACTS** with respect to this incident:

The Meadowview Dress Code policy states: all uniforms worn by Hospital staff must be clean and in good repair, and other County staff, vendors, or students who wear a uniform or lab coat should follow their Departmental guidelines. The County Handbook Dress Code reflects:

> Employees should present themselves in a neat, orderly, business-like manner and dress appropriately for the work performed. Employees assigned to offices must dress in appropriate business attire. Uniforms must be worn by employees when required.

The drivers have a uniform consisting of a light-blue shirt, dark-blue pants, and a jacket. The shirt and jacket have the County emblem on them, but the pants do not. On January 27, 2017, Beatty reported to work not wearing a uniform or any article of clothing identifying her as a County employee.

February 21, 2017, Assignment-Refusal Incident

Charge:

> On February 21, 2017, Beatty refused an assignment to pick up a patient in Hoboken at 3:00 P.M. As such, a social service aid[e] was sent on the run with the hospital Jeep. Beatty again left for the day at 4:00 P.M. without approval to leave early. This constitutes neglect of duty and insubordination.

If the trip was being assigned to Beatty at 3:00 p.m., it is evident that she was not on a trip and therefore could have taken her lunch prior. Further, her testimony that she had advised Garriga that she had not taken her lunch was not credible, as she then could have taken her lunch from 3:00 p.m. until 4:00 p.m. or 3:30 p.m. until 4:30 p.m., but did not. Further supporting that her testimony was not credible is that she left at 4:00 p.m. If she had not taken a lunch as she testified and finished her meeting about the trip at 3:30 p.m. as she testified, then she would have left at 3:30 p.m. for an hour lunch, but instead left at 4:00 p.m. Had Beatty left at 4:30 p.m., her testimony about not working overtime may have been more plausible. Additionally, 3:00 p.m. was not rush hour, and given the geographic proximity between Secaucus and Hoboken, Beatty should have had more

than sufficient time to return by 4:30 p.m. Given that she signed out at 4:00 p.m., it appears that she intended to leave early and therefore refused the trip.

I **FIND** the following **FACTS** with respect to this incident:

Beatty left work early without approval from Garriga. Beatty refused to make a trip to Hoboken to pick up a patient, requiring that the hospital send an aide without a commercial driver license in an SUV to make the trip.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the executive branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including incompetency, inefficiency or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty, misuse of public property, and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(1), (2), (6), (7), (8), and (12).

In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Beatty was suspended for ninety working days for insubordination, conduct unbecoming a public employee, neglect of duty, misuse of public property, and

other sufficient cause. The burden of proof is on the County to prove the charges by a preponderance of the credible evidence.

N.J.A.C. 4A:2-2.3(a)(2) does not define insubordination. Black's Law Dictionary 919 (10th ed. 2014) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Likewise, N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

An employee may be subject to discipline for misuse of public property. Beatty utilized the Meadowview van on a solo personal trip to Walmart. Accordingly, I **CONCLUDE** that Beatty's use of the van for a personal trip was a misuse of public property, conduct unbecoming a public employee, and a violation of the standards of conduct in the County Handbook.

Beatty's supervisor provided her with a copy of her job description and advised that it was Beatty's responsibility to remove snow from the van. Snow-removal tools were available to Beatty, but she failed and refused to remove the snow from the van. Accordingly, I **CONCLUDE** that Beatty was insubordinate and neglected her duty.

With respect to the microwave, the testimony at the hearing did not entirely corroborate the charges. Thus, while entirely possible that Beatty was advised by her supervisor that the microwave was removed from the transportation office at his direction, and contrary to his decision she moved it back, I **CONCLUDE** that the evidence adduced at the hearing falls short of establishing insubordination. With respect to the January 19, 2017, trip, while there is little doubt that Beatty likely had a bad attitude about having to make the trip, she did not refuse to make the trip, and I **CONCLUDE** that the evidence

adduced at the hearing fell short of establishing that she had been insubordinate or neglected her duty.

It was evident that Beatty was signing in and out for lunch and out of work at the same time, essentially leaving work an hour early. While she is entitled to a lunch hour, she is the only driver on duty after 3:30 p.m., and taking her lunch and leaving for the day required approval that she did not obtain. Thus, I **CONCLUDE** that Beatty's taking lunch at the end of the day and/or leaving work early, without approval, constitutes neglect of duty. Further, Beatty left work at 2:30 p.m. on February 3, 2017. The timesheet reflects that she took lunch from 2:30 p.m. to 3:30 p.m., thus she left work an hour early without approval. Likewise, on February 21, 2017, Beatty left work half an hour early, and her assertion that it was because she did not take lunch that day was unsupported by the evidence. Thus, there were occasions on which she simply left work early and failed to work her full shift, which I **CONCLUDE** constitute neglect of duty and conduct unbecoming a public employee.

On January 27, 2017, Beatty reported to work not in uniform as required, which I **CONCLUDE** was a violation of Meadowview policy and constituted neglect of duty and insubordination.

On February 21, 2017, Beatty left work early without approval and failed to work her full shift. Accordingly, I **CONCLUDE** that this constituted neglect of duty and conduct unbecoming a public employee. Additionally, I **CONCLUDE** that her refusal to make the trip to Hoboken constituted insubordination, neglect of duty, and conduct unbecoming a public employee.

As more specifically set forth above, I **CONCLUDE** that the charges of neglect of duty, insubordination, conduct unbecoming a public employee, misuse of public property, and other sufficient cause are sustained. The penalty imposed by the County was a ninety-working-day suspension. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38

N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations, and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated.

In view of Beatty's numerous instances of misconduct, as well as her disciplinary history, most recently a twenty-day suspension, I **CONCLUDE** that a sixty-working-day suspension is an appropriate penalty in this matter.

ORDER

I **ORDER** that the charges of neglect of duty, insubordination, conduct unbecoming a public employee, misuse of public property, and other sufficient cause are sustained. I further **ORDER** that the penalty of a ninety-working-day suspension is **MODIFIED** to sixty working days, and that Beatty be awarded back pay in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10 if she has already served any period of the suspension.

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

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

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

August 24, 2018
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: August 24, 2018

Date Mailed to Parties:

mm

APPENDIX

WITNESSES

For Appellant:

Fatima Beatty

For Respondent:

Walt Boraczek
Patricia McCarthy
Noel Garriga

EXHIBITS IN EVIDENCE

Joint:

J-1 FNDA (without attachments)

For Appellant:

None

For Respondent:

C-1 PNDA
C-2 Email, dated January 5, 2017
C-3 Email, dated December 28, 2016
C-4 Standards of Conduct Excerpt
C-5 Email, dated January 9, 2017
C-6 Job Specification—Omnibus Operator
C-7 (Not in evidence)
C-8 (Not in evidence)
C-9 Email, dated January 19, 2017
C-10 Email, dated January 20, 2017

C-11 Written Statement of Patricia McCarthy, dated February 7, 2017

C-12 Bi-Weekly Attendance sheet (01/21/2017–02/03/17)

C-13 Email, dated January 23, 2017

C-14 Bi-Weekly Attendance sheet (02/18/2017–03/03/17)

C-15 Handbook Excerpt

C-16 Email, dated January 27, 2017

C-17 Dress Code Policy

C-18 Email, dated February 21, 2017

C-19 (Not in evidence)

C-20 Employee Profile

C-21 Video (DVD)

A-1

STATE OF NEW JERSEY

In the Matter of Tia Bragg
Vineland Developmental Center,
Department of Human Services

CSC DKT. NO. 2018-2103
OAL DKT. NO. CSV 8195-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 3, 2018 BW

The Civil Service Commission, at its meeting of October 3, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 8195-18

AGENCY DKT. NO. 2018-2103

IN THE MATTER OF TIA BRAGG,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Robert C. Little, for appellant, Tia Bragg, pursuant to N.J.A.C. 1:1-5.4(a)6

Bernadette Musiwa, for respondent, Vineland Developmental Center, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: August 30, 2018 Decided: August 31, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Tia Bragg from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and Chief ALJ

Date Received at Agency: 9.5.18

Date Mailed to Parties:

mph

OAL DKT. NO. CSV 8195-2018
AGENCY DKT. NO. 20 – 2018-2103

SETTLEMENT AGREEMENT

IN THE MATTER OF

Tia Bragg

AND

Vineland Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 11/28/17 contained the following charges and proposed discipline:

	Charge AO:408,	Discipline	Dates Effective
1.	E.1.4		
2.	C.9.4		
3.	B.2.3	Removal	9/11/07
4.	C.7.2		
5.	NJAC 4A:2-2.3(a) 7,6,12		

B. The Appellant Tia Bragg withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	All above	Sustained.	6 mos. suspension
2.			recorded as time served beginning
3.			9/11/17

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 9/11/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Dept. of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Tia Black 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges that as a subordinate she must yield to supervisory direction speaking in a respectful and calm manner and shall not talk back to a supervison.

J. Appellant shall attend training sessions that management may schedule to address her behavior.

K. Appellant acknowledges that management will seek her immediate suspension and removal for any further incident involving misuse of cell phone, insubordination, neglect of duty, and conduct unbecoming a public employee.

L. Appellant will be required to sign again for VDC's policies regarding general conduct while on duty and cell phone usage.

M. Appellant withdraws
The following three major suspensions pending at OAL, are no longer appealable and are sustained: 1) FNDA dated 3/2/17 - 10 days susp; 2) FNDA dated 3/2/17 - 15 days suspension; 3) FNDA dated 3/2/17 - 35 days suspension > OAL DOCKET NO. CSV 05433-2017, Agency Docket No. 2017-2924. Suspension recorded as time served following 6 months suspension.

N. All pending grievances at VDC are withdrawn that were filed by Appellant.

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

Aug 30, 2018
DATE

Appellant

8/30/18
DATE

Respondent

8-30-18
DATE

ON BEHALF OF APPELLANT

8/30/18
DATE

Bernadette M Musiwa, ERC
ON BEHALF OF Vineland Dev. Center

OAL DKT. NO. CSV 8195-2018

CERTIFICATION

I, Tia Bragg, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Aug 30 2018
DATE

NAME

A-1

STATE OF NEW JERSEY

In the Matter of Noel Lamboy
Department of Education

CSC DKT. NO. 2017-3765
OAL DKT. NO. CSV 08219-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 3, 2018 BW

The Civil Service Commission, at its meeting of October 3, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 08219-17

AGENCY DKT. NO. 2017-3765

IN THE MATTER OF NOEL LAMBOY,
DEPARTMENT OF EDUCATION.

William A. Nash, Esq., for appellant Noel Lamboy (Nash Law Firm, LLC, attorney)

Kimberly Smith, Employee Relations Coordinator, for respondent Department of Education, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: August 27, 2018 Decided: August 31, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on June 12, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018 _____
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 9-6-18

Date Mailed to Parties: 9-7-18

tat/

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

D-1

Noel Lamboy, Appellant)
OAL Docket No. CSV 08219-2017S)
v.)
) SETTLEMENT AGREEMENT
Department of Education)
Respondent
)

2018 AUG 27 A 8:55

The parties hereto agree to settle this matter in accordance with the following terms:

1. As the appellant, Noel Lamboy, has not been employed with the Department of Education since December 31, 2017, and status with the employer is resigned in good standing, therefore rendering this matter moot, the appellant, Noel Lamboy, will withdraw his appeal of the Final Notice of Disciplinary Action dated May 8, 2017, and the Department of Education agrees to withdraw the disciplinary charges contained therein.

2. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

Authorization has been given by the Department to agree to this settlement and the parties have read this settlement agreement, and freely and voluntarily agree to its provisions.

8/27/18
For the Appointing Authority (Date)

8/9/18
Appellant Noel H. Lamboy (Date)

8/27/18
Appellant's Representative (Date)

CERTIFICATION

I, Noel Lamboy, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey, Department of Education.

8/9/18

Appellant Signature Noel H. Lamboy(Date)

2018 AUG 27 A 9:57

(Copy)

J-1

Noel Lamboy, Appellant)
OAL Docket No. CSV 08219-2017S)
v.)
) SETTLEMENT AGREEMENT
Department of Education)
Respondent
)

2018 AUG 27 A 9:55
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

The parties hereto agree to settle this matter in accordance with the following terms:

1. As the appellant, Noel Lamboy, has not been employed with the Department of Education since December 31, 2017, and status with the employer is resigned in good standing, therefore rendering this matter moot, the appellant, Noel Lamboy, will withdraw his appeal of the Final Notice of Disciplinary Action dated May 8, 2017, and the Department of Education agrees to withdraw the disciplinary charges contained therein.

2. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

Authorization has been given by the Department to agree to this settlement and the parties have read this settlement agreement, and freely and voluntarily agree to its provisions.

8/27/18
For the Appointing Authority (Date)

8/9/18
Appellant Noel H. Lamboy (Date)

8/27/18
Appellant's Representative (Date)

CERTIFICATION

I, Noel Lamboy, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey, Department of Education.

8/9/18

Appellant Signature Noel H. Lamboy(Date)

2018 AUG 27 A 9:57
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

STATE OF NEW JERSEY

In the Matter of Rajheher Massenburg
City of East Orange

CSC DKT. NO. 2018-2808
OAL DKT. NO. CSR 07312-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 3, 2018 BW

The Civil Service Commission, at its meeting of October 3, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 07312-18

AGENCY DKT. NO. N/A

IN THE MATTER OF RAJHEHER MASSENBURG, CITY OF EAST ORANGE.

Debra Masker Edwards, Esq., for appellant Rajherer Massenburg (Sciarra & Catrambone, LLC, attorneys)

Aaron Mizrahi, Assistant Corporation Counsel for respondent City of East Orange (Ryan Linder, Corporation Counsel)

Record Closed: September 13, 2018 Decided: September 13, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeal of a Final Notice of Disciplinary Action dated 1/25/18 in which the respondent, City of East Orange removed Rajheher Massenburg from his position as police officer. The appeal was filed with the Office of Administrative Law (OAL) on May 15, 2018 pursuant to N.J.S.A. 40A:14-202(d).

The matter was scheduled for a settlement conference on July 19, 2018, and during that time, the parties reached a settlement of all issues in dispute. The signed Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on September 13, 2018 and is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 13, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: September 13, 2018

Date Mailed to Parties:
sej

Exhibit A

Settlement Agreement and General Release

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[AGREEMENT FOLLOWS ON NEXT PAGE]

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made as of this 9th day of August 2018, by and between:

Rajherer Bailey (f/k/a Rajherer Massenburg), individually,
494 North Maple Avenue,
East Orange, New Jersey, 07017; and,

The City of East Orange, a Municipal Corporation,
44 City Hall Plaza,
East Orange, New Jersey, 07018,

(collectively, "Parties").

2018 SEP 13 P 2:06

Definitions

For Purposes of This Agreement the term "Bailey", as used herein throughout, shall mean and refer to Rajherer Bailey, formerly known as Rajherer Massenburg individually, as well as her agents, attorneys, representatives and all of their respective heirs, representatives, successors and assigns; and,

For Purposes of This Agreement the term "City", as used herein throughout, shall collectively mean and refer to the City of East Orange, its present or former, direct or indirect affiliates, departments, boards, authorities, commissions, officers (elected or appointed), agents, administrators, insurers, attorneys, representatives, past and present employees and all of their respective heirs, representatives, successors and assigns; and,

For Purposes of This Agreement the term "Commission", as used herein throughout, shall mean and refer to the New Jersey Civil Service Commission; and,

For Purposes of This Agreement the term "OAL", as used herein throughout, shall mean and refer to the New Jersey Office of Administrative Law; and,

For Purposes of This Agreement the term "Appeal", as used herein throughout, shall mean and refer the administrative action entitled *In the Matter of Rajherer Massenburg and City of East Orange*, filed with the Commission and subsequently referred to the OAL under Docket No. CSR 07312-2018; and,

For Purposes of This Agreement the term "Notice of Claim", as used herein throughout, shall mean and refer to the Notice of Claim submitted to the City by Bailey on or about September 16, 2016, as well as all affirmative claims that are or were asserted therein by Bailey against the City.

Recitals

Whereas Bailey was employed by the City as a Police Officer, in its Department of Public Safety, Police Division ("EOPD") between May 19, 2003, and January 23, 2018; and,

Whereas Bailey was indicted by an Essex County Grand Jury on October 22, 2014, on charges of second-degree Official Misconduct, under *N.J.S.A.* 2C:30-2(b), and second-degree Conspiracy, under *N.J.S.A.* 2C:30-2 (collectively, "Criminal Charges"); and

Whereas the City issued a Preliminary Notice of Disciplinary Action to Baily, dated October 23, 2014 ("2014 PNDA"), suspending her from her employment, without pay, effective October 23, 2014, and recommending that she be suspended from her employment indefinitely pending disposition of the Criminal Charges based on actions involving a criminal matter under *N.J.A.C.* 4A:2-2.3(a)(7) ("2014 Disciplinary Charge"); and

Whereas Bailey did not request a departmental hearing on the 2014 PNDA and the 2014 Disciplinary Charge; and

Whereas the City issued a Final Notice of Disciplinary Action to Bailey, dated June 19, 2015 ("2015 FNDA"), sustaining the 2014 Disciplinary Charge and imposing an indefinite suspension pending disposition of the Criminal Charges; and

Whereas Bailey was acquitted of the Criminal Charges on June 30, 2016; and

Whereas the City issued an Amended Final Notice of Disciplinary Action to Bailey, dated July 26, 2016 ("2016 Amended FNDA"), modifying the 2015 FNDA to include a suspension of 618 working days, from October 23, 2014, through June 30, 2016; and,

Whereas the City placed Bailey on paid administrative leave, effective July 1, 2016, pending disposition of an administrative investigation by the EOPD's Professional Standards Unit; and,

Whereas the City issued a Preliminary Notice of Disciplinary Action to Bailey, dated August 4, 2016 ("2016 PNDA"), charging her with violating EOPD Rules & Regulations, § 3:1.1, and recommending that Bailey be either suspended for 180 working days or permanently removed as a police officer based on sufficient cause under *N.J.A.C.* 4A:2-2.3(a)(12); and,

Whereas the City issued an Amended Preliminary Notice of Disciplinary Action to Bailey, dated August 15, 2016 ("2016 Amended PNDA"), modifying the 2016 PNDA to charge Bailey with violating EOPD Rules & Regulations, §§ 3:1.1, 3:1.5(c), 3:1.5(d), 3:1.6, 3:1.7 and 3:1.8, and further modified the proposed discipline to reflect the City's recommendation that Bailey be either suspended for 180 working days or permanently removed as a police officer based on conduct unbecoming a public employee under *N.J.A.C.* 4A:2-2.3(a)(6); and,

Whereas the City issued a Second Amended Preliminary Notice of Disciplinary Action to Bailey, dated August 19, 2016 ("2016 Second Amended PNDA"), modifying the 2016 Amended PNDA to charge Bailey with violating EOPD Rules & Regulations, §§ 3:1.1, 3:1.5(b), 3:1.5(c), 3:1.5(d), 3:1.5(e), 3:1.6, 3:1.7 and 3:1.8, and maintaining the City's recommendation that Bailey be either suspended for 180 working days or permanently removed as a police officer based on conduct unbecoming a public employee under *N.J.A.C.* 4A:2-2.3(a)(6) (collectively, "2016 Disciplinary Charges"); and,

Whereas Bailey filed the Notice of Claim with the City on or about September 16, 2016, alleging that the City and the EOPD engaged in negligent and/or wrongful acts relating to the Criminal Charges and adverse employment actions taken against her, including without limitation, acts of: discrimination; retaliation; negligent and gross negligent investigation; intentional false reporting and testimony; abuse of process; malicious prosecution; defamation; slander; unlawful interference of contract; and, wrongful suspension and disciplinary charges (collectively, "Alleged Torts"); and,

Whereas to date, Bailey has not commenced any formal litigation against the City and/or the EOPD based on the Alleged Torts; and,

Whereas a departmental hearing was held on the 2016 Second Amended PNDA and the 2016 Disciplinary Charges over 3 days--November 14, 2016, December 14, 2016, and September 29, 2017; and,

Whereas the Hearing Officer issued an initial decision on January 16, 2018, recommending that the City suspend Bailey for 180 working days and withhold back pay for the entire period of her suspension under the 2016 Amended FNDA; and

Whereas the City rejected the Hearing Officer's recommendation and issued a Final Notice of Disciplinary Action to Bailey, dated January 26, 2018 ("2018 FNDA"), sustaining the 2016 Disciplinary Charge and permanently removing Bailey from her position as a Police Officer, effective January 23, 2018; and

Whereas the City paid Bailey her regular salary and provided her with full benefits through January 23, 2018, under the collective negotiations agreement between the City and Bailey's union, East Orange Fraternal Order of Police, Lodge No. 111 ("FOP Lodge 111"); and,

Whereas Bailey filed the Appeal with the Commission, which was subsequently referred to the OAL, wherein she alleges that the City improperly removed her from her position as a Police Officer and seeks reinstatement, back pay and counsel fees; and

Whereas the City maintains that Bailey's removal was proper and that she is not entitled to back pay or counsel fees; and,

Whereas the City further alleges that Bailey's paid administrative leave effectively concluded upon issuance of the 2016 PNDA, and that Bailey wrongfully accepted payment of her regular salary and benefits ("Disgorgement Claim"); and,

Whereas the Parties, in good faith and without admitting or further alleging any wrongdoing or liability, after extensive arms-length negotiation and consultation with their respective legal counsel, reached a global resolution of the Claims, the terms of which were put on the record orally before the Honorable Elissa Mizzone Testa, A.L.J., on August 9, 2018; and,

Whereas the Parties agreed to further memorialize the terms of the global resolution in a comprehensive, formal settlement agreement and, now, enter into this Agreement to fully and finally resolve the all claims relating to the 2016 Amended FNDA, the 2018 FNDA, the Alleged Torts, the Appeal and the Disgorgement Claim that the Parties either asserted and/or could have asserted against one another in any forum.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

Now, Wherefore, in consideration of the Parties' mutual promises and covenants contained herein, and good and valuable consideration, which is hereby acknowledged, the Parties hereby agree to the terms and conditions as set forth at length herein.

Terms

1. Definitions; Recitals. The above-referenced Definitions and Recitals, in all respects, are incorporated herein by reference.

2. City Council Approval. This Agreement is subject to formal approval through adoption of a resolution by the City's governing body ("City Council") within 30 days following execution of same by Bailey. The Parties understand and acknowledge that execution of this Agreement by anyone acting on the City Council's behalf shall only be construed as confirmation that negotiation of the terms contained herein was authorized by the City Council's Subcommittee on Law and Legislation and that this Agreement is recommended for approval by the City Council, but under no circumstance shall such execution be considered effective and/or binding upon the City prior to formal approval by the City Council.

3. Consideration.

3.1. In consideration for Bailey's undertaking to be bound by this Agreement following the delivery to the City of a copy of the Agreement executed by Bailey, in addition to voluntarily withdrawal of the Notice of Claim with prejudice pursuant to Subparagraph 4.1 below, dismissing the Appeal with prejudice pursuant to Subparagraph 4.2 below, the general releases set forth in Paragraph 8 below, and Bailey's agreement to be bound by the nondisclosure and non-disparagement provisions set forth in this Agreement, the City shall make a single, lump-sum payment equal to $50,000.00 ("Settlement Payment") directly to Bailey's legal counsel, Sciarra & Catrambone LLC, and not to Bailey. The Settlement Payment shall be made in the manner set forth in Subparagraph 3.1.1 below, and shall be allocable to Bailey's legal fees, but shall not, in any way, be construed as an admission, allocation or apportionment of liability with respect to any of the Parties.

3.1.1. The Settlement Payment shall be made payable and sent to "Sciarra & Catrambone LLC" at the address set forth in Paragraph 10 below, such that it is received within 30 days after this Agreement is fully-executed. The City shall issue IRS form 1099 to Bailey and Sciarra & Catrambone LLC in connection with the Settlement Payment; however, the Parties expressly acknowledge that Bailey is not receiving any portion of the Settlement Payment.

3.1.2. Concurrent with Bailey's execution of this Agreement, her legal counsel, Sciarra & Catrambone LLC, shall provide the City with an IRS Form W-9.

3.1.3. The Parties make no representations regarding the federal or state tax consequences of the Settlement Payment. In the event any governmental bodies impose any taxes for the Settlement Payment upon Bailey, she agrees that she shall be solely responsible and liable for any such taxes and agrees to indemnify and hold the City harmless from and against any and all taxes, penalties and interest imposed and any and all expenses incurred as a result of or in connection with the payment of the Settlement Payment.

4. Withdrawal of Claims; Dismissal of Appeal.

4.1. As consideration for the Settlement Payment pursuant to Paragraph 3 above, Bailey's reinstatement pursuant to Paragraph 5 below, and in addition to the general releases set forth in Paragraph 8 below, Bailey agrees that by executing this Agreement, the Notice of Claim and the Alleged Torts shall be deemed withdrawn with prejudice.

4.2. As further consideration for the Settlement Payment pursuant to Paragraph 3 above, Bailey's reinstatement pursuant to Paragraph 5 below, and in addition to the general releases set forth in Paragraph 8 below, Bailey shall voluntarily dismiss the Appeal with prejudice. Concurrent with Bailey's execution of this Agreement, her legal counsel shall execute a Stipulation of Settlement and Dismissal, consistent with the form appended hereto as *Schedule A*, dismissing the Appeal with prejudice ("Stipulation"), and shall submit an original copy of the Stipulation, bearing a "wet ink" signature, to the City's Office of the Corporation Counsel along with the original executed copy of this Agreement.

4.2.1. The executed copy of the Stipulation shall be held in escrow by the City's Office of the Corporation Counsel until this Agreement is approved by the City Council pursuant to Paragraph 2 above and executed by the City Administrator. Within 10 days after this Agreement is fully-executed by the Parties, the Stipulation shall be filed with the OAL along with a copy of this Agreement, thereby dismissing the Appeal and all claims alleged therein, with prejudice and without costs.

4.3. Bailey certifies that she has no other charges, claims and/or complaints of any kind currently pending against the City arising out of the subject matter of the Appeal and/or the Notice of Claim, including without limitation the 2016 Amended FNDA, the 2018 FNDA and/or the Alleged Torts. Bailey further certifies that she has not assigned to any third-party any right or claim that she had, may have had or now has, and/or believes she had, may have had or now has against the City arising out of the subject matter of the Appeal or the Notice of Claim, including without limitation the 2016 Amended FNDA, the 2018 FNDA and the Alleged Torts.

4.4. As consideration for Bailey voluntarily withdrawing the Notice of Claim with prejudice pursuant to Subparagraph 4.1 above, dismissing the Appeal with prejudice pursuant to Subparagraph 4.2 above, and the general releases set forth in Paragraph 8 below, the City agrees to withdraw the Disgorgement Claim, and any other known or contemplated actions or claims against Bailey regarding the conduct related to the 2016 Disciplinary Charges, with prejudice.

4.5. As further consideration for Bailey voluntarily withdrawing the Notice of Claim with prejudice pursuant to Subparagraph 4.1 above, dismissing the Appeal with prejudice pursuant to Subparagraph 4.2 above, and the general releases set forth in Paragraph 8 below, the City agrees to dismiss the 2016 Disciplinary Charges with prejudice, and further agrees to issue an Amended Final Notice of Disciplinary Action in the proposed form appended hereto as *Schedule B* ("2018 Amended FNDA"), to reflect that none of the 2016 Disciplinary Charges are sustained and no discipline is being imposed as a result of the 2016 Disciplinary Charges.

4.5.1. Within 7 days after this Agreement is fully-executed by the Parties, the City shall file the 2018 Amended FNDA with the Commission.

4.6. The City certifies that it has no other charges, claims and/or complaints of any kind currently pending against Bailey arising out of the 2016 Amended FNDA, the 2018 FNDA and/or the Disgorgement Claim. The City further certifies that it has not assigned to any third-party any right or claim that it had, may have had or now has, and/or believes it had, may have had or now has against Bailey arising out of the 2016 Amended FNDA, the 2018 FNDA and/or the Disgorgement Claim.

5. Reinstatement; Training/Re-Training.

5.1. Within 45 days after this Agreement is fully-executed by the Parties, Bailey shall be reinstated to the City's active payroll, with the same compensation, benefits, rank, tenure and seniority that she had as of her removal on January 23, 2018, in accordance with the collective negotiations agreement between the City and the FOP Lodge 111. Upon successful completion of all training/re-training pursuant to Subparagraph 5.2 below, Bailey shall be assigned to a unit within the EOPD as determined by the Chief of Police or her designee.

5.2. Upon her reinstatement pursuant to Subparagraph 5.1 above, Bailey shall be enrolled in any training/re-training programs that may be required by the New Jersey Police Training Commission ("PTC") in accordance with the Police Training Act, *N.J.S.A.* 52:17B-66 *et seq.* and/or any other applicable statute or regulation. Said training/re-training shall be completed through a police academy approved by the PTC ("Police Academy"), and Bailey shall be enrolled in the first-available training/re-training program. Selection of the Police Academy shall be within the sole discretion of the City; however, the City agrees to make best efforts to arrange for Bailey to complete any required training/re-training at the Essex County College Police Academy.

5.2.1. The City shall bear the full cost of Bailey's training/re-training but shall not be responsible for payment or reimbursement of any other expenses associated with said training/re-training (*e.g.*, supplies, uniforms, etc.).

5.2.2. For purposes of Subparagraph 5.2, the term "first-available training/re-training program" shall mean the first training/re-training program with an open seat that is conducted by a City-selected Police Academy, where the start date falls after the date this Agreement is fully-executed and the Stipulation and 2018 Amended FNDA are filed.

5.3. Bailey acknowledges that her reinstatement pursuant to Subparagraph 5.1 above shall become permanent only upon successful completion of all training/re-training that may be required by the PTC and that, while attending said training/re-training, she shall be responsible for complying with the requirements of said training/re-training, and agrees to strictly adhere to any applicable rules, regulations and policies imposed by the Police Academy.

5.4. Bailey further acknowledges that if she is removed from any required training/re-training program by the Police Academy for any reason, and/or fails to successfully complete all training/re-training required by the PTC, she may be declared ineligible for continued employment with the City as a Police Officer by the PTC. The Parties expressly acknowledge that any action taken by the City relating to Bailey's removal from and/or failure to successfully complete any required training/re-training shall be subject to her rights to a hearing and/or appeal on such action under the Civil Service Act, *N.J.S.A.* 11A:1-1 *et seq.*, and its implementing regulations codified under *N.J.A.C.* 4A:1-1 *et seq.*; however, such action shall not serve as grounds for either of the Parties to allege a breach of this Agreement, and shall have no bearing upon the provisions set forth under Paragraphs 3 or 4 above, or the releases set forth under Paragraph 8 below.

5.5. The Parties acknowledge that if Bailey successfully completes all required training/re-training and her reinstatement pursuant to Subparagraph 5.1 above becomes permanent, she shall satisfactorily perform the duties of a Police Officer as assigned to her and shall be evaluated in the same manner as all other Police Officers in the City.

5.6. The Parties acknowledge that, by virtue of this Agreement, Bailey shall not be entitled to any special preferences and shall not be subject to retaliation by the City, either while attending the Police Academy or, if she successfully completes all required training/re-training, while serving as an employee of the City.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

6. Future Discipline.

6.1. Bailey acknowledges that she is currently facing separate charges of driving while intoxicated and related offenses in Union Township and Bloomfield Township (collectively, "Pending DWI Charges"). Bailey further acknowledges that if she is convicted of any or all of the Pending DWI Charges, her driving privileges may be suspended or revoked, and she may be subject to further disciplinary action by the City, up to and including removal.

6.2. Bailey expressly acknowledges that she is entering into this Agreement with the understanding that the City is not waiving its right to take disciplinary action based on the Pending DWI Charges and/or her conviction of any or all of the Pending DWI Charges. Bailey further agrees that any disciplinary action based on the Pending DWI Charges shall not be construed as an act of retaliation by the City.

6.3. The Parties specifically agree that any future disciplinary action by the City against Bailey, and/or any other incident(s) occurring after this Agreement is executed, shall have no bearing or effect upon the provisions set forth under Paragraphs 3 or 4 above, or the releases set forth under Paragraph 8 below.

6.4. Bailey further acknowledges that, if she fails to perform any of her obligations under this Agreement and/or breaches this Agreement in any way, the City may, in its sole discretion and in lieu of or in addition to an action to enforce the Agreement, rescind the 2018 Amended FNDA (if filed with the Commission), and reinstate the 2018 FNDA, along with the discipline imposed thereunder, without being subject to any time limitations set forth in the Civil Service Act, *N.J.S.A.* 11A:1-1 *et seq.*, its implementing regulations codified under *N.J.A.C.* 4A:1-1 *et seq.*, and/or any other applicable statutes, regulations, rules, ordinances, collective negotiations agreements or contractual provisions. If the City files an action to enforce this Agreement and Bailey is subsequently ordered by a court to perform and/or remedy the breach, the City shall reissue the 2018 Amended FNDA upon Bailey's compliance with that order.

7. Waiver of Back Pay. Bailey agrees that she is not entitled to any back pay or other compensation from the City for any period prior to her reinstatement pursuant to Subparagraph 5.1 above, including without limitation the period between October 23, 2014, and July 1, 2016, or the period subsequent to January 23, 2018, and by executing this Agreement, Bailey expressly waives any and all right and/or claim to any such back pay and other compensation.

8. General Releases.

8.1. The term "Releasees" as used throughout this Paragraph 8, shall specifically include the City and its present or former, direct or indirect affiliates, departments, boards, authorities, commissions, officers (elected or appointed), agents, administrators, insurers, attorneys, representatives, past and present employees and their respective heirs, representatives, successors and assigns.

8.2. In consideration of the promises contained in this Agreement, to which Bailey acknowledges she would not otherwise be entitled, Bailey agrees on her own behalf and on behalf of her representatives, heirs, estates, executors, administrators and assigns, and anyone claiming by, through or for her (collectively, "Releasors"), to irrevocably and unconditionally waive, release and discharge the Releasees from any and all actions, claims, counterclaims, cross-claims, third-party claims, allegations, demands, complaints, covenants, contracts, controversies, promises, judgments, obligations, duties, charges, legal/equitable/administrative causes of action, liability, lawsuits, costs, expenses, fees (including attorneys' fees, court costs, expert witness fees, etc.), damages, remedies and losses, known or unknown, which the Releasors ever had, may have had, or which were asserted or could have been asserted in any other forum as a result of any event or circumstance arising or existing prior to the date of the execution of this Agreement relating to the subject matter of the Appeal and/or the Notice of Claim, including without limitation the 2016 Amended FNDA, the 2018 FNDA and/or the Alleged Torts, and any claim or matter arising out of or relating, directly or indirectly, to any federal, state or local statute, common law, regulation, administrative decision, or municipal ordinance.

8.2.1. The claims and potential claims deemed to be released by the Releasors shall include, by way of example and not limitation: (a) any claims or causes of action in law, equity, contract, tort and/or public policy; (b) any claims or causes of action for breach of express or implied contracts, collective negotiations agreements and/or employment agreements, whether express or implied; (c) any claims or causes of action for negligence, failure to accommodate, retaliation, harassment and/or discrimination based upon, among other things, disability, handicap, sex, age and/or race; (d) any claims or causes of action for wrongful discharge, infliction of emotional distress, failure to promote, improper demotion, defamation and/or wrongful discharge; and, (e) any claims which were raised or could have been raised in the context of the Appeal.

8.2.2. The claims and potential claims deemed to be released by the Releasors shall also include, by way of example and not limitation, any claims or causes of action, whether known or unknown, unforeseen, unanticipated, unsuspected or latent, under: (a) the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 *et seq.*, as amended; (b) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended; (c) the Civil Rights Act of 1991, 42 U.S.C. §§ 1981a *et seq.*, as amended; (d) the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, as amended; (e) the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq.*, as amended; (f) the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 *et seq.*, as amended; (g) the Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881 *et seq.*, as amended; (h) the Equal Pay Act of 1963, 29 U.S.C. §§ 206 *et seq.*, as amended; (i) the

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.*, as amended; (j) the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101 *et seq.*, as amended; (k) the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001 *et seq.*, as amended; (l) the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*, as amended; (m) the National Labor Relations Act of 1935, 29 U.S.C. §§ 151 *et seq.*, as amended; (n) the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, as amended, (o) the Constitution of the United States and any amendments thereto; (p) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-12 *et seq.*, as amended; (q) the New Jersey Civil Service Act, *N.J.S.A.* 11A:1-1 *et seq.*, as amended, and its implementing regulations codified under *N.J.A.C.* 4A:1-1 *et seq.*, as amended; (r) the New Jersey Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, as amended; (s) the New Jersey Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*, as amended; (t) the New Jersey Wage Payment Law, *N.J.S.A.* 34:11-4.1 *et seq.*, as amended; (u) the New Jersey Wage Discrimination Law, *N.J.S.A.* 34:11-56.1 *et seq.* as amended; (v) the New Jersey State Wage and Hour Law, *N.J.S.A.* 34:11-56a *et seq.*, as amended; (w) the Constitution of the State of New Jersey and any amendments thereto; and, (x) any other federal, state or local statute, ordinance or regulation or common law theory, including any handbook or *qui tam* or false claim act or whistleblower laws or theories.

8.3. Bailey agrees that she will not file or cause to be filed any charge, claim or complaint of any kind against the Releasees seeking civil and/or criminal sanctions, personal recovery and/or injunctive relief based upon any facts relating to the subject matter of the Appeal and/or the Notice of Claim, including without limitation the 2016 Amended FNDA, the 2018 FNDA and/or the Alleged Torts.

8.4. Nothing in this Agreement shall prohibit Bailey from filing a charge with or participating in any investigation or proceeding against the Releasees conducted by any governmental agency relating to the 2016 Disciplinary Charges, to the extent such a prohibition is inconsistent with applicable law; however, Bailey agrees to waive her right to recover any individual or monetary damages in any charge, investigation or proceeding against the Releasees by her or anyone else on her behalf, including any governmental agency, relating to the 2016 Disciplinary Charges.

8.5. The releases and waivers contained in Subparagraphs 8.2 and 8.3 above do not apply or extend to any right that, as a matter of law, cannot be released or waived, including without limitation unemployment insurance and workers' compensation benefits. However, Bailey affirmatively represents that, while employed by the City, she did not sustain any injuries that would have been compensable under the New Jersey Workers' Compensation Law, *N.J.S.A.* 34:15-1 *et seq.*, as amended. Bailey also represents that she was paid all (nonwaived) wages due and owing to her by the City and was not denied any leave of absence accommodation by the City.

8.6. The releases contained in Subparagraphs 8.2 and 8.3 above are intended to be construed, collectively, as a full, final and general release by the Releasors of all claims against the Releasees to the broadest extent permitted by law and represent a full and final settlement of all claims as set forth in this Agreement. This means that the Releasors release all respective present and future claims that they have and/or may have had against the Releasees, including those not specifically mentioned in this Agreement; however, it is expressly acknowledged that the provisions of this Paragraph 8 shall not apply to or preclude any claims necessary to seek enforcement of the terms of this Agreement.

9. Beneficiaries of Agreement. This Agreement shall be binding on and inure to the benefit of the Parties, their respective present or former affiliates, departments, officers, directors, members, shareholders, agents, administrators, insurers, attorneys, representatives, past and present employees and all their respective heirs, representatives, successors and assigns.

10. Communications Between Parties; Notice. All communications between the Parties regarding the execution and implementation of this Agreement shall be through their respective legal counsel. Notices required or provided for hereunder shall be deemed to have been validly given upon receipt by the party to whom such notice is to be given through certified mail or other trackable means (*e.g.*, Federal Express, UPS, Lawyers Service, etc.) and electronic mail, addressed as follows:

For the City
Aaron Mizrahi, Esq.
Assistant Corporation Counsel
City of East Orange
44 City Hall Plaza
East Orange, New Jersey 07018
aaron.mizrahi@eastorange-nj.gov

For Bailey
Deborah Masker Edwards, Esq.
Sciarra & Catrambone LLC
1130 Clifton Avenue
Clifton, New Jersey 07013
dedwards@sciarralaw.com

[REMAINDER OF PAGE INTENTIONALLY BLANK]

11. Nondisclosure; Non-Disparagement.

11.1. The Parties hereby agree that this Agreement contains confidential personnel information, and shall not be subject to public disclosure unless ordered by a Court of competent jurisdiction or the New Jersey Government Records Council. Notwithstanding, the Parties acknowledge that the City is a governmental entity and, as a result, may be required under the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* ("OPRA") to disclose certain terms of this Agreement to the public upon request; however, to the extent the City is required to release this Agreement under OPRA, it shall be released in redacted form--without disclosing any confidential information.

11.2. Subject to Subparagraph 11.1 above, the Parties agree that, except as required by law, if asked, they or their respective attorneys may state that there was a dispute between the Parties that was resolved amicably but shall not disclose any details regarding this Agreement. This provision shall not limit the Parties or their respective attorneys from disclosing the terms of this Agreement where such disclosure: (a) is required by subpoena; (b) is required under an order entered by an arbitrator or court of competent jurisdiction; or (c) is necessary to implement, enforce and/or give effect to the terms of this Agreement. If either of the Parties is required to disclose the terms of this Agreement by subpoena, arbitrator or court for any reason, that party will provide the other party with written notice pursuant to Paragraph 10 above, at least 10 calendar days (including holidays) prior to making any such disclosure. If the Parties are required to file a copy this Agreement with a court or other tribunal for purposes of enforcing its terms, they shall make all efforts to do so under seal.

11.3. Except as required by Subparagraphs 11.1 and 11.2 above, the Parties agree that they shall not disclose, or cause to be disclosed, the terms of this Agreement, or the fact that this Agreement exists, except to immediate family members (*i.e.*, spouse and children), attorneys, accountants and/or tax advisors, as applicable. Each such person who is provided information regarding the terms of this Agreement shall first be required to review this Agreement and agree to abide by the limitations on disclosure.

11.4. Bailey agrees that neither she nor her respective heirs, representatives, successors and assigns will directly or indirectly, in any capacity or manner, make, express, transmit, speak, write, verbalize or otherwise communicate in any way (or cause, further, assist, solicit, encourage, support or participate in any of the foregoing), any remark, comment, message, information, declaration, communication or other statement of any kind, whether verbal, in writing, electronically transferred or otherwise, that might reasonably be construed to be derogatory or critical of, or negative toward the City its present or former, direct or indirect affiliates, departments, boards, authorities, commissions, officers (elected or appointed), agents, administrators, insurers, attorneys, representatives, past and present employees and any and all of their respective heirs, representatives, successors and assigns.

11.5. The City agrees to instruct the Chief of Police and EOPD superior officers (*i.e.*, Deputy Police Chiefs, Police Captains, Police Lieutenants and Police Sergeants) not to defame Bailey.

11.6. The Parties acknowledge that the provisions set forth in Subparagraphs 11.1 through 11.5 above are material terms of this Agreement and that, but for said provisions, the Parties would not enter into this Agreement.

12. Enforcement; Applicable Law; Choice of Forum/Venue.

12.1. The Parties acknowledge that their respective obligations under this Agreement are special to the circumstances and monetary damages may be inadequate to remedy a breach. Accordingly, except as provided in Subparagraph 6.4 above, in the event either party materially breaches any term or provision of this Agreement, the non-breaching party shall be entitled to bring an action against the breaching party for enforcement, including without limitation an action for specific performance. This entitlement shall not accrue, however, until the non-breaching party provides written notice to the breaching party in accordance with Paragraph 10 above and allows the breaching party at least 15 calendar days (including holidays) to remedy the breach.

12.2. This Agreement is made and entered into in the State of New Jersey and shall, in all respects, be interpreted, enforced and governed under the laws of this State.

12.3. The Superior Court of New Jersey, and any courts with direct appellate authority over said court, shall have exclusive jurisdiction over all disputes arising out of or relating to, directly or indirectly, the interpretation, application, alleged violation, and enforcement of any provision of this Agreement.

13. Informed Agreement.

13.1. The City expressly certifies that it is fully-informed of its rights and obligations under this Agreement, and enters into this Agreement voluntarily and without force, constraint, compulsion, coercion, intimidation, duress or hardship.

13.2. Bailey expressly certifies that: (a) she has read the Agreement in its entirety; (b) she is fully-informed of and understands the terms of the Agreement; (c) she knows that she is giving up important rights and claims, including, but not limited to, rights and claims under the constitutions, statutes, regulations and common law listed in Paragraph 8 above, and that she is giving up any such rights or claims in exchange for the Settlement Payment as set forth under Paragraph 3 above and the City's agreement to reinstate her as set forth under Paragraph 5 above; (d) she has consulted or had the opportunity to consult with her legal counsel prior to executing this Agreement; (e) she has had a reasonable amount of time to consider

the terms of this Agreement and, by executing same, she acknowledges that she has taken as much time as she deems necessary to consider the terms of this Agreement; and, (f) she executes this Agreement knowingly and voluntarily, without force, constraint, compulsion, coercion, intimidation, duress or hardship.

14. No Admission of Liability; No Past Practice. This Agreement shall not be construed, in part or in whole, as an admission of liability or wrongdoing by either party with respect to the other. Furthermore, the City's consent to the Settlement Payment and/or Bailey's reinstatement shall not be construed as establishing a past practice for purposes of any grievance, unfair practice charge or other administrative or legal action against the City by any City employee (or any labor union, on behalf of any City employee), and shall not be binding upon the City as a past practice with respect to disciplinary action against any other City employee.

15. No Prevailing Party; Legal Fees & Costs. Neither Bailey nor the City shall be deemed a prevailing party under any fee-shifting principles, and notwithstanding the Settlement Payment, they shall each be responsible for payment of their own respective legal fees and costs relating to the Appeal and negotiation of this Agreement. Furthermore, neither Bailey nor the City shall be entitled to bring any action in any forum for any legal fees and/or costs against the other, and this provision fully and finally waives and extinguishes the Parties' respective rights to recover any legal fees and/or costs from one another.

16. Headings; Construction.

16.1. The headings of the several paragraphs and subparagraphs in this Agreement are solely for the convenience of reference and shall have no further meaning, force or effect.

16.2. The language contained in this Agreement is deemed to have been negotiated and drafted collaboratively by the Parties, and no provision of this Agreement shall be interpreted (in part or in whole) in favor of or against either of the Parties as a drafter. In all cases, this Agreement shall be construed as a whole according to its objective and fair meaning.

17. Entire Agreement. This Agreement constitutes the entire agreement between the Parties regarding all aspects of the final and complete settlement of the Disciplinary Action and all other known or unknown claims by or between the Parties existing as of the Effective Date, and supersedes all prior agreements and understandings pertaining to same.

18. Modification. This Agreement shall only be amended, modified and/or amplified in a writing executed by the Parties. Oral statements by any person shall not serve to amend, modify and/or amplify the terms and provisions of this Agreement in any way.

19. Severability; Waiver. If any court of competent jurisdiction declares or determines that any provision of this Agreement is illegal, invalid or otherwise unenforceable, the validity and enforceability of the remaining provisions shall remain unaffected and the illegal, invalid or unenforceable provision shall be deemed removed from this Agreement. Furthermore, either party's failure to insist upon strict performance of any provision and/or obligation under this Agreement shall not operate as a waiver of that provision and/or obligation and shall not preclude that party from seeking enforcement of said provision and/or obligation pursuant to Paragraph 8 above at any time.

20. Signatures; Counterparts. The undersigned certify that they have full authority to enter into and bind the parties for which they are respectively signing to the terms of this Agreement. This Agreement may be executed in 1 or more counterparts, all of which together shall be considered a single document and the same, and shall become effective when 1 or more counterparts have been signed by each of the Parties. It is understood that the Parties need not sign the same counterpart.

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[SIGNATURES FOLLOW ON NEXT PAGE]

In Witness Whereof, the Parties hereto have executed this Agreement as of the date(s) below.

Witness

By: Deborah Masker Edwards, Esq.

RAJHERER BAILEY (f/k/a Rajherer Massenburg), Individually

By: Rajherer Bailey

Dated: Aug 10, 2018

Witness

By: Aaron Mizrahi, Esq.
Assistant Corporation Counsel

CITY OF EAST ORANGE

By: Solomon Steplight
City Administrator

Dated: 08/01/2018

Acknowledgement by Counsel

I hereby acknowledge that negotiation of the terms contained in this Agreement was authorized by the City Council's Subcommittee on Law and Legislation, subject to final approval by the City Council.

By: Aaron Mizrahi, Esq.
Assistant Corporation Counsel

Dated: 08/10/2018

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Schedule A

Proposed Stipulation of Settlement and Dismissal

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[PROPOSED FORM OF STIPULATION FOLLOWS ON NEXT PAGE]

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
Newark Division

2018 SEP 13 P 2:06

I/M/O RAJHERER BAILEY (f/k/a Rajherer Massenburg) AND CITY OF EAST ORANGE (Department of Public Safety, Police Division)	Civil Service Commission (Department of Personnel) OAL Docket No. CSR 07312-2018

Stipulation of Settlement and Dismissal

It Is Hereby Stipulated by and between the parties hereto, Rajherer Bailey, formerly known as Rajherer Massenburg, and the City of East Orange on behalf of its Department of Public Safety, Police Division (collectively, "Parties"), that the within action is hereby resolved on the following terms and conditions as set forth in the Settlement Agreement and General Release appended hereto as *Exhibit A*; and

It Is Further Stipulated that the within action is hereby Dismissed with Prejudice, and without costs to any of the Parties.

Aaron Mizrahi, Esq.
Assistant Corporation Counsel
aaron.mizrahi@eastorange-nj.gov
Office of the Corporation Counsel
CITY OF EAST ORANGE
Attorneys for City of East Orange
44 City Hall Plaza
East Orange, New Jersey 07018
Telephone 973.266.5170
Facsimile 862.930.7797

Dated: 9/12/2018

Deborah Masker Edwards, Esq.
dedwards@sciarralaw.com
SCIARRA & CATRAMBONE LLC
Attorneys for Rajherer Bailey
(f/k/a Rajherer Massenburg)
1130 Clifton Avenue
Clifton, New Jersey 07013
Telephone 973.242.2442
Facsimile 973.242.3118

Dated: 9.10.18

[END OF SCHEDULE A]
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Schedule B

Proposed Amended Final Notice of Disciplinary Action (DPF-31B)

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[PROPOSED FORM OF AMENDED FNDA FOLLOWS ON NEXT PAGE]

Amended Final Notice of Disciplinary Action (31-B)

Civil Service Commission - State of New Jersey

Instructions for Employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a departmental hearing (if requested) if 1 of the following types of disciplinary actions is taken: **(a)** suspension or fine for more than 5 working days at any 1 time; **(b)** suspension or fine for 5 working days or less where the aggregate number of days suspended or fined in any 1 calendar year is 15 working days or more; **(c)** the last suspension or fine where an employee receives more than 3 suspensions or fines of 5 working days or less in a calendar year; **(d)** disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; **(e)** removal; or **(f)** resignation not in good standing. If the employee does not request, or does not appear at, the departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/Phone Number	Date
City of East Orange Department of Public Safety, Police Division	15 South Munn Avenue, East Orange, NJ, 07018 (973) 266-5000	

Attorney Representing Agency (should this matter be appealed)	Attorney Address/Phone Number/Email Address
Aaron Mizrahi, Esq. Assistant Corporation Counsel, City of East Orange	44 City Hall Plaza, East Orange, NJ, 07018 (973) 266-5170; aaron.mizrahi@eastorange-nj.gov

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Rajherer Bailey (f/k/a Rajherer Massenburg) (PSP-558/PSP-390/PSU-13-226-TLW)	Police Officer	00029399

Address/Phone Number	Pension Number
494 North Maple Avenue, East Orange, NJ, 07017 (973) 673-0281	96399

On 08/19/2016 **you were served with a Preliminary Notice of Disciplinary Action and notified of the pending disciplinary action.**

☒ **You requested a hearing, which was held on** 11/14/2016, 12/14/2016 & 09/26/2017. ☐ **You did not request a hearing.**

☐ **You requested a hearing, but did not appear at the designated time and place.**

Sustained Charges:

NONE.

☐ *check if charges are continued on attached page*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

***** This Amended Final Notice of Disciplinary Action is issued in accordance with a negotiated settlement agreement between the City of East Orange and Rajherer Bailey (f/k/a Rajherer Massenburg), regarding a disciplinary appeal filed under OAL Docket No. CSR 07312-2018. *****

☐ *check if incidents are continued on attached page*

The following disciplinary action has been taken against you:

☐ Suspension for ____ working days, beginning on _____ and ending on _____.

☐ Indefinite suspension pending criminal charges, effective _____.

☐ Removal, effective _____.

☐ Demotion to position of _____, effective _____.

☐ Resignation not in good standing, effective _____. ☒ Other Disciplinary Action: NONE.

☐ Fine of _____, which is equal to ___ working days.

Appointing Authority/Authorized Agent Signature & Title

Signature _____ Title City Administrator

This form was personally served on the employee or sent by certified/registered mail:

☐ Certified/Registered Mail ☐ Receipt Number _____

☒ Signature of Server _____ ☒ Date of Personal Service _____

APPEAL PROCEDURE TO EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. **Pursuant to P.L.2010, c.26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L.1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c.256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by *N.J.S.A.* 11A:5-1 *et seq.* are exempt from this appeal fee.** Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, NJ, 08625-0312. **Any appeal postmarked after the 20-day statutory time-limit will be denied.** We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: *www.state.nj.us/csc.*

[END OF SCHEDULE B]
[REMAINDER OF PAGE INTENTIONALLY BLANK]

Angiulo, Nicholas

From: Mizrahi, Aaron <Aaron.Mizrahi@eastorange-nj.gov>
Sent: Monday, September 24, 2018 10:06 AM
To: Angiulo, Nicholas; dedwards@scairralaw.com
Cc: Messina, JoAnn
Subject: [EXTERNAL] RE: In the Matter of Rajheher Massenburg - OAL Docket No. CSR 17312-18 - SETTLEMENT

Mr. Angiulo:

It would be an approved unpaid leave. We are still working out the logistics behind a start-date, and when that information is available, it will be updated in CAMPS.

If you have any additional questions or concerns, please do not hesitate to contact me.

Regards,

Aaron Mizrahi
Assistant Corporation Counsel
Direct Extension 5472
aaron.mizrahi@eastorange-nj.com

Office of the Corporation Counsel
City of East Orange
44 City Hall Plaza
East Orange, New Jersey 07018
Telephone 973.266.5170
Facsimile 862.930.7797

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PRIVACY & CONFIDENTIALITY NOTICE: This message is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.* It may contain privileged and/or confidential information from the City of East Orange, for use by the intended recipient(s) only, and is not subject to disclosure or release under the New Jersey Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, the federal Freedom of Information Act, 5 U.S.C. §§ 552 *et seq.*, and/or any common law "right to know". If you are not an intended recipient, be advised that any review, distribution or use of the contents of this message is unauthorized and strictly prohibited. If you received this message in error, please contact the sender immediately.

IRS CIRCULAR 230 DISCLOSURE: Unless otherwise expressly approved in advance by the sender, any discussion of federal tax matters herein is not intended to and cannot be used to avoid penalties under federal tax laws or to otherwise promote, market or recommend to another party any transaction and/or tax-related matter addressed herein.

From: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Sent: Monday, September 24, 2018 10:02 AM
To: Mizrahi, Aaron <Aaron.Mizrahi@eastorange-nj.gov>; dedwards@scairralaw.com
Cc: Messina, JoAnn <Joann.Messina@csc.nj.gov>
Subject: In the Matter of Rajheher Massenburg - OAL Docket No. CSR 17312-18 - SETTLEMENT
Importance: High

Ms. Masker and Mr. Mizrahi:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Rajheher Massenburg (Bailey) from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Ms. Massenburg's removal effective January 23, 2018 is being settled to, among other things, reinstatement. However, while the settlement indicates that she will not be receiving back pay, it

does not specifically indicate how to record the time from January 23, 2018 until her actual reinstatement. Before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be specifically accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties. Please make sure you "reply to all."

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service

10-3-18

A-3

STATE OF NEW JERSEY

In the Matter of Michael Megara
Township of Riverside, Department of Public Safety

CSC DKT. NO. 2018-27
OAL DKT. NO. CSR 09622-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 5, 2018 BW

The appeal of Michael Megara, Police Officer, Township of Riverside, Department of Public Safety, removal effective June 27, 2017, on charges, was heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on August 31, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 3, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Michael Megara.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSR 09622-17
AGENCY DKT. NO. N/A
2018-27

IN THE MATTER OF MICHAEL MEGARA,
TOWNSHIP OF RIVERSIDE.

Thomas A. Cushane, Esq., for appellant, Michael Megara (Cushane Law Firm, LLC, attorney)

Armando V. Riccio, Esq., for respondent, Township of Riverside (Armando V. Riccio, LLC, attorney)

Record Closed: August 22, 2018 Decided: August 31, 2019

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Michael Megara (appellant), appeals his removal as a police officer with the Township of Riverside (respondent). Respondent terminated appellant's employment following his denial of enrollment by the Division of Pensions and Benefits (Division) into the Police and Firemen's Retirement System (PFRS) and requirement by law that participation in PFRS was required as a condition of employment.

PROCEDURAL HISTORY

The original Petition of Appeal was filed with the Civil Service Commission (CSC) on June 30, 2017.[1] The matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case where it was received on July 5, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Appellant waived the 180-day hearing requirement on August 3, 2017. Due to ongoing discovery issues, the hearing dates were set for April 11, 2018, April 18, 2018 and April 19, 2018. On February 16, 2018, respondent filed a Motion for Summary Decision. On February 26, 2018, the parties requested that the hearing dates be adjourned and the matter heard on the papers by way of Cross-Motions for Summary Decision. On April 2, 2018, appellant filed a Cross-Motion for Summary Decision. Oral Argument on the motions was held on June 21, 2018. Subsequently, appellant submitted additional documentation for consideration.[2] The record closed on August 22, 2018.

FACTUAL DISCUSSION

The following facts are not in dispute in this matter and as such I **FIND** them as **FACT**:

From December 2009 through August 2010, appellant was a Special Law Enforcement Officer (SLEO) for the City of Cape May located in Cape May County. (Certification of appellant, Exhibit B; respondent's Statement of Facts and Exhibits G, H, I and J.)

---

[1] Appellant filed an appeal with the Division; however, the Board of PFRS (Board) declined to hear the matter as appellant was not currently employed as a "policeman", therefore, there was no enrollment issue for the Board to consider. (Appellant's Brief in Support of Summary Decision, Exhibit GG.) It is appellant's position that subject to this Tribunal's determination in the instant matter, an appeal of the Board's adverse-enrollment determination is still possible.

[2] Counsel for appellant submitted a copy of a Complaint in Lieu of Prerogative Writ (Complaint) which appellant filed against the Township of Riverside and requested that judicial notice be taken of the filing. This Tribunal does not have jurisdiction over the Complaint and the basis for it are not dispositive or relevant to the issues presented in this matter. As such, the supplemental submission has not been considered in the determination of this matter.

In 2010, appellant successfully completed the Law Enforcement Examination (LEE). As of the "Closing Date" for the 2010 LEE, respondent was under the age of thirty-five. The only municipality for which appellant sought certification as a full-time police officer was Gloucester Township located in Gloucester County. At the time appellant took the LEE, he resided in Camden County. (Second Certification of appellant, ¶ 6; respondent's Statement of Facts and Exhibit M.) Under the 2010 LEE guidelines, residency codes cannot be changed after the Closing Date for acceptance of applications. (Respondent's Brief, Exhibits N, and O.)

By law, no person may be appointed as a member or officer of a police department in any municipality wherein Title 11 (Civil Service) is operative, who is over the age of thirty-five. One exception to this rule is credit for time served in certain law enforcement titles. (Respondent's Brief, Exhibits F, N, O, and P.) Notice of the age requirements is given to LEE applicants as part of the application process. The position of SLEO does not fall within one of the exceptions. (N.J.S.A. 40A:14-146.14.)

From February 2011 through April 2012, appellant was a SLEO for respondent, which is located in Burlington County.

In August 2012, a revised Certification of Eligibles for Appointment List was posted wherein appellant's rank rose to fourth on the List of Eligibles for Gloucester County. (Appellant's Reply Brief, Exhibit L.)

In April 2012 through October 2014, he was employed by the City of Beverly (Beverly) as a SLEO. Beverly is located in Burlington County.[3] (Certification of appellant, Exhibit B; respondent's Statement of Facts and Exhibits G, H, I and J.)

On February 19, 2013, an internal memorandum was sent to the Gloucester Police Department (Gloucester), Chief Harry Earle, requesting that appellant be placed back on the current Certification of Eligibles List for Appointment. (Appellant's Reply Brief, Exhibit M.)

[3] Both Beverly and respondent are jurisdictions where Title 11 is operative.

In May 2013, Beverly, on behalf of appellant, submitted an enrollment application for PFRS. (Respondent's Brief, Exhibit K – Bate Stamp 424.)

By letter dated June 4, 2013, the Division denied appellant's enrollment application as the position/title of SLEO did not fall within one of the eligible titles to qualify for the PFRS. (Respondent's brief, Exhibit K - bate stamp P426 – 429, P-466 – 467.) On June 11, 2013, Beverly passed a resolution to make appellant a "full time police officer". (Respondent's Brief, Exhibit K – bate stamp 468.) By letter dated June 24, 2013, the Division requested additional documentation from Beverly/appellant in the form of a copy of the "Certification of Eligibles For Appointment (CS-10)" and a "copy of the flyer which shows the closing date for the examination and the position for which the applicant is applying." (Second Certification of appellant, ¶ 20; respondent's Brief, Exhibit K – bate stamp 471.) This information was never produced and appellant was not enrolled in the PFRS.

By letter dated July 2, 2013, appellant requested that he be removed from Gloucester's hiring process due to having obtained a full-time position as a police officer in Beverly. (Appellant's Reply Brief, Exhibit N.)

In the fall of 2013, while employed by the City of Beverly, appellant took the LEE. As of the Closing Date of September 4, 2013, appellant was thirty-seven years and twenty-five days old. (Second Certification of appellant ¶ 20; appellant's reply brief, Exhibit O; Respondent's Brief, Exhibits A, C, and E.)

In December 2013, appellant enrolled in the Public Employees Retirement System (PERS). (Respondent's Brief, Exhibits R, S and T.)

In October 2014, respondent resigned his position as a SLEO with Beverly having accepted a position with appellant as a Municipal Police Officer from the active Civil Service list. (Certification of Meghan Jack, ¶ 2; Respondent's Brief, Exhibit W.)

On or about January 8, 2015, respondent submitted an application for enrollment into the PFRS for appellant. On this same date, the Division denied the application for a number of reasons, one of which was appellant's age at the time of enrollment and second his lack of qualifying reductions to reduce and satisfy the age requirements. (Appellant's Cross-Motion for Summary Decision, Exhibit N; Certification of Meghan Jack.)

On March 5, 2015, respondent submitted a "Report of Transfer/Multiple Enrollment Form" with the Division seeking to transfer appellant's PFRS pension from Beverly to Riverside. (Second Certification of Meghan Jack, ¶ 6 and Exhibit B.) On this same date, the Division denied the application due to appellant's age at the time of enrollment and lack of qualifying reductions to reduce and satisfy the age requirements. Additional documentation was requested to satisfy the age requirement. Without the requested information, the "application would be considered an illegal hire". (Appellant's Cross-Motion for Summary Decision, Exhibit O.)

On March 6, 2015, respondent submitted additional information for consideration by the Division. (Appellant's Cross-Motion for Summary Decision, Exhibit P.)

On April 6, 2015, the Division notified respondent that an enrollment application for PFRS was required along with an Interfund Transfer Form (if eligible). Thereafter, on May 26, 2015, the Division also requested additional documentation in the form of "a copy of the Certification of Eligible for Appointment (CS-10)" and a copy of the "flyer which shows the closing date of the examination and the position for which the applicant is applying". (Appellant's Cross-Motion for Summary Decision, Exhibits Q and R.)

On June 4, 2015, appellant submitted to the Division, an Enrollment Application for appellant into the PFRS and an application for Interfund Transfer to the Division seeking to transfer his PERS pension into the PFRS. (Appellant's Cross-Motion for Summary Decision, Exhibit R; respondent's Brief, Exhibit V.)

By letter dated January 11, 2016, the Division advised respondent that as a result of appellant having no former qualifying membership service time and due to his age, he

would be considered an "illegal hire". (Appellant's Brief in Support of Summary Decision, Exhibit U; respondent's Brief, Exhibit A.) Even after receipt of this correspondence, over the ensuing months, respondent continued to seek enrollment of appellant into the PFRS. (Appellant's Brief in Support of Summary Decision, Exhibits V – AA; First Certification of Meghan Jack.)

By letter dated March 10, 2017, the Division again advised respondent that appellant's application for admission into the PFRS was denied because appellant was overaged and did not have any qualifying reductions to reduce and satisfy the age requirements. Through this letter, respondent was reminded that enrollment in the PFRS was a condition of employment, absent which, the individual could not be hired. (Appellant's Brief in Support of Summary Decision, Exhibit BB; respondent's Brief, Exhibit C.)

On June 7, 2017, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) containing the following charges: 1) Unfit as it pertains to meeting legal requirements for the position; 2) Inability to perform job duties; and 3) Other sufficient cause. The disciplinary action sought was removal. The basis for the charges alleged *inter alia* that on January 11, 2016, the Division advised respondent that appellant was not eligible to become a member of the PFRS as he did not meet the age requirements. Based upon appellant's ongoing representation that he had been hired by Beverly from a list of "Eligibles", respondent continued to pursue enrollment in the PFRS on his behalf. On March 10, 2017, the Division reiterated its determination that appellant was overaged and therefore ineligible to enroll in the PFRS. (Appellant's Brief in Support of Summary Decision, Exhibit CC.)

On June 28, 2017, appellant was served with a Final Notice of Disciplinary Action (FNDA) wherein the sustained charges determined that appellant was: 1) Unfit as it pertains to meeting legal requirements for the position; 2) Inability to perform job duties; 3) Other sufficient cause. The disciplinary action sought was removal effective June 27, 2017. The sustained charges stated *inter alia* that on January 11, 2016, the Division advised respondent that appellant was not eligible to become a member of the PFRS as

he did not meet the age requirements. Based upon appellant's ongoing representation that he had been hired by Beverly from a "List of Eligibles", respondent continued to pursue enrollment in the PFRS on his behalf. On March 10, 2017, the Division reiterated it's determination that appellant was overaged and there ineligible to enroll in the PFRS. (Appellant's Brief in Support of Summary Decision, Exhibit DD.)

After review of the documentary evidence submitted, in addition to the findings of **FACT** above, I **FIND** as **FACT** that as early as May/June 2013, while employed with Beverly, appellant was placed on notice that as a SLEO, he would not be eligible to participate in PFRS.

I further **FIND** that appellant voluntarily removed himself from consideration for a position with Gloucester: before he took the 2013 LEE; before he received the results of the 2013 LEE; and over a year before he applied for a job with respondent.

In **FIND** that appellant was cognizant of the fact that he had already "aged-out" when he took the 2013 LEE; that he did not have qualifying time as a law enforcement officer to reduce his age; and that he was ineligible for enrollment into the PFRS and to hold the position of Municipal Police Officer.

I further **FIND** that when he resigned from Beverly, he held the position of SLEO. (Appellant's Motion for Summary Judgment, Exhibit M.) I **FIND** that respondent, appellant provided a resume indicating that he was a police officer with Beverly and credentials which identified him as a patrolman with Beverly. (Appellant's Reply Brief, Exhibit Q; Second Certification of Michael Megara ¶ 35 and 37; Second Certification of Meghan Jack, Exhibit A.)

I **FIND** that at the time of hire, respondent believed that appellant was eligible for enrollment into the PFRS based upon his prior law enforcement experience and actively sought membership on his behalf. (Appellant's Second Certification, ¶ 28; First and Second Certification of Meghan Jack.)

I **FIND** that there was no knowing and intentional misrepresentation on the part of respondent to appellant regarding the hiring process or respondent's ability to enroll respondent in the PFRS.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

In the instant matter, the sustained charges against appellant were:

1. Unfit as it pertains to meeting legal requirements for the position;
2. Inability to perform job duties
3. Other sufficient cause.

The incident giving rise to the sustained charges state in part:

> "The Township of Riverside has relied upon your representations that you met all requirements, including but not limited to prior service and age requirements imposed by law and subject to State regulations, which would enable the Township to appoint you to the Civil Service title of police officer..."

Appellant concedes that at the time he took the 2013 LEE, he was over the age of thirty-five and had no prior creditable full-time law enforcement services that would reduce his age at the time of the Closing Date for the examination. Appellant argues however, that the principal of estoppel is applicable in this matter because: 1) The Civil Service Commission permitted him to sit for the 2013 LEE and placed him on the "Certified List of Eligibles"; 2) Respondent hired him off of the civil service list despite knowing his age at the time he was hired; 3) From the date of hire to the date of termination, his employment record was impeccable; and 4) he turned down an offer of employment with Gloucester based upon assurances from respondent's representatives of that he would be hired.[4]

Respondent argues: 1) As a matter of law, appellant is over the statutory age limit and therefore is ineligible for admission into the PFRS and appointment as a Municipal Police Officer; 2) Appellant's failure to avidly pursue review by the Division renders the instant appeal "moot" as this Tribunal lacks jurisdiction to render a decision pertaining to his enrollment in PFRS; 3) Equitable estoppel is an extraordinary relief for which appellant has failed to establish each element.

New Jersey statutory law prohibits the appointment of a full-time Police Officer whose age exceeds thirty-five years. N.J.S.A. 40A:14-127. Further, all full-time Municipal Police Officers must be enrolled in PFRS, which requires that a full-time

[4] Appellant asserts that he was offered a full-time position with the Gloucester County Police Department which he turned down based upon assurances from respondent's former and current Chief(s) of Police (Chief Tursi and Chief Earle – respectively) respondent would hire him as a full-time police officer if he got on the List of Eligibles. Respondent denies that any such promise of future employment was made and that appellant's claim of both a future job offer and reliance on appellant's part is a fabrication.

at 63. The Court went on to define the "relevant public and private interests" in that case that would "inform" the Board's analysis stating:

> [The Board] should look at the equities from Sellers' point of view, considering whether the government failed to "turn square corners" with him, whether he acted in good faith and reasonably, the degree of harm he will sustain if the age requirement is strictly enforced, and other factors that go to the fairness of applying the age restriction to him after he was hired and left a previous job to take the position. The Board must then consider the purposes of the age restrictions from the perspective of the municipal firefighter position and the pension system and determine whether or to what extent those purposes will be thwarted if relief is provided to Mr. Sellers, taking into account the extent to which he fails to meet the age criteria and the overall pension scheme.
>
> Id. at 62-63.

In Petry v. Board of Trs., Police & Fireman's Ret. Sys., 2015 N.J. Super. Unpub. LEXIS 3011 the Appellate Court clarified its determination in Sellers stating:

> Despite our careful instruction, we did not compel the Board to conclude that Sellers was entitled to equitable relief. Nor did we hold that the Board is required to undertake this balancing analysis in every case where a municipality hires a police officer or firefighter whose age exceeds the statutory maximum.
>
> We stressed that the Board's equitable power is to be used "rarely and sparingly." Id. at 62. We acknowledged that granting equitable relief in such cases did not follow neatly from application of principles of equitable estoppel, because Sellers was "seeking to bind the Board, a State entity, for action taken by a municipality." Id. at 59; see also Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., 221 N.J. 349, 364-65, 113 A.3d 764 (2015) (refusing to bind school board to superintendent's representations regarding tenure eligibility, stating, "[i]n an application of estoppel the focus must be on the conduct of the person or entity who had the authority to act," which was the school board) (internal quotation marks and citation omitted).

In Juliano, a seventeen-year veteran and acting chief in a non-civil service municipality sued the municipality when she was passed over for appointment as chief. In defense, the Borough raised the argument that Juliano's original appointment should

be declared illegal as she was over the age of thirty-five when appointed by the Borough. Citing to O'Malley v. Dept. of Energy, 212 N.J. Super. 114 (App. Div. 1986), the court found that the Borough could not assert that Juliano's appointment that had occurred seventeen years prior, was defective. In determining that estoppel was a proper remedy, the court stated:

> It is a disturbing prospect that a public employer could make an innocent mistake which could jeopardize an employee's job. In certain situations the employee might have to suffer the consequences. However, when the mistake is belatedly raised by the employer only in response to the employee's suit to enforce perceived employment rights, the mistake can be unforgivable and the employee should not suffer.
>
> Juliano at 510 – 511.

Here, appellant has failed to meet the essential elements of equitable estoppel. As early as April/May 2013, he was aware that he did not have qualifying law enforcement experience to reduce his age in accordance with N.J.S.A. 40A:14-127. When he sat for the 2013 LEE, he had already aged out and knew that his experience as a SLEO could not be counted towards the prior law enforcement experience required to reduce his age. As such, he was aware, long before he was hired by respondent and when he accepted the position with respondent, that he was over-aged and did not have any qualifying time to enable membership in the PFRS.

Appellant further argues that to his detriment, he turned down a job offer with Gloucester in reliance upon a future job opportunity with respondent. Assuming arguendo that that in fact was the case, any offer of future employment with respondent was speculative at best and fraught with a number of contingencies and intervening factors which included: appellant taking the 2013 LEE and scoring high enough to get placed on the List of Eligibles; respondent having a future job opening; appellant getting recommended and hired by respondent; and appellant qualifying for membership in the PFRS. As noted above, this last factor was the biggest hurdle and one which appellant, not respondent, was well aware of before he withdrew his name from Gloucester's consideration.

With regard to appellant's argument that he detrimentally relied upon the fact that he was allowed to sit for the 2013 LEE; that he was placed on the List of Eligibles from which respondent hired him; and that respondent was aware of his age at the time of hiring yet still hired him - this too lacks merit. As noted above, appellant was fully aware at the time he sat for the 2013 LEE, that he was overaged and had no qualifying law enforcement experience to reduce his age - yet he still sat for the exam. While it is undisputed that respondent hired petitioner off of the List of Eligibles and was aware of his age at the time of hire, it is equally undisputed that respondent was operating under the mistaken belief that appellant had sufficient qualifying law enforcement experience that would reduce his age to allow enrollment into PFRS. No credible facts have been presented in this matter to substantiate the assertion that respondent knowingly and/or intentionally misrepresented to appellant that it was aware that he did not have qualifying time and/or could overcome the age and enrollment requirements under N.J.S.A. 40A:14-127 and N.J.S.A. 43:16A-3 which induced him to turn down a job offer from another jurisdiction over a year earlier.

In a disciplinary action, the burden of proof is on the appointing authority, which must prove its case by a preponderance of the believable evidence. In re Polk, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In order for evidence to meet that threshold, it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). That is to say, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re: Perrone, 5 N.J. 14, 522 (1950).

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, including inability to perform duties, N.J.A.C.

4A:2-2.3(a), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). N.J.S.A. 11A:2-6; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action and the employee's guilt by a preponderance of competent, credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson, 37 N.J. 143; Polk, 90 N.J. 550.

In this matter, the sustained charges against appellant were: 1) Unfit as it pertains to meeting legal requirements for the position; 2) Inability to perform job responsibilities; and 3) Other sufficient cause.

At the time of hire, appellant was over the age of thirty-five and did not have the requisite law enforcement experience to reduce his actual age to meet the maximum age requirement of thirty-five years of age. As such, he was ineligible to hold such a position and ineligible for membership in the PFRS as required by law.

With the above in mind, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant was is ineligible for appointment to the position of Municipal Police Officer. Therefore, he is unfit as it pertains to meeting the legal requirements for the position.

Under the second count, Inability to Perform Job Duties (N.J.A.C. 4A:2-2.3(a)(3)), as more fully set forth above, it is clear that appellant, by operation of law, is ineligible for appointment to the position of Municipal Police Officer and therefore unable to perform the functions thereunder.

For the foregoing reasons and ones cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant is ineligible for appointment and unable to perform the job duties of Municipal Police Officer.

Under the third count, Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a) (12)), appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Other sufficient cause is conduct that violates the implicit standard of good behavior that

devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Asbury Park v. Dep't of Civil Serv., 17 N.J. 419 (1955).

As to this charge, appellant was aware, long before he took the position with respondent that his prior law enforcement experience did not qualify to reduce his age to thirty-five. He was also aware that without this, he would not be eligible for membership into the PFRS. No credible evidence was presented that this very important piece of information was ever conveyed to respondent who was operating under the belief that appellant's prior law enforcement experience would properly reduce his actual age to qualify him for appointment and membership into the PFRS.

For the foregoing reasons and ones cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence the charge of Other Sufficient Cause.

PENALTY

With regard to penalty, consideration must generally be given to the concept of progressive discipline, involving penalties of increasing severity. W. New York v. Bock, 38 N.J. 500 (1962). However, progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). It is well-established that when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest, progressive discipline need not apply. In re Herrmann, 192 N.J. 19, 28 (2007); In re Stallworth, 208 N.J. 182 (2011).

Here, by law, appellant is ineligible for employment as a Municipal Police Officer and he is not entitled to equitable relief. Accordingly, I **CONCLUDE** that removal is the appropriate discipline for violations of: Unfit as it pertains to meeting legal requirements for the position; Inability to Perform Job Duties (N.J.A.C. 4A:2-2.3(a)(3)); and Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a) (12)).

ORDER

Based upon the foregoing, it is **ORDERED** that:

Respondent's motion for summary decision is **GRANTED**; and the disciplinary action entered in the Final Notice of Disciplinary Action of the Riverside Township Police Department against appellant Michael Megara is hereby **AFFIRMED**.

It is further **ORDERED** that appellant's motion for summary decision is **DENIED**.

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

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

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

August 31, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 8/31/18
Date Mailed to Parties: 8/31/18

tat/lam

EXHIBITS

For Appellant:

1) Appellant's Cross-Motion for summary Decision/Opposition to Respondent's Motion for Summary Decision – Exhibits A through UU

2) Certification of Michael Megara

3) Certification of Counsel

4) Appellant's Reply Brief – Exhibits A through R

5) Second Certification of Michael Megara

For Respondent:

1) Respondent's Motion for Summary Judgment - Exhibits A through W

2) Certification of Meghan Jack

3) Certification of Counsel

4) Respondent's Opposition to Cross-Motion for Summary Dismissal and Reply Brief – Exhibits A through E

5) Second Certification of Meghan Jack

6) Second Certification of Counsel

7) Certification of Chief W. Earle

8) Certification of Chief (Ret.) P. Tursi

9) Certification of Chief W. Eliason

10-3-18

A-1

STATE OF NEW JERSEY

In the Matter of Michael Meyer
Juvenile Justice Commission

CSC DKT. NO. 2017-2371
OAL DKT. NO. CSV 01519-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 3, 2018 BW

The Civil Service Commission, at its meeting of October 3, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01519-17

AGENCY DKT. NO. 2017-2371

IN THE MATTER OF MICHAEL MEYER,
JUVENILE JUSTICE COMMISSION.

Stuart J. Alterman, Esq., for appellant Michael Meyer (Alterman & Associates, LLC, attorney)

Erica R. Heyer, Deputy Attorney General, for respondent Juvenile Justice Commission (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: August 23, 2018 Decided: September 5, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on February 1, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

September 5, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 9-6-18

Date Mailed to Parties: 9-6-18

tat/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

OAL DKT. NO. CSV 01519-2017S
AGENCY DKT. NO. 2017-2371

SETTLEMENT AGREEMENT

IN THE MATTER OF

MICHAEL MEYER

AUG 28 2018

AND

JUVENILE JUSTICE COMMISSION

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 1/11/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	Conduct Unbecoming	- 10 Days	1/30/17 - 4/3/2017
2.	Discrimination that affects EEO	- 10 Days	1/30/17 - 4/3/2017
3.	Other Sufficient Cause	- 10 Days	1/30/17 - 4/3/2017
4.			
5.			

B. The Appellant MICHAEL MEYER withdraws his/her appeal and request for a hearing, and the Respondent appointing authority JUVENILE JUSTICE COMMISSION agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	OTHER SUFFICIENT CAUSE	Guilty	5 Days
2.			
3.			
4.			
5.			

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 10 days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 5 DAYS BACK PAY.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: – N/A –.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N.
4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation A

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Juvenile Justice Commission (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority Juvenile Justice Commission will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Michael Meyer 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, Juvenile Justice Commission, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

J. The Juvenile Justice Commission reserves the right to move for termination should there be a finding of a violation of the State Policy Prohibiting Discrimination with Appellant, Michael Meyer, reserving all rights, defenses and remedies.

DATE 8/23/18 Appellant

DATE 8/23/18 Respondent Erica R Meyer, DAG

DATE 8/23/2018 ON BEHALF OF JJC

8/23/18 ON BEHALF OF APPELLANT

DATE

OAL DKT. NO. CSV 01519-2017S

CERTIFICATION

I, Michael Meyer, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/23/18
DATE

NAME

A-1

STATE OF NEW JERSEY

In the Matter of Trisha Nigro
Essex County, Department of Citizen Services

CSC DKT. NO. 2018-1738
OAL DKT. NO. CSV 01496-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 3, 2018 BW

The Civil Service Commission, at its meeting of October 3, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01496-18

AGENCY DKT. NO. 2018-1738

TRISHA NIGRO,

Petitioner,

v.

ESSEX COUNTY DEPARTMENT OF CITIZEN SERVICES,

Respondent.

Robert R. Cannan, Esq., for appellant (Markman & Cannan, attorneys)

Sylvia Hall, Esq., Assistant Corporation Counsel, for respondent Essex County (Courtney M. Gaccione, County Counsel)

Record Closed: August 16, 2018 Decided: August 31, 2018

BEFORE **ANDREW M. BARON**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on January 26, 2018, for determination as a contested case. The parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 31, 2018

DATE

ANDREW M. BARON, ALJ

Date Received at Agency: August 31, 2018

Date Mailed to Parties:

mm

COURTNEY M. GACCIONE, ESSEX COUNTY COUNSEL
BY: SYLVIA HALL, ASSISTANT COUNTY COUNSEL
HALL OF RECORDS - ROOM 535
NEWARK, NEW JERSEY 07102
Telephone: (973) 621-2701
Fax: (973) 621-4599
Attorney for the Essex County
Department of Citizen Services

RECEIVED
2018 AUG 16 P 3:37
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

		OFFICE OF ADMINISTRATIVE LAW
TRISHA NIGRO,	:	
	:	OAL DKT. NO. CSV-01496-2018 N
v.	:	AGENCY REF. NO. 2018-1738
	:	
ESSEX COUNTY DEPARTMENT OF CITIZEN SERVICES.	:	STIPULATION OF SETTLEMENT AND GENERAL RELEASE

It is hereby stipulated and agreed by and between the County of Essex Department of Citizen Services through the County of Essex ("County") and Trisha Nigro ("employee") (which are both collectively referred to herein as the "parties") that hereto the above-captioned matter be and same is hereby settled upon the following terms and conditions:

1. The employee hereby acknowledges that she was released at the end of her one (1) year Working Test Period, effective, December 6, 2017.

2. Thereafter, the employee filed an appeal of her release from the Working Test Period with the New Jersey Civil Service Commission. Prior to the hearing before the Office of Administrative Law ("OAL"), which was scheduled for May 23 and May 24, 2018, the parties settled the matter.

3. In lieu of removal, the parties agree the employee will be returned to work for a Working Test Period, effective August 20, 2018 at 3:00 p.m. (Tour 2) pursuant to the following:

A. The parties agree that the employee will be returned to a Working Test Period for a period of one (1) year as a probationary employee at the County Juvenile Detention Center in the Civil Service title of Juvenile Detention Officer, commencing on the above return to work date of August 20, 2018 and ending on August 19, 2019.

B. The employee agrees that she is not entitled to backpay.

C. The employee agrees that there are no counsel's fees or other monetary relief payable from the County or from any of its Departments to the employee.

D. The employee agrees that she is not entitled to any carryover of benefit time based upon her prior Working Test Period.

E. The employee agrees that she is not entitled to seniority or promotion or any workplace priority based upon the prior Working Test Period.

F. The parties agree that the employee's annual salary upon her return to work will be Thirty-One Thousand Two Hundred Dollars ($31,200.00), which is the starting salary for a Juvenile Detention Officer.

G. If the employee successfully completes the one (1) year Working Test Period, the employee will become permanent in the position of Juvenile Detention Officer at Essex County Juvenile Detention Center at the conclusion of said Working Test Period on August 20, 2019;

H. During the Working Test Period, the employee must maintain an acceptable standard of performance and abide by the following terms and conditions:

(i) Employee expressly agrees to conform her conduct to all acceptable work standards and conduct, including but not limited to, an adherence to all Essex County Policies and Procedures and the Policies and Procedures of the Essex County Juvenile Detention Center;

(ii) Employee expressly agrees to adhere to Essex County Policies and Procedures and the Policies and Procedures of the Essex County Juvenile Detention Center on time and attendance;

(iii) Employee agrees that she will undergo training as required by the Essex County Juvenile Detention Center and attend all required training classes; and

(iv) Employee warrants that she is currently fit and able to fully participate and perform in a Working Test Period as a Juvenile Detention Officer, with no claim of limitation, medical or otherwise, and has no known condition or impediment that would prevent her from executing all Civil Service job duties of a Juvenile Detention Officer.

I. The parties agree that the failure of the employee's warranty above, and/or her failure to conform her conduct in accordance with paragraph (H) set forth above including, but not limited to, lateness, absenteeism, refusal to

work overtime during the Working Test Period, shall give the County the right to immediately commence a disciplinary proceeding, seeking up to termination, for conduct and for breach of this Stipulation of Settlement and General Release. If during the Working Test Period a departmental disciplinary hearing results in termination, the employee will accept the penalty of termination. The employee voluntarily and knowingly waives her right to appeal any departmental determination to the New Jersey Civil Service Commission and voluntarily and knowingly waives her right to pursue a discipline any further on any level through any other forum, such as (but not limited to) the Office of Administrative Law, Equal Employment Opportunity Commission or State or Federal Court. The employee expressly agrees that she will accept any departmental decision and she expressly, knowingly and voluntarily waives an appeal after a departmental determination.

4. In the event that the employee is released at the end of the one (1) year Working Test Period, she shall be separated for unsatisfactory performance in accordance with N.J.S.A. 4A:4-5.4(a) and immediately terminated.

5. The employee agrees to withdraw her appeal and request for a hearing in this matter, however, the parties acknowledge that this Stipulation of Settlement and General Release is subject to and contingent upon the approval by the New Jersey Civil Service Commission as adopted in a Final Agency Decision. In the event this Stipulation of Settlement and General Release is rejected by the Court (OAL) and/or the New Jersey Civil Service Commission fails to approve and adopt this Stipulation of Settlement and

General Release in a Final Agency Decision, the parties agree that they will, in good faith, attempt to renegotiate and resettle the matter, with the employee continuing to wave back wages, counsel fees and promotion/seniority. If after a reasonable time, the parties fail to resettle the matter, the parties agree that the employee's appeal to the New Jersey Civil Service Commission, as represented by Agency Ref. No. 2018-1738, OAL Docket No. CSV-01496-2018N, is preserved and employee shall have the right to reinstate her case appealing her release from the original Working Test Period with the New Jersey Civil Service Commission and the County retains its rights and defenses.

6. The employee and the County agree that the terms and conditions of this Stipulation of Settlement and General Release and the discussions and negotiations leading up to it shall be kept absolutely confidential hereafter and shall not be disclosed by the employee to any other employee or former employee of the County or other persons or the general public unless compelled to do so by judicial process. However, the employee may make disclosures to the members of her immediate family, attorney/union representative and as may be required by their accountant in connection with the discharge of the latter's duties in preparation of tax returns or financial statements. Employee's failure to comply with the confidentiality provisions of this Settlement and General Release may result in the dissolution of the within Stipulation of Settlement and General Release at the sole and exclusive option of the County.

7. In the event that an action is brought by the County for the employee's breach of the confidentiality conditions set forth in paragraph six (6) hereof, in addition to such other relief as is appropriate, the County may be entitled to reasonable attorney's fees and costs.

8. This Stipulation of Settlement and General Release is not, and shall not in any way be construed, as an admission by the County of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to employee, but instead constitutes the good faith settlement of a disputed claim and the County specifically disclaims any liability to employee or any other person. The parties have entered into this Stipulation of Settlement and General Release for the sole purpose of resolving employee's claims concerning their employment with the County, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

9. Employee agrees that this Stipulation of Settlement and General Release shall operate as a complete and final disposition of this matter. In consideration of the County's satisfactory action in resolving the disciplinary offenses, employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims to any relief of any kind from the County, whether or not (s)he knows about those rights, arising out of his/her employment with the County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including

sex, race, color, national origin; the Americans with Disabilities Act; Family Medical Leave Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealing; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; Federal and New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that employee is waiving all possible claims against the County from the beginning of employee's first Working Test Period with the County to the date this Stipulation of Settlement and General Release is approved by the OAL.

10. Employee represents and warrants that she has no current litigation contemplated nor has she filed any complaints against the County which are active, in any forum, including, but not limited to State and Federal Court, or before the Equal Employment Opportunity Commission. Violation of this provision shall void this Stipulation of Settlement and General Release.

11. Employee represents and certifies that she has carefully read and fully understands all of the provision of and effects of this Stipulation of Settlement and General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with her attorney. Further, the employee certifies that she is knowingly and voluntarily entering into this Stipulation of Settlement and General Release and that the County has not made any representations concerning their terms of effects of this Stipulation of Settlement and General Release, other than those contained herein.

12. The parties hereby represent that they acknowledge that this Stipulation of Settlement is in the best interest of the parties and that they have entered into this Stipulation of Settlement and General Release in good faith.

13. This Stipulation of Settlement shall neither set a precedent nor constitute a past practice.

14. This Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Stipulation of Settlement and General Release, shall, in all cases, be construed as a whole, according to its fair meaning and not strictly for or against any of the parties.

15. Should any provision of this Stipulation of Settlement and General Release be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

16. This Stipulation of Settlement shall not be considered binding and/or final until approved by the Civil Service Commission.

17. The foregoing constitutes a full and final disposition of this matter.

18. Employee shall not institute an appeal in this matter.

19. Employee shall not request relief with respect to this matter, in any forum, beyond that which is contained herein.

20. This Stipulation of Settlement may not be modified, altered, or changed, except upon the prior, express written consent of both parties.

21. This Stipulation of Settlement and General Release is the result of negotiations with employee's attorney, with whom employee had an opportunity to consult and to whom she provided consent prior to signing same.

SIGNATURE PAGE FOLLOWS

THE REMAINDER OF THIS PAGE IS LEFT INTENTIONALLY BLANK

DATED: 8/2/18

SYLVIA HALL,
ASSISTANT COUNTY COUNSEL

DATED: 8/10/18

ROBERT D. JACKSON
COUNTY ADMINISTRATOR

DATED: 8/7/18

ANIBAL RAMOS, JR.
DIRECTOR, DEPARTMENT OF
CITIZEN SERVICES

DATED: 8-9-18

DENNIS E. HUGHES
DIRECTOR, ESSEX COUNTY
JUVENILE DETENTION CENTER

DATED: 7/17/18

ROBERT CANNAN, ESQ.
ATTORNEY FOR EMPLOYEE

DATED: 7/17/18

TRISHA NIGRO
EMPLOYEE

STATE OF NEW JERSEY

In the Matter of Derek Stallings
Ann Klein Forensic Center, Department of Health

CSC DKT. NO. 2017-2638
OAL DKT. NO. CSV 3169-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 3, 2018 BW

The Civil Service Commission, at its meeting of October 3, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 3169-17
AGENCY DKT. NO. 2017-2638

IN THE MATTER OF DEREK STALLINGS,
DEPARTMENT OF HUMAN SERVICES,
ANN KLEIN FORENSIC CENTER.

William A. Nash, Esq., appearing for appellant (Nash Law Firm, LLC, attorneys)

Emil M. Bisnauth, Esq., appearing for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 6, 2018 Decided: September 10, 2018

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 6, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

September 10, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 9-11-18

Date Mailed to Parties: 9-11-18

/cb

OAL DKT. NO. CSV 03169-2017 S

SETTLEMENT AGREEMENT

J-1

DEREK STALLINGS,

Appellant,

v.

DEPARTMENT OF HEALTH, ANN KLEIN FORENSIC CENTER,

Respondent.

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated February 22, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3a6 Conduct unbecoming a public employee	Removal (for all charges)	2/27/17
2. N.J.A.C. 4A:2-2.3a12 Other sufficient cause		
3. Admin. Order 4:08, E1 Violation of policy/procedure		

B. Appellant Derek Stallings withdraws his appeal and request for a hearing and the Respondent Appointing Authority agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3a6 Conduct unbecoming a public employee	General Resignation (resolving all charges)
2. N.J.A.C. 4A:2-2.3a12 Other sufficient cause	

3. Admin. Order 4:08, E1
   Violation of policy/procedure

C. The parties have agreed to the following:

1) Total number of work days of suspension without pay Respondent will impose on Appellant: not applicable.

2) The total number of days of back pay to be paid by the Appointing Authority to the Appellant is as follows: no back pay.

3) Any other days from the time of last suspension day until return to work shall be treated as follows: not applicable.

4) Appellant agrees to a general resignation pursuant to N.J.A.C. 4A:2-6.3, which shall be effective February 22, 2017. As of this date, Appellant is no longer under consideration for any disciplinary action. Any days from the effective date of removal on the Final Notice of Disciplinary Action, dated February 22, 2017, to the effective date of resignation shall be treated as follows: not applicable.

i. The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for periods for which the employee is not paid by the employer.
ii. Appellant shall not seek or accept future employment with the Department of Health or the Department of Human Services or any of its subsidiaries.
iii. Respondent shall not intentionally interfere or obstruct Appellant's application for retirement.

D. The Appointing Authority shall amend Appellant's personnel records to reflect the terms of this agreement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as

consistent with state or federal law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. This agreement resolves any and all disciplinary actions pending against Appellant.

F. Nothing in this agreement shall constitute an admission or stipulation of facts regarding the charges listed in Section A. By entering into this agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the parties' collective negotiations agreement. This agreement shall not constitute precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver

includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims. Notwithstanding anything to the contrary herein, nothing in this agreeement shall constitute a waiver of Appellant's rights to contiue prosecuting his workers compensation claims pending under CP#20016-12931 and CP#2017-21439 CM D.S.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. By signing this Settlement Agreement, the signatories represent that they have read this agreement and fully understand its terms.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-6-18
DATE

Appellant
Mr. Derek Stallings

9-6-18
DATE

On Behalf of Appellant
William Nash, Esq.

9-6-18
DATE

Charles Moore
On Behalf of Dept. of Health, Charles Moore, Employee Relations Coordinator

CERTIFICATION

I, Derek Stallings, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9.6.19
DATE

D K Stallings
Derek Stallings

STATE OF NEW JERSEY

In the Matter of Marilyn Camp
Atlantic County, Department of the Administrator

CSC DKT. NO. 2018-435
OAL DKT. NO. CSV 11981-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2018 BW

The appeal of Marilyn Camp, Employment Specialist, Atlantic County, Department of the Administrator, removal effective August 2, 2017, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo, who rendered her initial decision on September 21, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 17, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Marilyn Camp.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17th DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11981-17
AGENCY DKT. NO. 2018-435

IN THE MATTER OF MARILYN CAMP, ATLANTIC COUNTY, DEPARTMENT OF PERSONNEL.

Yolanda Lawson, Staff Representative, AFSCME NJ, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jennifer P. Starr, Assistant County Counsel, for respondent (James F. Ferguson, County Counsel)

Record Closed: August 7, 2018 Decided: September 21, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Respondent Atlantic County (County) removed appellant Marilyn Camp (Camp) from her position as an Employment Specialist, effective August 2, 2017. The County alleged there was just cause for the disciplinary action under N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, because on June 14, 2017, Camp did not contact her supervisor before taking two hours and fifty-five minutes of administrative leave time in violation of Atlantic County Policies and Procedures and her Last Chance Agreement. Camp contests her removal claiming that she had administrative leave time and she notified the designated supervisor in charge that she would be late.

PROCEDURAL HISTORY

On June 21, 2017, the County issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth charges against Camp and suspending her and recommending removal for a date to be determined. (R-1.)

A departmental hearing was conducted on July 12, 2017. The County issued a Final Notice of Disciplinary Action (FNDA) on August 1, 2017, removing Camp from her position, effective August 2, 2017. (R-1.) Appellant requested an appeal, and the matter was filed with the Office of Administrative Law (OAL) on August 18, 2017, to be scheduled for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The hearing was scheduled for December 12, 2017 but was adjourned at the County's request with Camp's consent. It was rescheduled for March 7, 2018 but adjourned due to a scheduling conflict with my calendar. I heard the case on August 7, 2018 and closed the record.

FACTUAL DISCUSSION

The parties stipulated to the following facts and I therefore **FIND** them as **FACTS**:

1. On Monday, June 12, 2017, Camp worked a full day.

2. On Tuesday, June 13, 2017, Camp was out of the office serving a suspension.

3. On Wednesday, June 14, 2017, Camp clocked in for work at 11:25 a.m., two hours and fifty-five minutes after her scheduled start time of 8:30 a.m.

4. Camp did not submit her request for administrative leave time for Wednesday, June 14, 2017 on the County's electronic system which is an email system for submitting requests and receiving responses.

5. Camp executed a Settlement and Last Chance Agreement with the County on October 6, 2015.

TESTIMONY

Shirley Smith (Smith) was Camp's supervisor during the incident and testified for the County. On November 1, 2017, Smith retired from the County. Prior to her retirement, Smith was an employment specialist supervisor for five years.

Smith testified that the County used an electronic system for the employees to input requests for leave. When a leave request was submitted, Smith would review it and approve it, if appropriate. In emergency situations, an employee could submit a verbal request by leaving Smith a voice message on her office telephone. Smith testified that Camp was familiar with the procedure and she used it for leave requests in the past. According to Smith, it was her responsibility as the employment specialist supervisor to approve requests for time off from work. This was not a task that she delegated to others in her office. Smith testified that when she was out of the office, she delegated certain responsibilities to Regina Ludmer, but she never delegated the responsibility to approve leave requests because that was a supervisor's job.

When Smith arrived at work on June 14, 2017, there were three members of her department missing from work, including Camp. Smith had received a voice mail message from one staff member advising her that the employee would not be at work due to sickness. The other employee had requested leave in advance. Only Camp had provided no prior notice of her absence. Smith stated that she asked other staff members if they had heard from Camp. Later that day, Smith testified that she saw Camp and asked her if she had requested time off from work for that morning. Camp's only response was that she used her administrative time. According to Smith, it was not normal practice for any employee to take time off without prior notice to their supervisor. Smith explained that her employees service the public, therefore, she needs to know in advance how many employees will be available each day.

Smith stated that Camp put in her administrative leave request after the fact, but she denied it as against policy for not requesting the leave time before the event. Smith understood that Camp had sufficient notice of the event that required leave time to make her request in proper order.

On cross-examination, Smith stated that she has discretion whether to deny or grant a request for leave. Smith believed that she had a fairly good working relationship with Camp. Smith responded that she keeps a calendar on her desk and her staff are welcome to write reminders or notes for her on it. However, a leave request could not be written on her calendar without it being approved first. Smith also stated that a staff member could not submit a leave request on behalf of someone else. According to Smith, the process was not burdensome because an employee always had the option of leaving a verbal voice message on Smith's telephone if there was no opportunity for advance notification through the electronic email system.

Regina Ludmer (Ludmer) works as an employment specialist and testified on behalf of the County. Ludmer testified that she is not a supervisor, so she cannot approve or deny leave requests. Over the course of her employment with the County, she recalled having requests for leave denied.

On June 12, 2017, Ludmer recalled having a conversation with Camp at the end of their work day about attending graduation activities involving their children. Ludmer was taking Friday off to attend a graduation. She recalled telling Camp that she would mark Camp's time on Smith's calendar when she wrote her own time. Ludmer wrote on Smith's calendar that both she and Camp would be off on Friday, June 16, 2017. She assumed from their conversation that Camp had also taken Friday off from work because the only day they discussed was Friday. Friday had been the day that the office was going to celebrate birthdays but it had to be changed due to the amount of employees taking Friday off from work.

Ludmer testified that all employee requests for leave must be entered in the computer system. Each employee has an individualized log in and password. No one can enter a request on behalf of a co-worker. Ludmer also stated that she made notations

on the calendar as a reference or reminder.

On cross-examination, Ludmer stated that she received training on the computer system in January 2017. She could not recall if there were complaints or problems with the system. Ludmer stated that when Smith was not available, Ludmer would be designated as the acting supervisor to deal with any day to day problems. She could not recall if she was every approached about becoming a union shop steward. Ludmer stated that she wrote on Smith's calendar as a courtesy. Her recollection was that she had been speaking to Camp about graduation ceremonies and the only day discussed was Friday, so she assumed Camp's event was on Friday. Ludmer stated that all employees have access to Smith's desk calendar and anyone can write reminders on the calendar.

Rhonda Lowery (Lowery) is the Executive Director and the Director for Workforce Development. She has been employed by the County for thirty-four years and has been the Director for over ten years.

Employees are required to use the time clock to verify their time spent at work, break, and lunch. Lowery stated that the worker is required to use the computer system for leave requests. The computer generates an email and notifies the employee when the supervisor approves a leave request. She understood that the system is not liked by the employees. She stated that all employees received training but there are glitches in the system.

Lowery stated that she was familiar with Ludmer. Ludmer is an employment specialist, which is not a supervisory position. Lowery is also familiar with Camp, who is also an employment specialist.

Lowery was the director who signed Camp's Settlement and Last Chance Agreement on October 6, 2015. (R-2.) Lowery recalled that Camp's time and attendance were the concern prior to the agreement. She described it as "no call, no show."

After the June 14, 2017 incident, Lowery signed the PNDA. (R-1.) According to Lowry, because the employees deal with the public, it is important for the supervisors to

know who is available on any given day. She stated that it is not efficient for the department if employees do not show up for work on time without notice.

On cross-examination, Lowry stated that she was told about the event before she signed the PNDA. She did not remember being told about the notation on Smith's calendar. Lowry focused on the fact that Camp did not request leave before she failed to show up for work. She further stated that if she had known about the calendar notation, her decision would not have changed because the employees know they must call for emergencies or input their request into the computer system. She stated that there are always exceptions but those would involve life-threatening events.

Lowry testified that under the Atlantic County Policies and Procedures P.S. 5.11, any absence from work which is not approved by the supervisor is considered an unauthorized absence, known as "W-time."

Daphne Brown (Brown) testified on behalf of Camp. Brown is a shop steward for the AFSCME NJ, the union for the County employees. As the shop steward, Brown recalled that Camp had filed a complaint against Smith alleging disparate treatment and there had been telephone calls and complaints by Camp about her treatment.

Brown testified that she is familiar with the computer system, but she does not use it for administrative leave requests. As described by Brown, every employee gets three personal days each year to be used as needed by the employee. The time can be taken in any increments of one hour. Brown stated that she just tells her supervisor when she is taking her administrative time.

On cross-examination, Brown stated that she does not have the same supervisor as Camp because they work in different departments. Brown stated that she always calls first if she is going to be late. The computer system is new for the workers. Although Brown does not always use the computer system, she stated that she always lets her supervisor know if she is going to be late. She never just tells a co-worker.

On redirect, Brown stated that she understood that Ludmer was the acting supervisor when Smith was not available.

Melanie Griffin (Griffin) is a clerk who has been employed by the County for fourteen years. Griffin testified on behalf of Camp. Griffin knows Camp from the time they both worked in the Pleasantville office. Griffin stated that it is common to input administrative time after the fact. The main thing is to input your time prior to payroll so that you are paid correctly. Griffin was aware that there were personal confrontations between Smith and Camp. She also knew that Camp had trouble getting her vacation time approved, but after Camp filed a complaint alleging a hostile work environment, her vacation was approved.

On cross-examination, Griffin testified that many employees notify their supervisors, instead of using the computer for leave requests. Griffin stated that employees either tell their supervisor or they tell the person in charge. Smith was not Griffin's supervisor, but she also understood that Smith made Ludmer the acting supervisor when Smith was not available.

Marilyn Camp (Camp) testified on her own behalf. She stated that on June 12, 2017, Smith was not in the building. Her past practice was to talk to Ludmer when Smith was not available.

Camp described problems with using the computer system for leave requests. By way of example, Camp used her administrative leave request entered into the computer for April 17, 2017 to show that Smith never issued a response, even though Camp used the time with no ramifications. (P-1.)

On June 12, 2017, Smith was out of the building and Camp recalled being very busy with clients. Camp stated that at approximately 3:30 p.m., she learned that there would be no family representative at a school function for one of her children. As a single parent and because she had available administrative time, she decided to go. At the end of the work day, while conversing with Ludmer, Camp asked Ludmer to let Smith know. Camp also stated that Ludmer told her she would mark it on Smith's calendar. Because

she was requesting administrative leave, Camp was not concerned because there was never a problem with getting administrative time approved. It was not until she questioned Ludmer on June 21, 2017 that she realized Ludmer put the wrong date on the calendar. Camp stated that she never thought Smith would not approve her administrative time because the practice has always been that administrative time had to be entered into the computer before the next payroll cycle.

Camp testified that she was aware that there were only two months remaining on her last chance agreement. If she did not think that telling Ludmer was sufficient, she would have made the request on the computer or left a voice message for Smith. Camp acknowledged that she knew about the event in enough time for her to either enter it into the computer or leave a voice mail for Smith. She reiterated that she worked for the County for many years and there was never a problem with taking administrative time.

On cross-examination, Camp acknowledged that before taking time off from work she needed to tell her supervisor, but she believed that telling Ludmer, the acting supervisor, was good enough.

I asked Camp to describe her conversation with Ludmer on June 12, 2017. Camp responded that she told Ludmer that her daughter was getting an award during a school program and she would be attending. There was also a discussion about moving the birthday celebration from Friday, June 16, 2017 because so many people were going to be out of the office. Ludmer is the birthday coordinator for the office and according to Camp, after their conversation, Ludmer stated that she would take care of it and put it on Smith's calendar.

ANALYSIS AND ADDITIONAL FINDINGS OF FACT

To resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness considering its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). A trier of fact may reject testimony because it is inherently incredible, or because

it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

I deem the testimony of Smith to be credible. She testified in a very business-like manner, with a flat affect. She did not fidget and maintained her composure during questioning. Her responses were thoughtful but not coached. Her factual assertions that supervisors must be notified before an employee takes time off from work was not disputed. Her responses were delivered in a no-nonsense matter of fact manner. There was no bias against Camp noticed by me during her testimony. There is nothing in the record to dispute Smith's assertion that she was unaware that Camp intended to be out of the office on June 14, 2017. Smith had prior knowledge that she would be missing two employees on Wednesday, June 14, 2017, so it is reasonable that missing a third employee from her department could prove problematic, especially when there was no notice. Smith testified that she designated Ludmer as the supervisor in charge when she was not available to handle daily operations. However, Smith stated that she did not delegate the authority to approve leave time requests to a non-supervisor. There is nothing inherently incredible in that statement. Smith's testimony about delegation of tasks was also supported by Ludmer's understanding of her limitations when she was acting supervisor in Smith's absence. Camp also testified that she did not request Ludmer to approve her leave time but simply to tell Smith that she would not be in the office.

Ludmer and Camp both recalled having a conversation at the end of the work day on June 12, 2017. There were similarities in their testimony about the time of the conversation, the discussion of graduation activities, and the need to change the birthday celebration from Friday, June 16, 2017. Ludmer acknowledged telling Camp that she was going to mark the event on Smith's calendar, but the date marked on the calendar was Friday, June 16, 2017 not Wednesday, June 14, 2017. There was nothing from Ludmer's testimony to suggest that she understood Camp was asking her to approve an administrative leave request for Camp. Surprisingly, Camp's testimony did not provide

details of exactly how she informed Ludmer of her need to use a certain amount of administrative leave on June 14, 2017. The testimony about the conversation was vague. I gave Camp the opportunity to provide more details about the nature of her conversation with Ludmer, but in her response she never mentioned the words administrative time, never provided details about how many hours she was taking, or even if she was planning to come back to work after the event. Camp has a substantial stake in the outcome, yet she responded to questions by using a flippant tone of voice. Her argument that she thought it was good enough to tell Ludmer was not persuasive, especially because she was not able to articulate exactly what she told Ludmer regarding the specific leave request. I **FIND** that Ludmer's testimony about the nature of the conversation had a greater ring of credibility and Ludmer's actions in writing on Smith's calendar that Camp would be out of the office on Friday, June 16, 2017 demonstrated that Ludmer did not know that Camp was taking administrative time on Wednesday, June 14, 2017.

While I found the testimony of Brown and Griffin to be credible, they were not present for the conversation between Ludmer and Camp and they both agreed that advance notice to a supervisor is required, even for administrative leave.

Lowry testified that she based her decision on her conversation with Smith who informed her that Camp took leave time without notice or approval. I deemed Lowry's testimony to be credible and consistent with the rules and regulations governing requests for administrative leave time. As set forth in the Agreement between the County of Atlantic and AFSCME Local #2302, "[r]equests for administrative leave of absence must be approved in advance by the employee's supervisor." (R-4.)

The testimony from Brown, Griffin, and Camp was that administrative leave time was flexible and it could be entered in the computer at any time prior to the next billing period for payroll purposes. While I do not deny that this may have been common practice among certain employees for computing time, it does not strike at the crux of the matter regarding whether leave can be taken without notice to a supervisor.

Based upon a review of the documentary evidence and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following as **FACTS** in this matter:

1. Before the end of the work day on June 12, 2017, Camp decided to use administrative leave time on Wednesday, June 14, 2017.

2. At the end of the work day on June 12, 2017, Camp and Ludmer had a conversation about attending graduation events and moving the office birthday celebration from Friday, June 16, 2017.

3. On June 12, 2017, Smith was out of the office so Ludmer was designated to handle routine office matters on her behalf.

4. Ludmer was not a supervisor and requests for leave of absence may only be approved by an employee's supervisor.

5. Camp did not enter her request for administrative leave on the computer system prior to taking three hours of administrative leave on June 14, 2017.

6. Camp did not leave a voice message for her supervisor, Smith, about taking administrative leave time on June 14, 2017.

7. Smith, as Camp's supervisor, did not approve Camp's administrative leave time entered after the fact in the computer system.

8. Under Camp's Last Chance Agreement, Camp acknowledged that there would be a zero tolerance by the County of "any future conduct resulting in a no-call, no-show, or any other unauthorized absences from work." (R-2.)

9. The Last Chance Agreement stated that any "future infraction implicating time and attendance issues resulting in 'W' time during the next 24 months shall be cause for and result in employee's removal (termination) from employment with Atlantic County."

LEGAL ANALYSIS AND CONCLUSIONS

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an inducement to attract qualified people to public service. Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). A civil service employee who commits a wrongful act related to his or her employment, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Here, the County has the burden to demonstrate by a preponderance of the evidence that the appellant violated the County's policies and procedures and the last chance agreement to justify the disciplinary action of removal. N.J.A.C. 4A:2-2.3(a)(12). This is a fact-sensitive determination as to whether Camp's claim of mentioning that she would be out of the office for her child's school event to the supervisor in charge satisfied the requirement in her collective bargaining agreement that requests for administrative leave must be approved in advance. (R-4.)

I **CONCLUDE** that the County has established by a preponderance of the evidence that all employees are required to notify their supervisors in advance before taking administrative leave time. This procedure is stated in the Collective Bargaining Agreement. (R-4.) The testimony from the supervisor, Smith, the Executive Director, Lowry, and all the County employees, including Camp, established that an employee cannot miss work without notifying her supervisor in advance. While I acknowledge that

the procedure for administrative time requests may be less formal than other types of leave requests, there is nothing in the record to support an employee taking administrative time and notifying her supervisor after the fact.

I further **CONCLUDE** that the testimony about Camp's conversation with Ludmer, regardless of whether Ludmer was designated as acting supervisor, does not support Camp's position that she gave Ludmer advanced notice of her request for administrative leave for June 14, 2017. There were no facts from the testimony to corroborate Camp's assertion that she notified Ludmer that she needed to take administrative leave time on June 14, 2017, or that notifying Ludmer was sufficient.

Finally, I **CONCLUDE** that Camp violated her last chance agreement by engaging in conduct that resulted in a no-call, no-show, or an unauthorized absence from work. Camp testified that she was aware there were two months remaining on her agreement. Camp also testified that she had the ability to enter her leave request on the computer or leave Smith a voice message regarding her absence. Camp did neither.

DECISION AND ORDER

I **ORDER** that the County's decision to remove Camp is **AFFIRMED**.

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

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

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

September 21, 2018
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: September 21, 2018

Date Mailed to Parties: September 21, 2018

cmo

APPENDIX
LIST OF WITNESSES

For Appellant:

Daphne Brown
Melanie Griffin
Marilyn Camp

For Respondent:

Shirley Smith
Regina Ludmer
Rhonda Lowery

LIST OF EXHIBITS

For Appellant:

P-1 Computer Print-Out of Leave Requests

For Respondent:

R-1 PNDA and FNDA
R-2 Second Chance Agreement October 6, 2015
R-3 Policies and Procedures
R-4 Collective Bargaining Agreement
R-5 Chronology of past discipline

STATE OF NEW JERSEY

In the Matter of Rhonda Denson
Atlantic County
Department of Public Safety

CSC DKT. NO. 2017-2967
OAL DKT. NO. 05246-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05246-17

AGENCY DKT. NO. 2017-2967

IN THE MATTER OF RHONDA DENSON, ATLANTIC COUNTY, DEPARTMENT OF PUBLIC SAFETY.

Jacqueline M. Vigilante, Esq., for appellant, Rhonda Denson

Jennifer Starr, Assistant County Counsel, for respondent, Atlantic County Department of Public Safety (James F. Ferguson, County Counsel, attorney)

Record Closed: September 19, 2018 Decided: September 24, 2018

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on April 18, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

9-24-18
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 9-26-18

Date Mailed to Parties: 9-27-18

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on September 18, 2018

THE VIGILANTE LAW FIRM, P.C.

Exhibit: P-1

JACQUELINE M. VIGILANTE, ESQUIRE
NEW JERSEY SUPREME COURT CERTIFIED CIVIL TRIAL ATTORNEY

Email: jacci@thevigilantelawfirm.com

September 12, 2018

Honorable Jeffrey R. Wilson
Office of Administrative Law
PO Box 049
Trenton, NJ 08625

Re: Rhonda Denson v. Atlantic County Dept of Public Safety
10 Working Day Suspension

Dear Judge Wilson:

This law firm represents the Plaintiff, Rhonda Denson in the above-referenced matter. The purpose of this correspondence is to advise you that this matter has been settled. Kindly mark this matter settled in your files. Enclosed please find a fully executed settlement agreement. Should you have any questions or require any further information, please feel free to contact our office.

Respectfully submitted,

THE VIGILANTE LAW FIRM, P.C.

Jacqueline M. Vigilante, Esquire

JVM/dm
Cc: Jennifer Star, Esquire (via email)

Exhibit: J-1
Date:
I:
E:

RECEIVED
2018 SEP 18 A 11:42
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT BETWEEN RHONDA DENSON AND THE COUNTY OF ATLANTIC

This Settlement Agreement, hereinafter referred to as "Agreement" is made by and between RHONDA DENSON, hereinafter referred to as "Employee," and Atlantic County and the Atlantic County Justice Facility referred to as "Employer" or "County." Employee and the County are sometimes hereinafter collectively referred to as the "Parties."

WHEREAS, Employee was served with Preliminary Notice of Disciplinary Action for an incident which occurred on November 16, 2016, a copy of which is attached hereto as **Exhibit A**; and

WHEREAS, the disciplinary sanction being sought in the above Preliminary Notice of Discipline was a 10-day suspension from employment; and

WHEREAS, a departmental hearing was conducted and the hearing officer upheld the 10 day suspension, and a Final Notice of Disciplinary Action (31-B) was issued, a copy of which is attached hereto as **Exhibit B**; and

WHEREAS, Employee served the 10 days of suspension associated with the disciplinary sanction and appealed the 31-B to the Civil Service Commission/Office of Administrative Law (Docket No: CSV 05246 -2017S); and

WHEREAS, Employee was served with a Preliminary Notice of Disciplinary Action for an incident which occurred on November 28, 2017, a copy of which is attached hereto as **Exhibit C**; and

WHEREAS, the parties to the agreement have decided to resolve the disposition of all of the above charges and claims in a summary fashion without the necessity for hearings, and in order to avoid the expense and burden of litigation, and in resolution of all other matters and proceedings that might arise between Employee and Employer as a result of the aforesaid charges.

NOW, THEREFORE, Employee and Employer agree as follows:

1. The above recitals are repeated, incorporated and made a part of the Agreement.

2. ***Modified Suspension:*** In consideration for entering into the Agreement, the Employer agrees to modify the suspension as follows:

5/17/2018

(a) A new Final Notice of Disciplinary Action (31-B) for the November 16, 2016 violation will be issued, and the suspension will be reduced to 5 days. Employee will not have to serve these days, as they have already been served. Employee waives all rights to appeal.

(b) Employer shall modify the suspension associated with the November 28, 2017 to a 5 day suspension from employment. Employee served 10 days associated with the November 16, 2016 incident and has had that reduced to a 5-day suspension as set forth above. The additional 5 days served as a result of the November 16, 2016 incident shall be considered time served from this modified suspension of the November 28, 2017 incident. Employee waives all rights to appeal.

3. ***Modified Charges***: In consideration for entering into this agreement, employer shall modify the charges associated with the November 28, 2017 incident to reflect violation of Insubordination only. All other charges will be removed.

4. ***Withdrawal of appeal:*** Employee shall withdraw her pending appeal to the Civil Service Commission/Office of Administrative Law (Docket No: CSV 05246 -2017S).

The County's modification of Employee's suspension as listed above is expressly conditioned upon Employee agreeing to the terms of the Agreement and Employee withdrawing her appeal before the New Jersey Civil Service Commission/Office of Administrative Law for the above-referenced charge. **THE PARTIES ACKNOWLEDGE THESE ARE MATERIAL TERMS AND THE EMPLOYEE'S FAILURE TO PERFORM UNDER THE TERMS OF THIS SECTION SHALL BE CAUSE FOR THE COUNTY TO PROCEED WITH AND PURSUE ALL OF THE CHARGES NOTED ABOVE IN EXHIBIT B AND C.**

5. ***Nondisclosure.*** All parties to the Agreement agree that the terms of the Agreement, and the circumstances surrounding same, are not to be divulged to any outside sources, either directly or indirectly. Outside sources do not include various agents of the County of Atlantic, the State of New Jersey, the United States of America, or any court of competent jurisdiction.

The provisions of the paragraph are binding only on the Employee and Employer. The Employer makes no representation and takes no responsibility for any unofficial actions of other employees who are not parties to the Agreement.

5/17/2018

6. ***Discipline and Future Conduct.*** Employee EXPRESSLY ACKNOWLEDGES AND UNDERSTANDS future violations of policy will not be tolerated by the Atlantic County Justice Facility. Future violations of any County policy will result in progressive discipline up to and including termination of employment.

7. ***Release/Exclusions.*** Except as expressly provided in paragraph 7(a) below, Employee knowingly and voluntarily releases and forever discharges for herself, her heirs, executors, and administrators, the Employer and any employees and agents of the Employer, of and from all demands, complaints, causes of action, claims and charges whatsoever, arising from the charges and conduct at issue, including, but not limited to, any alleged violation of:

- The National Labor Relations Act;
- Family Medical Leave Act (Federal and State);
- Title VII of the Civil Rights Act of 1964;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act of 1974;
- The Immigration Reform and Control Act;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- New Jersey State Wage and Hour Law;
- The New Jersey Law Against Discrimination;
- The New Jersey Workers' Compensation laws;
- The Conscientious Employee Protection Act;
- New Jersey Civil Service Statutes;
- any other federal, state or local civil or human rights law or any other alleged violation of any local, state or federal law, executive order, regulation or ordinance;

5/17/2018

- any public policy contract (whether oral or written, expressed or implied), tort or common law;
- any claim for costs, compensation, fees or other expenses including attorney's fees incurred in these matters.

7(a). *Exclusions* The above general release specifically excludes only the following:

i) Claims to enforce the settlement.

8. ***Waiver of Right to Costs and Fees.*** The Parties agree that the Employee waives any claims for fees and costs, including but not limited to attorney's fees.

9. ***Governing Law.*** The Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey.

10. ***Binding Agreement.*** The agreement constitutes the entire agreement between the parties. The agreement supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of the agreement shall be binding unless in writing and executed by the parties. No waiver of any of the provisions of the agreement shall be deemed or shall constitute a waiver of any other provisions, whether or not similar. Nor shall any waiver constitute a continuing waiver. The Parties have negotiated the terms of the Agreement through and by their counsel. Accordingly, the Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing the Agreement to be drafted.

11. ***Execution in Counterparts/Facsimile and E-mail Signatures.*** The Agreement may be executed in counterparts, and all counterparts so executed will together constitute one (1) binding agreement. The Agreement shall be validly executed and delivered by exchange of executed counterparts by regular mail, facsimile or e-mail.

12. Without in any way limiting the scope or effect of the preceding paragraphs:

A. <u>Employee represents that she is able to read the English language and understands the meaning and effect of her Agreement.</u>

B. Employee understands that the above paragraphs include a waiver of all demands, complaints, causes of action, claims and charges against the Employer and the Employer's current and former employees and agents, whether known or unknown, asserted or unasserted, suspected or unsuspected, which Employee may

5/17/2018

have as a result of any act that has occurred arising out of the filing of the attached Notice of Discipline.

C. Employee understands that if the Agreement were not signed, the Employee would have the right to submit information to a hearing officer, and then on appeal to an administrative law judge assigned to hear the cause of action by the New Jersey Department of Personnel / Civil Service Commission, and further understands that upon receipt of an unfavorable ruling by an administrative law judge, would have the right to make submissions to the Civil Service Commission, and thereafter, if unsatisfied with the final decision of the Civil Service Commission, would have the right to take an appeal to the New Jersey Superior Court, Appellate Division, together with any further rights to file appeals, either by right or by grace in the New Jersey State Court and Federal Court system.

D. **WAITING PERIOD** Employee acknowledges that she has twenty-one (21) days to review and consider this Agreement and general release, which waives Employee's rights and claims under the Age Discrimination in Employment Act ("ADEA")(29 U.S.C. § 621 et seq.) and that her execution of this release prior to the expiration of that time period constitutes an express waiver to the consideration period. Employee acknowledges that she has seven (7) days from the date of execution of the General Release to rescind the General Release Of Rights under the ADEA by giving written notice to legal counsel for the County, Jennifer P. Starr, Assistant County Counsel, located at 1333 Atlantic Ave, 8th Floor, Atlantic City NJ 08401, or her successor.

E. **Employee understands and agrees that she has sought and received the advice of counsel and Union Representation of her own choice prior to executing the Settlement Agreement and General Release. Employee acknowledges having had ample time to review the document, she has reviewed its terms, understands them and that she has voluntarily decided to release all claims against the County except as otherwise set forth herein after thoroughly reviewing the Settlement Agreement and the General Release.**

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their respective names:

The Parties

5/17/2018

Rhonda Denson (Employee)

Dated: 5/17/2018

ATLANTIC COUNTY

Captain David Kelsey
Atlantic County
(Employer)

Dated: 5-21-18

5/17/2018

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

Instructions for employers: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

Employing Agency Name	Address/ Phone Number		Date
Atlantic County	5060 Atlantic Ave, 609-645-5855	Mays Landing, NJ 08330	1-3-2018

Attorney representing your agency should this matter be appealed	Address/Phone Number/Email address
James Ferguson, Atlantic County Department of Law	1333 Atlantic Ave, Atlantic City, NJ 08401 / (609) 343-2310 / Ferguson James@aclink.org

Employee Name	Permanent Civil Service Title		Employee Identification Number
Rhonda Denson	County Correction Officer		
Address/ Phone Number 23 Hopkins ct, Woodbury NJ 08096 856-845-0140			Pension Number

You are hereby notified that the following charge(s) have been made against you: *(If necessary, use additional sheets and attach)*

Charge(s):	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
See Attached	See Attached
☒ *If checked, charges are continued on attached page.*	☒ *If checked, incidents are continued on attached page.*

☐ You are hereby suspended effective _____
(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 5 *days of receipt of this form. If you request a hearing it will be held on January 31, 2018 at (time) 10am at (place of hearing) training suite

*Must be a minimum of five days

The following disciplinary action may be taken against you:

- ☐ Suspension for 60 working days, beginning when and ending notified
- ☐ Indefinite suspension pending criminal charges effective (date) _____
- ☐ Removal, effective (date) _____
- ☐ Demotion to position of _____ effective (date) _____
- ☐ Resignation not in good standing, effective (date) _____
- ☐ Other Disciplinary Action
- ☐ Fine _____ (amount) which is equal to _____ (number) (number of working days)

Appointing authority or authorized agent's signature and title.

Signature Geraldine V. Cohen Title Warden 1/8/2018

This form must be personally served on the employee or sent by certified or registered mail.

- ☐ Certified or Registered Mail ☒ Receipt Number _____
- ☒ Signature of Server _____ ☒ Date of personal service 1/8/18

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

Atlantic County
Department Of Public Safety
Division of Adult Detension
Preliminary Notice Of Disciplinary Action

Wednesday, January 03, 2018
Atlantic County New Jersey
Preliminary Notice Of Disciplinary Action
Danson, Rhonda, County Correction Officer

Specifications:

On November 28, 2017 employee refused two orders from Lt. Zimmerman to attend training. Employee refused an order from Lt Carber to attend mandatory training. Employee refused an order from Lt. Trout to file an incident report regarding her leaving for medical reasons prior to leaving the facility grounds. Employee struck Lt. Trout with her shoulder as she walked through him, while in the medical unit. Employee again struck Lt. Trout with her shoulder as she exited the operations unit. Employee stated, "you better stop following me everywhere I go." Employee stated to Lt trout, "I'm tired of your bullshit." Employee was not truthful in incident report 17110557 that was submitted on 12-1-2017.

Charge(s):

Atlantic County Department of Public Safety, Division of Adult Detension, Policy and Procedure Manual 1.3.11 Personnel Rules and Regulations;

Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11, Manual of Personnel Rules and Regulations, Chapter 1 - Professional Conduct: (4 counts) 01.10 INSUBORDINATION Officers shall not commit acts of insubordination, cause, or incite other employees to become insubordinate in areas such as listed below but not limited to: (a) Failure or deliberate refusal to obey a lawful order given by a superior officer. (b) Any disrespectful, mutinous, insolent, or abusive language or action toward a superior officer. (4 counts) 01.11 OBEDIENCE TO LAWS ; DEPARTMENT RULE, POLICY, OR REGULATION Officers and employees shall observe and obey all laws and ordinances of the State, all rules and regulations and orders of the Department. P&P 1.3.6 Code of Ethics B. Prohibited Conduct 3. Behaving in a disrespectful manner toward a supervisor or willfully disobeying the lawful command of a superior. (3 Counts) 4. Striking or effecting any violance toward any other employee. 5. Using thretening, abusive, or insulting language toward any employee of the department, member of the public, or person under custody of the department. Chapter 3 - Authority to discipline: 03.05 TRUTHFULNESS All officers and member of the Department shall speak the truth at all times and under all circumstances. Any member who willfully departs from the truth is unfit for service and shall be subject to disciplinary action. Chapter 12- Violations and discipline: 12.10 Using rude, insulting, inappropriate or offensive language to include cursing .

New Jersey Administrative Code, Title 4A Chapter #2, Sub chapter #2 Major Discipline, 4A:2-2.1 General Causes, (a) An employee may be subject to discipline for: 2. Insubordination. 11. Other sufficient cause. (county charges)

Special Conditions:

60 Day suspension hearing date January 31, 2018 at 10 am in the training suite.

Hearing Is Requested [X]
Hearing Is Not Requested [ ]
Check appropriate box — Print and Sign — Date 1/8/2018

Note: Further disciplinary infractions of the above nature will result in progressive levels of discipline.

Signature: Geraldine D. Cohen Title: Geraldine D. Cohen, Warden
(Appointing Authority or Authorized Agent)

Method Of Service [X] Personal

Server Signature. For first 2 pages.

Atlantic County
Department Of Public Safety
Division of Adult Detension
Preliminary Notice Of Disciplinary Action

Service [ ] Certified or Registered Mail

Capt. E. Hall — Name and Title of Server

9-18-18 — Date Served

Postal Receipt Number: _____

Total Pages: ____

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

Employing Agency Name	Address/ Phone Number	Date
Atlantic County	5060 Atlantic Ave, Mays Landing, NJ 08330 609-645-5855	12-13-2016

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Elizabeth DAncona, Atlantic County Department of Law	1333 Atlantic Ave, Atlantic City, NJ 08401 / (609) 343-2310 / DAncona_Elizabeth@acnjlaw.org

EMPLOYEE INFORMATION

Employee Name	Permanent Civil Service Title	Employee Identification Number
Rhonda Denson	County Correction Officer	

Address/ Phone Number	Pension Number
23 Hopkins St Woodbury NJ 08096 856-845-0140	

You are hereby notified that the following charge(s) have been made against you *(if necessary, use additional sheets and attach)*

Charges:	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
See Attached	See Attached
☒ *If checked, charges are continued on attached page.*	☒ *If checked, incidents are continued on attached page.*

☐ You are hereby suspended effective _____
(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 5 *days of receipt of this form. If you request a hearing it will be held on January 11, 2016 at (time) 1000 am at (place of hearing) training suite.

*Must be a minimum of five days

The following disciplinary action may be taken against you:

☒ Suspension for 10 working days, beginning when and ending notified

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ (amount) which is equal to _____ (number of working days)

Appointing authority or authorized agent's signature and title,

Signature Kathleen V. Colleran Title Director

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☐ Receipt Number _____

☒ Signature of Server _____ ☒ Date of personal service 12-14-16

PAF-3-13 Revised 03-24-11

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

PRELIMINARY NOTICE OF DISCIPLINARY ACTION

December 13, 2016
Atlantic County New Jersey
Preliminary Notice of Disciplinary Action
Denson , Rhonda , County Correction Officer,

Specifications:

On November 18, 2016 employee was insubordinate with Lt Iuliucci and Lt Trout by being belligerent and disrespectful over the phone when she was ordered to complete a search of a new female commitment. Employee criticized the order given to her to complete the search of a new female commitment. Employee stated there were other female officers on duty and the female officers have to take turns completing searches of new female commitments. Employee was not truthful when she stated to Lt Iuliucci and Lt Trout that she was in and out of admissions all day completing searches of new female commitments, it was confirmed in OMS that Ofc Denson only completed one search on a new female commitment inmate Tashira Faulkner 250624, which was approximately 1348 hours.

Charge(s):

Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11 Personnel Rules and Regulations ;

Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11, Manual of Personnel Rules and Regulations, Chapter 1 - Professional Conduct: 01.10 INSUBORDINATION Officers shall not commit acts of insubordination, cause, or incite other employees to become insubordinate in areas such as listed below but not limited to: (a) Failure or deliberate refusal to obey a lawful order given by a superior officer. (b) Any disrespectful, mutinous, insolent, or abusive language or action toward a superior officer. 01.12 CRITICISM OF OFFICIAL ACTS, ORDERS OR POLICY Officers and employees shall not criticize the official actions, instructions, or orders of any Department member in a manner which is defamatory, obscene, unlawful, disrespectful or which tends to impair the efficient operation of the Department. Chapter 9 Judicial Actions and Testifying- 09.05 TRUTHFULNESS Officers and employees are required to be truthful at all times whether under oath or not.

New Jersey Administrative Code, Title 4A Chapter #2, Sub chapter #2 Major Discipline, 4A:2-2.3 General Causes, (a) An employee may be subject to discipline for: 2. Insubordination. (county charges)

Special Conditions:

Hearing date January 11, 2016 at 1000 am in the training suite.

Hearing Is Requested [X] Rhonda Denson 12/14/2016
Hearing Is Not Requested [ ]
Check appropriate box Print and Sign Date

Note: Further disciplinary infractions of this nature will result in progressive levels of discipline.

SIGNATURE: Geraldine D. Cohen TITLE: Geraldine D. Cohen, Warden
(Appointing Authority or Authorized Agent)

METHOD OF SERVICE
SERVICE [X] PERSONAL
[ ] CERTIFIED OR REGISTERED MAIL

Cohen [illegible] 12-14-16
NAME AND TITLE OF SERVER DATE SERVED

POSTAL RECEIPT NUMBER: Total Pages

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

Employing Agency Name: Atlantic County	Address/ Phone Number: 5060 Atlantic Ave, Mays Landing, NJ 08330 / 609-645-5856		Date: 03-10-2017
Attorney representing your agency should this matter be appealed: James Ferguson, Atlantic County Department of Law	Address/Phone number/Email address: 1333 Atlantic Ave, Atlantic City, NJ 08401 / (609) 343-2310 / Ferguson_James@aclink.org		
Employee Name: Rhonda Denson	Permanent Civil Service Title: County Correction Officer	Employee Identification Number:	
Address/ Phone Number: 23 Hopkins St, Woodbury NJ 08096 856-845-0140		Pension Number:	

On 12-14-2016 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ You requested a hearing which was held on 01-31-2017 ☐ You did not request a hearing

☐ You requested a hearing and did not appear at the designated time and place

Sustained Charges:	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
See Attached	See Attached
☒ *If checked, charges are continued on attached page.*	☒ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for 10 working days, beginning 6-16-2017 and ending 05-27-2017

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ (amount), which is equal to _____ (number of working days)

Appointing authority or authorized agent's signature and title.

Signature Christine A. Cotter Title Warden (A) 3/10/2017

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☒ Receipt Number _____

☒ Signature of Server _____ ☒ Date of personal service 3-10-17

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 et seq.), P.L.1973, c. 256 (C.44:7-85 et seq.), or P.L.1997, c.38 (C.44:10-55 et seq.); and veterans as defined by N.J.S.A.11A:5-1 et seq. are exempt from this appeal fee. Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory time limit will be denied. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

DPF-31B Revised 03-24-11

A-3

STATE OF NEW JERSEY

In the Matter of Gerrell Elliott, City of Newark, Department of Public Safety

CSC DKT. NO. 2017-653
OAL DKT. NO. CSV 18316-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2018 BW

The appeal of Gerrell Elliott, Battalion Fire Chief, City of Newark, Department of Public Safety, nine working day suspension, on charges, was heard by Administrative Law Judge Julio C. Morejon, who rendered his initial decision on September 21, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 17, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the nine working day suspension to a five working day suspension.

Since the penalty has been modified, the appellant is entitled to four days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty

was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the nine working day suspension to a five working day suspension. The Commission further orders that appellant be granted four days of back pay, benefits, and seniority.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17th DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 18316-16
AGENCY DKT NO. CSC 2017-653

GERREL ELLIOT,

Appellant,

v.

CITY OF NEWARK, DEPT. OF PUBLIC SAFETY,

Respondent.

Sebastian B. Ionno, Esq., for appellant, Gerrel Elliot (Ionno & Higbee, L.L.C., attorneys)

Joyce Clayborne, Assistant Corporation Counsel, for respondent City of Newark, Department of Public Safety (Corporation Counsel, City of Newark, attorneys)

Record Closed: August 10, 2018 Decided: September 21, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDERUAL HISTORY

Appellant, Captain Gerrell Elliott,[1] City of Newark, appealed the respondent, City of Newark, Department of Public Safety's (Newark) action imposing a major discipline of

[1] Appellant's name was misspelled as "Gerrel Eliot" in the original pleadings filed with the OAL. Elliott was elevated to Battalion Chief on September 2016.

a nine-day working suspension effective August 20, 2018, for violating the civil services regulations for incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty, and other sufficient cause. In addition, respondent found that Elliott violated the Newark rules and regulations for duties and responsibilities; care, prevention maintenance, and repair of department vehicles; neglect, proper use of Newark equipment, services and supplies, and acts of omission constituting neglect of duty.

Elliott requested a fair hearing and the matter was filed at the Office of Administrative Law (OAL) on December 5, 2016, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13. A telephonic prehearing conference was held on March 2, 2017. Sebastian Ionno, Esq., (Mr. Ionno) appeared for Elliot, and Corrine Rivers, Esq., (Ms. Rivers), appeared for respondent. A hearing was scheduled for July 14, 2017. On July 5, 2017, Joyce Clayborne, Esq. (Ms. Clayborne), wrote to Mr. Ionno that she had taken over the handling of the case from Ms. Rivers. The hearing was adjourned to October 3, 2017 and October 5, 2017, to allow for the exchange of discovery.

A hearing was conducted on October 3, 2017, and October 5, 2017. Prior to the commencement of the hearing on October 5, 2017, Elliott made a motion to exclude his disciplinary history, as the document discovery concerning the same was not provided by Newark during the time allowed under the Prehearing Order. The motion was granted, and a ruling was made by the undersigned excluding Elliott's disciplinary history as Newark failed to provide a compelling reason for not providing the same during the discovery period.

At the conclusion of the hearings on October 5, 2017, counsel were allowed to file written summations by December 15, 2017. Newark field its written summation on December 11, 2017, and Elliott, with Newark's consent, filed his written summation on January 17, 2018, and the record was closed.

An Order of Extension was entered on March 5, 2018, under N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, allowing the undersigned to complete the initial decision by April

19, 2018. The record was re-opened on April 17, 2018, to allow Newark to re-submit a CD containing recorded departmental interviews of Elliott and other witnesses, as the same submitted in evidence was inaudible. Respondent provided the original CD sometime in June 2018, and the same was heard by the undersigned on August 10, 2018, at which time the record was closed.

ISSUES

The issues to be determined in this matter are the following:

1. Whether Elliott is guilty of the alleged conduct, that he failed to have the replacement apparatus restocked with the necessary tools and equipment, and in doing so, is his conduct unbecoming a public employee, failure to perform duties and inability to perform duties.

2. Whether the disciplinary action against Elliott should have been a reprimand or lesser suspension on principles of progressive discipline.

FACTUAL DISCUSSION AND FINDINGS

Summary of Testimony

Kyle White, Fire Fighter/Driver:

Kyle White, ("White") is employed as a Fire Fighter with Newark since May 1998. On direct-examination, White testified that on April 22, 2016, he was the scheduled driver for Tour 4, Ladder 12, which commenced a twenty-four tour at 800 hours through April 23, 2018. White testified that Elliott was on twenty-four hours overtime, working the tour for Captain Edward Wilcher (Wilcher), the Captain assigned to Tour 4. White testified that it is the driver's job to make sure that the "apparatus (fire truck or rig) is in operating condition and that all of the necessary equipment on the apparatus is in working condition. If the apparatus is/are not functioning properly or essential equipment is missing, it is the driver's responsibility to notify his or her Captain.

White testified that during his routine vehicle preventative maintenance check at about 7:45 am, he discovered multiple tools and equipment missing from the apparatus, including some ladders and power tools such as the "Holmatro" spreaders and cutters. White testified that he verbally notified Elliott of the same, and that Elliott responded: "I'll take care of it." White stated that Elliott did not address the missing equipment. White also testified that the apparatus he inspected was an older model, as the regular apparatus was out for repair.

In addition to the vehicle preventative maintenance check, White testified that he also performed a mechanical inspection of the apparatus and he prepared a report which was placed on Elliott's desk. White testified that the mechanical inspection report is not a missing equipment checklist. A mechanical inspection report concerns specific issues with the apparatus. White testified that the Newark does not have a missing equipment checklist, and that if something is missing he verbally reports it to his Captain.

White testified as to the protocol for the fire station log book. He testified that Firefighters are not permitted to make entries in the log book regarding missing equipment. The log entries for missing equipment is the responsibility of the Fire Captains (See, R-8 and R-10).

On cross-examination, White testified that he was instructed by "one of the Chiefs" to prepare a memo concerning the missing equipment and who he informed as result of the same. As a result, White prepared a memo dated April 27, 2016, addressed to Fire Chief John Centanni (Centanni), indicating that he informed Elliott of the missing equipment on April 23, 2017, after performing the preventive maintenance check (See, R-5). White also prepared a second memo to Chief Centanni dated May 17, 2016, which contained a detailed description of the items that were missing from the apparatus on April 23, 2016, that White reported to Elliott (See, R-6).

White testified that he believed he complied with that obligation on April 23, 2016. White also testified that he was suspended for fourteen (14) hours because of the missing equipment on April 23, 2016. As to the memo White prepared May 17, 2016 (R-6), White

was asked to compare the same to the memo prepared by Captain Miguel Fresse (Fresse) dated April 24, 2016, to Centanni, concerning the missing equipment on April 23, 2016 (See, A-11). The two memos appeared identical, even as to a typographical error regarding the word "exemption", which White acknowledged should have been "exception". White testified that he prepared the memo on a computer at the fire station, after he was told to do so because of the missing equipment on April 23, 2016.

On questioning from the undersigned, White testified that he prepared the May 17 memo concerning the detailed missing items from memory and that he had verbally informed Elliott on April 23, 2016, of the items listed in the May 17 memo.

Captain Miguel Fresse:

Captain Miguel Fresse ("Fresse") is employed as a Captain by Newark for the last two and one-half years, and twenty-years with Newark overall. On direct-examination, Fresse testified that on April 23, 2016, he was assigned overtime to Engine Company 26, which is in the same command station as Ladder 12. Fresse stated that he was working the engine in the same firehouse that night; however, his overtime shift did not begin until 1800 hours or 6:00 p.m. From that time up until April 24, 2016, at 8:00 a.m. Elliott and Fresse were working together. Fresse further testified that if there were any fires during the time frame that they were both working that both he and Elliott would have to respond to said fire.

Fresse also testified that the replacement fire truck used by Ladder 12 on April 23, 2016, was an antiquated fire truck and he made a joke regarding the condition of the replacement truck. On direct, Fresse testified that his comment was directed at the fire engine assigned to Elliott's command as it appeared unequipped and bare following Fresse's visual inspection. Fresse stated that Elliott respond to his comment, that "it was like that when I got here", and that Elliott did nothing to rectify the unequipped/ bare fire truck under his command. Freese admitted that he did not act to rectify Elliott's replacement fire truck at the time, as Elliott was still in command of the tour. He testified "that anyone who walked into the garage would notice that the truck was deficient, it was quite obvious."

On cross-examination, Fresse testified further that when Elliott's shift was done, he took charge as Captain of Ladder 12, (Tour 1), and made sure to rectify the equipment missing from the replacement fire truck. Fresse stated that he called "Mr. Maya", the civilian caretaker in charge of the garage in order to restock the replacement fire truck with all the necessary ladders, tools and equipment. Fresse confirmed that he and Elliott's shift had overlapped for fourteen-hours, but that he did not take any action on the replacement fire truck during the fourteen-hour overlap "out of respect" for Elliott's command of his tour.

Fresse testified that he was instructed by his superiors to submit a report listing all of the missing equipment, which he had observed during Elliott's shift (See, R-9). Fresse testified on April 24, 2016, he prepared a memo, which stated that "at 1800 while performing preventative maintenance on spare rig 1312 [replacement fire truck] we discovered that the majority of tools and equipment was missing." (See, R-9). Fresse testified that he did not include Elliott's name in the memo because there's a "brotherhood" among the firemen, and he did not want to "rat out" Elliott.

On cross-examination, it was pointed out to Fresse that both his memo and that of White dated May 17, 2016, were identical, including the typographical error. (See, R-6 and R-9). Fresse denied giving White a copy of his memo dated April 24, 2016, and also denied allowing White to use the personal computer located in the Captain's desk at the fire station.

Fresse testified further that he followed the chain of command and notified the Battalion Chief on duty as to the missing equipment in the replacement fire truck. Fresse confirmed the log book entry of April 23, 2016, which contained White's findings and Freese's actions (See, R-8).

Battalion Chief Ciottariello:

On direct-examination, Battalion Chief Ciottariello ("Ciottariello") was on duty during the time of the incident and had no knowledge of any issues with Ladder 12. (See,

R-4). On direct, Ciottariello testified that Elliott did not notify him of any missing equipment from the replacement fire truck during his shift. Ciottariello testified that it is the Standard Operating Procedure ("SOP") for a Captain to notify the Battalion Chief, in the event any issues occur during the Captain's tour.

Ciottariello further testified that the document admitted into evidence as A23-3, identified as a City of Newark vehicle check list is a check list that is utilized by the driver who is supposed to inspect the vehicle and list any missing equipment on the check list. Ciottariello testified that he was presented with a copy of the check list from the shift in question but the same cannot be located.[2]

Fire Detective Dwane Cobbs:

Fire Detective Duane Cobbs (Cobbs), has been with Newark for twenty-one years, and is currently assigned to the Newark Fire Department Internal Affairs Unit. Cobbs' testified on direct that he was assigned to investigate White and Elliott's conduct concerning the missing equipment in the fire truck at Ladder company 12 on April 23, 2016. As part of his investigation, Cobbs took a recorded statement from White and Elliott (See, R-10 and R-10).

Cobbs' testified that his investigation concluded that the allegations that Elliott was aware that tools and equipment were missing from the fire truck at Ladder company 12 on April 23, 2016, were founded (See, R-19).

Battalion Chief Gerrell Elliott: [3]

[2] The check list was not provided by respondent as part of the discovery in this matter. Elliott requests a ruling by the undersigned of an adverse inference by respondent as to the missing checklist as it fails to contain the alleged missing items from Ladder 12 and supports Elliott's position that he was never made aware of a majority of the equipment that was missing from Ladder 12 on the shift at issue. Elliott's request will be addressed in the legal analysis which follows.

[3] When this incident occurred on April 23, 2016, Elliott held the rank of Captain. On September 2016, Elliott obtained the rank of Battalion Chief.

On direct-examination, Elliott testified that he has been employed with Newark since, January 8, 2000. Elliott testified that during his employment he has never received a major discipline, other than the within matter.

Elliott testified that on April 22, 2016, he was the Captain for Tour 4, Ladder 12, which commenced a twenty-four tour at 800 hours through April 23, 2018. Elliott testified that he was on twenty-four hours overtime, working the tour for Captain Wilcher, the Captain assigned to Tour 4.

Elliott testified that for the shift in question the normal fire truck used by Ladder 12 was in the vehicle repair shop and they had a replacement fire truck that was already in the station when he commenced his shift. Elliott testified that when the prior platoon dropped off the fire truck for repairs it failed to switch out whatever equipment and ladders that would fit on the antiquated back up fire truck that Ladder 12 needed to use. Elliott testified that he was never advised by the Captain he relieved that certain equipment and ladders were not transferred over and that information did not appear in the log book or any of the vehicle check sheets.

Elliott confirmed that White was the driver for the tour and date in question, and that it is the driver's job to make sure that the apparatus is in operating condition and that all of the necessary equipment is on the apparatus and in working condition. Elliott testified that If the fire truck is not functioning properly or essential equipment is missing it is the responsibility of the driver to advise his or her Captain.

Elliott testified that White informed him that the fire truck was missing ladders and some tools/equipment. Elliot further testified that the Holmatro spreaders and cutters, which is used to rescue individuals trapped in vehicles, was missing as well.

Elliott also testified that he was never advised that the majority of the equipment or tools were missing from the replacement fire truck, as Fresse and White stated in their testimony and in their respective memos. Elliott admitted as testified to by Fresse and White, that Elliott was aware that some ladders were missing and also the extraction tools, the Holmatro cutters, spreaders and the power unit for the Holmatro tools was missing.

Elliott also testified that based on the age of the fire truck there was limited space and not all of the equipment tools and ladders from a normal fire truck would fit on the replacement fire truck; that some of the storage units were smaller and that you could not fit all of the normal ladders on truck.

Elliott testified that despite the replacement fire truck missing some equipment and tools, the rig was "fire ready" in the event of a fire. Elliott testified that neither White or Fresse informed him that the replacement fire truck was not fire ready. Elliott testified that he was being disciplined for not having proper tools and equipment on a replacement rig that was assigned to another Captain whose shift Elliott was covering, and that Elliott did not create the problem but inherited it.

On cross-examination, Elliott testified that he has worked with missing equipment on a fire truck before. He stated that it was not uncommon for Newark not to properly stock the rigs that were in service, and that he was always working in "unfit conditions". Elliott testified that if he were to respond to a fire or emergency with the replacement fire truck assigned to him, any missing equipment that was needed could be obtained from another rig or fire station.

Findings

FINDINGS OF FACT

Most of the facts in this case are undisputed. Below are the facts derived from the testimony of the parties submitted and my assessment of its credibility, together with the documents that the parties submitted and my assessment of their sufficiency, I **FIND** the following as **FACT**:

Elliott is charged with violating the following listed charges:

New Jersey Administrative Codes:

N.J.A.C. 4A:2-2.3 (a) (1): Incompetency, inefficiency or failure to perform duties;

N.J.A.C. 4A: 2-2.3(a)(3): Inability to perform duties;

N.J.A.C. 4A:2-2.3 (a) (7): Neglect of duty;

N.J.A.C. 4A:2-2.3(a) (11): Other sufficient cause;[4]

Newark Fire Department General Orders:

G.O. A-3: Duties and responsibilities of rank and titles of the Department.

G.O. F-3: Care, prevention maintenance and repair of Department vehicles.

Newark Fire Department Rules and Regulations:

Articles 6:

Para 1: Members of the Department shall not violate the Oath of Office, nor be guilty of neglect or cowardice or shirk any duty.

Article 40:

Para 2: Economy shall be exercised by all Members in the use of all Newark equipment.

Article 58:

Para 1: Members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

Article 59:

Para 1: Members whose performance is demonstrably inadequate or unsuitable and fails to meet, obtain or produce the effects or results mandated by Department Rules and Regulations, shall be deemed in violation of the Department Rules and Regulations.

Para 2: Members found guilty of Official Inefficiency or Incompetence shall be subject to Departmental charges. See, J.1.

[4] Subsequently re-codified as N.J.A.C. 4A:2-2.3 (a) (12). Hereinafter referred to as N.J.A.C. 4A:2-2.3 (a) (11). As originally charged.

The disciplinary charges in this matter result from an overtime shift for Ladder 12 that then Captain Elliott worked on April 23, 2016. At the time Ladder 12 was not Elliott's normal assignment as he was filling in for another Captain. For the shift in question the fire truck used by Ladder 12 was in the vehicle repair shop and they had a replacement truck that was already in the fire station when Elliott arrived for the start of his shift.

When the prior squad dropped off the truck for repairs it failed to switch out whatever equipment and ladders that would fit on the replacement truck that Ladder 12 needed to use. Elliott was never advised prior to starting the shift by the Captain he relieved that certain equipment and ladders were not transferred from the truck over to the replacement truck. The log book and vehicle check sheets did not reflect the lack of transfer of equipment and tools.

Elliott's tour started at 800 hours on April 23, 2016. White was the driver for Elliott that day on Ladder 12. It is the driver's job to make sure that the truck is in operating condition and that all of the necessary equipment is on the truck and in working condition. If the truck is not functioning properly or essential equipment is missing it is the responsibility of the driver to advise his or her Captain. White was disciplined for his conduct in failing to make sure the replacement truck contained adequate tools and equipment, and he served a 14-hour suspension.

The replacement fire truck utilized in Elliott's shift was antiquated and did not have the full capacity to hold all regulation ladders and equipment. It is also undisputed that the replacement truck utilized on April 23, 2016, was missing all of the equipment identified by White in his May 17, 2016, memorandum which was marked and admitted into evidence as R6 and also the equipment outlined by Fresse in R9 that was also admitted into evidence at the hearing. White provided Elliott with an oral list of the tools and equipment that was missing from the replacement truck, which included ladders and some of the power tools such as the Holmatro spreaders and cutters. White did not communicate to anyone else in the chain of command that additional tools or equipment were missing the entire time he was on his shift.

Elliott and Fresse were working together for part of the twenty-four-shift on April 23, 2016. Fresse was working the engine in the same firehouse that night; however, his overtime shift did not begin until 1800 hours or 6:00 p.m. During the time Fresse and Elliott worked together, Fresse took notice of the poor condition of the replacement truck and joked about the same with Elliott. In addition, Fresse could see that the replacement truck was missing ladders and equipment. When Elliott's tour ended, Fresse took the necessary steps to rectify the situation of missing ladders and equipment, including contacting the garage to see about the return of an updated fire truck.

As a result of the incident at issue, White and Fresse were instructed to prepare a memorandum concerning the equipment that was missing on the replacement truck, and their actions concerning the same. Thereafter, an internal affairs investigation was conducted and White and Elliott were issued Preliminary Notices of Disciplinary Action (PNDA). White did not contest the charges and served a seven-day suspension. Elliott did contest the same, which resulted in a Final Notice of Disciplinary Action (FNDA), and the within appeal. No PNDAs were issued as to Fresse or any Battalion Chief over-seeing Tour 4 of Ladder company 12.

After the incident on April 23, 2016, Captain Elliot was promoted to Battalion Chief in September 2016.

Credibility

Prior to conducting a legal analysis and making a conclusion as to the testimony provided herein, it is necessary to address the credibility of the testimony of White, Freese and Elliott. "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . trier of fact, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be

approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521–22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

I FIND the testimony of all of the witnesses to be credible concerning the condition of the replacement truck on April 23, 2016. They have all been consistent as to their observations that equipment was missing on the replacement truck. The same is conceded by Elliott as he does not dispute that the replacement truck was lacking certain equipment and supplies. There is a witness credibility issue, however, concerning whether White and Freese informed Elliott as to all of the items that were missing in the replacement truck on April 23, 2016. In addition, there is a credibility problem regarding what White communicated to Elliott on April 23, 2016.

The credibility issue concerns White and Fresse's memoranda, which were prepared more than three weeks apart, containing identical list of equipment that was missing in the same order with the same punctuation and even the same typo. Clearly, one of them had to copy the exact list from the other. Since Fresse's list was prepared on April 24, 2016, and White's memo was prepared May 7, 2016, **I FIND** that White copied word for word from Fresse's April 24, 2016 memo, and therefore my finding questions White's veracity that he verbally informed Elliott on April 23, 2016, that all of the items listed in his memo of May 17, 2016, was in fact communicated to Elliott. Consequently, **I FIND** White's testimony not credible that he verbally informed Elliott on April 23, 2016, that the replacement truck was missing the equipment and ladders referenced in White's memo of May 17,2016.

I FIND that White and Fresse collaborated in preparing their respective memos, and consequently, **I FIND** Freese's testimony not credible that he took no action to correct the missing equipment during Elliott's tour out of "respect" for him. Similarly, **I FIND** Freese's testimony not credible that the replacement truck was "not fire ready" as his failure to take corrective action during Elliott's tours is inconsistent with the items listed in his memo. In other words, how can I believe Freese that the replacement truck was missing all the items listed in his memo and that of White, when he is concerned that the truck is not fire ready, and Freese does not take corrective action until Elliott has concluded his tour? The answer is contained in my **FINDING** concerning Freese's lack of credibility.

I FIND Elliott's testimony consistent with that of Fresse and White that Elliott was aware that some equipment was missing; specifically ladders, extraction tools, the Holmatro cutters, spreaders and the power unit for the Holmatro tools was missing.

I FIND Elliott's testimony credible that based on the age of the replacement truck, there was limited space and not all of the equipment tools and ladders from a normal fire truck would fit, including that the storage units were smaller and that you could not fit all of the normal ladders on the replacement truck.

I FIND Elliott's testimony convincing that based on what was reported to him and based on what he actually observed, that the replacement truck was fire ready.

LEGAL ANALYSIS AND CONCLUSION

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007).

Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)). Indeed, progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest, such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. at 33.

In the within matter, Elliott is charged with violating the civil services regulations for incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty, and other sufficient cause. In addition, respondent found that Elliot violated the Newark Fire Department rules and regulations for duties and responsibilities; care, prevention maintenance, and repair of department vehicles; neglect, proper use of Newark equipment, services and supplies, and acts of omission constituting neglect of duty.

The basis for Newark's findings that Elliott violated the civil services regulations, and the rules and regulations arise from Elliott's failure to take any corrective actions concerning the missing equipment and ladders from the replacement fire truck. **I CONCLUDE** that Newark has proven by a preponderance of the credible evidence that Elliott was aware that some of the equipment was missing from the replacement fire truck and that he took no action to correct the same, and the respondent's decision concerning the same is **AFFIRMED.**

I CONCLUDE further that Newark has failed to prove by a preponderance of the credible evidence that Elliott's admission that the items he thought to be missing from the replacement truck rendered the replacement truck unsafe or not fire ready.

Having concluded that Elliott's conduct was in violation of the civil services regulations and the Newark Fire Department rules and regulations, I must determine if

the penalty assessed by Newark is consistent with the concept of progressive discipline inherent in the Civil Service Commission ability to increase or decrease the penalty, under N.J.S.A. 11A:2-19; In re Carter, 191 N.J. 474, 483–86 (2007).

In determining if the nine-day suspension is consistent with the concept of progressive history, I am limited in considering Elliott's complete disciplinary history, as Newark did not provide the same in discovery, and I have ruled that the same was excluded as a result of Newark's conduct. However, I can consider Elliott's testimony that he had some prior disciplinary history in his file and I can also factor that Newark elevated Elliott to the rank of Battalion Chief on September 2016, five months after this incident occurred. In addition, my conclusion that Newark failed to prove that the replacement fire truck was not fire ready is also factored into my decision of a proper penalty to be imposed on Elliott.

As such, **I CONCLUDE** that the nine-day suspension assessed by Newark against Elliott, deemed a major suspension, should be **REVERESED** and that the appropriate suspension should be five-days, a minor suspension.

My decision is formed from Newark's inability to prove that Elliott was made aware of all items missing from the replacement truck and limited to what he personally knew to be the case. In addition, no proof was presented that Elliott had violated civil service rules or departmental rules and regulations in the past to justify the imposition of a major disciplinary charge.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that respondent's decision that Elliott violated the civil services regulations and the Newark Fire Department rules and regulations, is **AFFIRMED** and I further **ORDER** that respondent's decision to suspend appellant for nine-days is **REVERSED** and the appropriate suspension should be five-days.

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

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

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

September 24, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: September 24, 2018

Date Mailed to Parties: September 24, 2018
lr

APPENDIX

Witnesses

For Appellant:

Battalion Chief Gerrell Elliott

For Respondent:

Firefighter Kyle White

Captain Miguel Fresse

Battalion Chief Ciottariello

Fire Detective Duane Cobbs

Exhibits

Joint:

J-1

Oath of Office

Article 1	Compliance with Rules and Regulations, General Orders, Executive Orders, and Directives
Article 2	Chain of Command
Article 3	Orders from Superiors
Article 4	Respect to Superiors
Article 5	Disciplinary Penalties
Article 6	Neglect of Duty
Article 7	Arrangement of Equipment
Article 8	Receiving of Personal Services
Article 9	Changing or Annulling of Standing Orders
Article 10	Acting Officers
Article 11	Personal Example
Article 12	False Statements
Article 13	On Duty, At All Times and Subject to Recall
Article 14	Punctuality

Article 15 Time, While on Duty
Article 16 Smoking in Public
Article 17 Absence from Quarters or Assignments
Article 18 Absence Without Authorized Leave
Article 19 Departmental Identification to Citizens
Article 20 Citizenship Requirements
Article 21 Residence and Telephone Number
Article 22 Driver's License Requirements
Article 23 Conduct of Members
Article 24 Payment of Debts
Article 25 Discrimination
Article 26 Political and Religious Discussions
Article 27 Entering Taverns While on Duty
Article 28 Use of Intoxicating Beverages and/or Controlled Dangerous Substances

For Appellant:

A-1 3/1/1988 General Order A-3- Duties and Responsibilities of Ranks and Titles
A-2 6/12/97 General Order A-4 Internal Affairs Unit
A-3 7/1/98 General Order A-2 Responsibilities of the Various Divisions and Offices of the Department
A-4 5/1/01 General Order A-5 Discriminatory Workplace Harassment Policy and Complaint Procedure
A-5 10/18/02 General Order A-1
A-6 5/15/03 General Order A-6 Emergency Appointment
A-7 6/4/03 General Order F-3 Care, Prevention Maintenance and Repair of Vehicles
A-8 2/27/16 Memo from BC Ciottariello to Chief Centanni Re: Ladder 12 Change Over
A-9 4/22/16 Log Book
A-10 4/24/16 Memo from Anthony Maya to Chief Centanni re: L-12 No Tools
A-11 4/24/16 Memo from Captain Fresse to Chief Centanni
A-12 4/24/16 Memo from Captain Fresse to Chief Centanni Re: Missing Equipment Follow Up

A-13 4/27/16 Memo from FF White to Chief Centanni Re: Preventative Maintenance

A-14 5/2/16 Memo from Captain Fresse to Chief Centanni Re: Tour 1

A-15 5/4/16 Memo from Elliott to DC Zieser Re: Change over Ladder

A-16 5/17/16 Memo from FF White to Chief Centanni Re: Preventative Maintenance

A-17 6/1/16 Investigation Report from Detective Cobbs

A-18 6/8/16 Correspondence from Detective Walker to FF White re: Investigation

A-19 6/22/16 IA Report from Detective Cobbs to BC Osorio re: Elliot Statement

A-20 6/23/16 IA Report from Detective Cobbs to BC Osorio re: White Statement

A-21 6/28/16 Preliminary Notice of Disciplinary Action

A-22 8/11/16 Final Notice of Disciplinary Action

A-23 Gerrell Elliott Appeal w/ attachments

A-24 CD Statement of Elliott

A-25 CD Statement of White

For Respondent:

R-1 Final Notice of Disciplinary Action (w/ Specification of Charges), dated August 11, 2016

R-2 Preliminary Notice of Disciplinary Action (w/ Specifications of charges), dated June 28, 2016

R-3 Memo to Deputy Chief Zieser from Captain Elliot, dated 5/4/16

R-4 Memo to Fire Chief Centanni from B/C Ciottariello

R-5 Memo to Fire Chief Centanni from Fire Fighter White, dated 4/27/16

R-6 Memo to Fire Chief Centanni from Fire Fighter White, dated 5/17/16

R-7 & 7a Dept. of Public Safety Fire Division Internal Affairs Report to Battalion Chief Osorio from Detective Cobbs, dated 6/22/16 & 6/23/16

R-8 Fire House Log Book Entries from April 21, 2016 to April 26, 2016

R-9 Two Memos to Fire Chief Centanni from Capt. Fresse, dated 4/24/16

R-10 CD Statement of Elliott

R-11 CD Statement of White

STATE OF NEW JERSEY

In the Matter of Jeneen Forman
Woodbine Developmental Center
Department of Human Services

CSC DKT. NO. 2017-3369
OAL DKT. NO. 06113-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 06113-17
AGENCY DKT. NO. 2017-3369

IN THE MATTER OF
JENEEN FORMAN, DEPARTMENT OF HUMAN SERVICES, WOODBINE DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant (The Nash Law Firm, attorneys)

Rimma Razhba, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 17, 2018 Decided: October 3, 2018

BEFORE **KATHLEEN M. CALEMMO,** ALJ:

This matter was filed with the Office of Administrative Law (OAL) on May 2, 2017 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement and Last Chance Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

October 3, 2018 — Kathleen M. Calemmo
DATE — **KATHLEEN M. CALEMMO**, ALJ

Date Received at Agency: 10.3.18

Date Mailed to Parties: 10.4.18

cmo

APPENDIX

EXHIBITS

Jointly Submitted:

J-1 Settlement and Last Chance Agreement

J-1

OAL DKT. NO. CSV 06113-2017S
AGENCY DKT. NO. 2017-3369

IN THE MATTER OF
JENEEN FORMAN

AND

SETTLEMENT AND LAST CHANCE AGREEMENT

DEPARTMENT OF HUMAN SERVICES, WOODBINE DEVELOPMENTAL CENTER

The parties in this appeal, Appellant Jeneen Forman ("Appellant") and Respondent Department of Human Services, Woodbine Developmental Center ("Respondent") have voluntarily resolved all disputed matters and enter into the following Settlement and Last Chance Agreement ("Agreement"), which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **April 3, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A3.1 – Abandonment of job as a result of absence from work as scheduled without permission for five (5) consecutive days. (2NJAC4A:2-6.2(b)) -	Resignation not in good standing,	effective February 28, 2017

B. The **Preliminary** Notice of Disciplinary Action dated 1/5/16 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A4.4 – Chronic or excessive absenteeism - (see attached)	removal	

C. The parties have agreed to the following:

1. Appellant shall be reinstated to the position of Human Services Assistant ("HSA") at Woodbine Developmental Center.
2. The Final Notice of Disciplinary Action dated April 3, 2017 shall be modified to charges of A4.5 (chronic or excessive absenteeism) and A1.4 (absence from work as scheduled without permission and without giving proper notice) and the discipline shall be reduced to six (6) months consecutive suspension without pay for each charge (time already served).
3. The Preliminary Notice of Disciplinary Action dated 1/5/16 RSF shall be reduced to 60 days suspension (time already served).
4. Pursuant to the Settlement Agreement signed by Appellant on February 6, 2017, ~~upon her return to work~~ Appellant ~~shall~~ agreed to serve ten (10) days suspension for a previous charge of A2.3. RSF This will be marked as time already served.
5. Appellant waives any and all claims for back-pay or attorney's fees from Respondent.
6. Any other days from the time of the last suspension day until reinstatement shall be recorded as Approved Leave of Absence Without Pay.
7. This settlement constitutes a final warning and last chance agreement arising from Appellant's conduct in this matter. Appellant shall be subject to discharge and/or removal by Respondent for any future conduct that results in violation of <u>any</u> of the regulations, policies or procedures cited in Paragraph A and Paragraph B of this Agreement, including any further infractions of: 1) absence from work as scheduled without permission (with or without giving proper notice; 2) abandonment of job as a result of absence from work as scheduled without permission for five (5) consecutive days; or 3) chronic or excessive absenteeism.

8. Upon the parties' signing of this Agreement, and only after the Civil Service Commission approves this Agreement, Respondent shall begin procedures for reinstatement of Appellant.
9. After her reinstatement, Appellant shall be re-trained with regard to her job duties and responsibilities and applicable Departmental policies and procedures.

D. Appellant agrees to withdraw her appeal and request for a hearing.

E. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

F. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

G. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

H. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

I. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New

Jersey, Department of Military and Veterans Affairs, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

J. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of this Agreement shall be fully enforceable.

K. The parties waive the right to file exceptions and cross exceptions.

L. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9/17/2018
DATE

Jeneen Forman
Jeneen Forman

9/17/2018
DATE

ON BEHALF OF APP.
William A. Nash, Esq.

9/17/18
DATE

ON BEHALF OF
Wardlaw Dep Center

9/17/18

Annie Randazzo
DAG
On behalf of Respondent

CERTIFICATION

I, Jeneen Forman, being the moving party in this matter, hereby certify that I have reviewed this Settlement and Last Chance Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement and Last Chance Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement and Last Chance Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement and Last Chance Agreement voluntarily.

I also understand that if this Settlement and Last Chance Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/17/2018
DATE

Jeneen Forman
Jeneen Forman

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

FROM

Employing Agency Name	Address/ Phone Number	Date
Woodbine Developmental Center	1175 DeHirsch Avenue Woodbine, NJ 08270 (609) 861-2164	01/05/16

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Jeneen Forman	Human Services Assistant	3047

Address/ Phone Number	Pension Number
650 Gershel Avenue, Pittsgove New Jersey 08318	

You are hereby notified that the following charge(s) have been made against you: *(If necessary, use additional sheets and attach)*

Charges:

(A4.4) Chronic or excessive absenteeism from work without pay.

RECEIVED
WOODBINE
DEVELOPMENTAL CENTER
2016 MAR -7 PM 12: 17
EMPLOYEE RELATIONS
OFFICE

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

On the following dates you called out sick and you have no sick time on the books to cover these absences.

12/07/15 - 8 hours UW
12/08/15 - 8 hours UW
12/09/15 - 8 hours UW

☐ *If checked, incidents are continued on attached page.*

☐ **You are hereby suspended effective** _____
(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 17 ***days of receipt of this form. If you request a hearing it will be held on** _____
at (time) _____ **at (place of hearing)** _____
**Must be a minimum of five days*

The following disciplinary action may be taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☒ Removal, effective (date) **TO BE DETERMINED

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing authority or authorized agent's signature and title.

Signature _____ **Title** ASPRS

This form must be personally served on the employee or sent by certified or registered mail.

☐ **Certified or Registered Mail** ☐ **Receipt Number** _____

☑ **Signature of Server** _____ ☐ **Date of personal service** 3/11/16

DPF-31A Revised 03-24-11

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

A-1

STATE OF NEW JERSEY

In the Matter of Brett J. Guinta
Hunterdon Developmental Center
Deaprtment of Human Services

CSC DKT. NO. 2019-97
OAL DKT. NO. 10438-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10438-18

AGENCY DKT. NO. 2019-97

IN THE MATTER OF
BRETT J. GUINTA, DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 27, 2018 Decided: October 1, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Brett J. Guinta from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 23, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

October 1, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 10-2-18

Date Mailed to Parties:

cmo

OAL DKT. NO. CSV 10438-2018

AGENCY DKT. NO. 20 – 2019-97

SETTLEMENT AGREEMENT

IN THE MATTER OF

Brett Guinta

AND

Hunterdon Development Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 6/29/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.4.5		
2.	NJAC 4A:2-2.3(a) 4, 5 + 12	Removal	7/6/18
3.			
4.			
5.			

B. The Appellant Brett Guinta withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A.4.5		
2.	NJAC 4A:2-2.3(a) 4,5+12	Suspension	3 months 30 d.
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of without pay since 7/6/15 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Brett Gunn 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I Appellant acknowledges and is committed to reporting to work as scheduled and as required

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9/27/18
DATE

Appellant

9/27/18
DATE

Respondent

9-27-18
DATE

ON BEHALF OF APPELLANT

9/27/18
DATE

ON BEHALF OF

OAL DKT. NO. CSV 10438-2018

CERTIFICATION

I, BRETT GUPTA, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/27/18
DATE

NAME

STATE OF NEW JERSEY

In the Matter of Matthew Harden
City of Millville School District

CSC DKT. NO. 2018-1965
OAL DKT. NO. 01490-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01490-18

AGENCY DKT. NO. 2018-1965

IN THE MATTER OF MATTHEW HARDEN,
CITY OF MILLVILLE SCHOOL DISTRICT.

Cosmas P. Diamantis, Esq., for appellant Matthew Harden (Zeller & Wieliczko, LLC, attorneys)

Joseph Betley, Esq., for respondent City of Millville School District (Capehart and Scatchard, P.A., attorneys)

Record Closed: September 13, 2018 Decided: September 18, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 26, 2018, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to F-13.

The parties have agreed to a settlement and have prepared an Agreement and General Release (J-1) indicating the terms of the settlement, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

September18, 2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 9-21-18

Date Mailed to Parties: 9-24-18

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Agreement and General Release received by the Office of Administrative Law on September 13, 2018

RECEIVED
2018 SEP [illegible] A 9:10
[illegible]

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

Allen S. Zeller+ Matthew B. Wieliczko*
Gianni A. Corleone
Cosmas P. Diamantis**
Amy L. Gillette
Michael J. Huntowski**
Dean R. Wittman

*Also Member of NY Bar
**Also Member of PA Bar
+Also Member of DC Bar

September 12, 2018

VIA REGULAR MAIL AND EMAIL

Honorable Elaine Frick, ALJ
Office of Administrative Law
1601 Atlantic Avenue
Atlantic City, New Jersey 08401

ATTN: Denise Miranda, Judicial Assistant to Hon. Elaine Frick, ALJ

RE: Matthew Harden v. City of Millville School District
OAL Docket No.: CSV 01490-2018 S
Agency Ref. No.: 2018-1965
Our File No.: 1341-1143-17

Dear Judge Frick:

As you know, Zeller & Wieliczko, LLP represents the Petitioner, Matthew Harden, in the above-referenced matter. Please accept this correspondence on behalf of counsel for both parties. First and foremost, we apologize for not appearing for the status conference call that was still scheduled for yesterday. It appears we were under the impression that all status calls and settlement conferences were adjourned given the matter was tentatively settled.

In that regard, and for your consideration and approval, enclosed please find a copy of the "Separation/Resignation Agreement and General Release" fully executed by the parties on August 20, 2018. As of today, counsel for the Millville School District provided our office with a copy of a letter dated September 11, 2018, along with a copy of the enclosed settlement check, which should be received by our office shortly.

Please advise us if wish to schedule another status conference call to confirm this settlement. Otherwise, thank you for Your Honor's time and attention to this matter.

Respectfully submitted,

ZELLER & WIELICZKO, LLP

By: _____
COSMAS P. DIAMANTIS, Esquire

CPD:jey
Enc.
cc: Mr. Matthew Harden (via email and regular mail)
Joseph Betley, Esquire (via email and regular mail)
Lauren E. Tedesco-Dallas, Esquire (via email and regular mail)
James Jameson, NJEA UniServ Rep. (via email only)

SEPARATION/RESIGNATION AGREEMENT AND GENERAL RELEASE

This Separation/Resignation Agreement and General Release ("Agreement") is made on this 7th day of August, 2018, by and between Matthew A. Harden ("Mr. Harden") and the Millville Board of Education, Cumberland County, New Jersey ("Board") (hereinafter collectively referred to as the "Parties").

WHEREAS, Mr. Harden was employed as a School Security Aid for the Board, and was placed on a 90-day Working Test Period pursuant to New Jersey Civil Service Commission statutes and regulations; and

WHEREAS, on December 18, 2017, the Board notified Mr. Harden that they would be proceeding with termination of Mr. Harding's 90-day Working Test Period from his position as School Security Aid; and

WHEREAS, on January 22, 2018, the Board terminated Mr. Harden from his position as a School Security Aid; and

WHEREAS, thereafter, Mr. Harden appealed the Board's termination of his employment by filing an appeal with the New Jersey Civil Service Commission; and

WHEREAS, Ms. Harden's Civil Service appeal was transferred to the Office of Administrative Law, docketed as OAL Dkt. No. CSV 01490-18 S, Agency Ref. No. CSC Dkt. #2018-1965; and

WHEREAS, after good faith negotiations, the Board and Mr. Harden desire to resolve amicably all matters and issues arising out of Mr. Harden's employment relationship with the Board and separation therefrom; and

WHEREAS, the Board and Mr. Harden have concluded that, effective the date this Agreement is signed by both parties, their employer-employee relationship shall terminate via the resignation of Mr. Harden; and

WHEREAS, this Agreement, and the execution and implementation of same, shall not be construed or considered an admission of liability and/or wrongdoing by Mr. Harden or the Board, its present and former board members, officers, employees, agents and servants, said liability and/or wrongdoing being expressly denied.

NOW, THEREFORE, in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Mr. Harden and the Board agree as follows:

1. Mr. Harden hereby submits his irrevocable letter of resignation with the Board, and the Board hereby accepts such resignation. The irrevocable letter of resignation is attached as Exhibit "A" to this Agreement. Effective at the close of business on August 7, 2018, Mr. Harden's employment with the Board shall, in all respects, cease. Additionally, Mr. Harden shall send a letter to the Office of Administrative Law withdrawing his Civil Service Appeal, docketed as OAL Dkt. No. CSV 01490-18 S, Agency Ref. No. CSC Dkt. #2018-1965.

2. In full consideration of the mutual exchange of this Agreement, the mutual agreement to be legally bound by its terms, and Mr. Harden's irrevocable resignation, withdrawal of appeal, and General Release set forth in Paragraph 4 below:

   a. The Board will pay Mr. Harden a one-time lump sum payment in the amount of $1,000.00. Payment to Mr. Harden shall be delivered to Cosmas Diamantis, Esquire of Zeller & Wieliczko, LLP. Said payment will be made within thirty (30) days of Board approval of this Agreement.

b. The Board shall provide Mr. Harden with a neutral reference to future employers which shall only disclose Mr. Harden's dates of employment with the Board, positions/titles held during dates of employment, and salary. In no event will the Board, nor anyone acting on its behalf, write or say anything adverse to Mr. Harden's interests.

c. The Board will not disclose the contents of Mr. Harden's personnel records and employee files to any third party without either: i) the express written authorization of the New Jersey Commissioner of Education/Department of Education, or ii) a valid court order. All documents pertaining to the alleged incidents giving rise to Mr. Harden's separation from employment, including this Agreement, will be removed from Mr. Harden's personnel file and placed the Board's counsel's litigation file. The letter of resignation is the only document concerning Mr. Harden's separation from employment that will remain in Mr. Harden's personnel file.

d. The Board, its officers, members, employees and agents will not contest, challenge, or appeal any award of unemployment benefits that Mr. Harden received from the New Jersey Department of Labor and Workforce Development.

3. Mr. Harden's resignation shall extinguish all employment rights with the Board, and he shall have no re-employment rights.

4. Mr. Harden, his executors, heirs and assigns, **RELEASES AND DISCHARGES** the Board and any and all of its former and current members, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, from any and all liability,

claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which he may have had, now has, or may hereafter have for any reason whatsoever on account, arising out of or in consequence of Mr. Harden's employment relationship and/or separation of employment from the Board, including, but not limited to:

a. All federal and state statutory claims and any amendments to such statutes, including but not limited to claims arising under the New Jersey Law Against Discrimination, the New Jersey Civil Rights Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, Title VII of the Civil Rights Act of 1964, Sections 1981 through 1988 of Title 42 of the United States Code, the Age Discrimination in Employment Act of 1967, including the Older Workers' Benefit Protection Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act, the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the National Labor Relations Act, the Federal Warn Act, the Family and Medical Leave Act of 1993, the Occupational Safety and Health Act, the Equal Pay Act, the New Jersey Minimum Wage Law, the New Jersey Wage and Hour Law, Equal Pay Law for New Jersey, the New Jersey Worker Health and Safety Act and the Labor Management Relations Act;

b. All claims arising under the United States or New Jersey Constitutions;

c. All claims arising under any Executive Order or derived from or based upon any state or federal regulations;

d. All common law claims, including but not limited to any and all rights to discovery, breach of contract, tort claims, claims for wrongful discharge, constructive discharge, violation of public policy, breach of an express or implied contract, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, hostile work environment, defamation, conspiracy, tortious interference with contract or prospective economic advantage, promissory estoppel, equitable estoppel, fraud, misrepresentation, detrimental reliance, retaliation and negligence;

e. Excluding the payment set forth in this Agreement, all claims for any compensation including, back wages, front pay, punitive damages, pay increases, bonuses or awards, fringe benefits, disability benefits, severance benefits, reinstatement, retroactive seniority, pension benefits, contributions to retirement plans, or any other form of economic loss;

f. All claims for personal injury, including physical injury, mental anguish, emotional distress, pain and suffering, embarrassment, humiliation, damage to name or reputation, interest, liquidated damages and punitive damages;

g. Any claims arising out of the terms and conditions of Mr. Harden's employment with the Board and the separation of such employment;

h. Any rights to reemployment with the Board;

i. Any grievance pursuant to any Board policy or regulation and any collective bargaining agreement; and

j. All claims for costs, interest and attorneys' fees.

5. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"). Mr. Harden represents that he has not filed and does not intend to file a Workmen's Compensation claim related to his employment with the Millville Board of Education. This release does not limit Mr. Harden's right to seek indemnification, in accordance with N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1, with respect to a claim filed against him for any act or omission arising out of and in the course of the performance of his duties as an employee of the Millville Board of Education. The parties are not aware of the existence of any such claims.

6. The Board, for and in consideration of the undertakings of Mr. Harden set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge Mr. Harden and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, including claims for costs, interest and attorneys' fees, which it ever had, now has, or hereafter may have, or which its officers, members, employees and/or agents, and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of his employment relationship and/or the termination of his employment relationship and/or affiliation with the Board with the exception of claims arising from the breach of this Agreement and claims by third parties.

7. This Agreement sets forth the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the Parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be

14. The terms of this Agreement are the product of good faith negotiations between the Parties and their respective counsel, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

15. The Parties, including their agents and members of District Administration, agree to maintain in confidence and not to disclose the terms of this Agreement, including but not limited to any facts surrounding Mr. Harden's employment and separation from employment, unless otherwise required by state or federal law. It shall not be considered a breach of the obligation of confidentiality for Mr. Harden to make disclosure of the settlement terms to his immediate family (who shall first be expressly advised of the same requirement of confidentiality), or to make disclosure of the settlement terms and the underlying events in order to obtain private and confidential legal, tax or financial advice or to his union representatives, or to respond to any inquiry from any governmental entity or agency.

16. Mr. Harden is provided with 21 days to review this Agreement and may revoke his signature of this Agreement within seven (7) calendar days of signing it by delivering written notice of revocation to Lauren E. Tedesco, Esq., Capehart Scatchard, 8000 Midlantic Drive, Suite 300 South, Mt. Laurel, NJ 08054. If Mr. Harden has not revoked his signature of this Agreement by written notice received within the seven (7) day period, it becomes effective immediately thereafter.

17. This Agreement is subject to formal approval by the Board.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.

8/7/18
Matthew A. Harden Date

8/14/18
Bryce Kell Date
Business Administrator/Board Secretary
Millville Board of Education

8/20/18
David Gentile Date
Superintendent
Millville Board of Education

8/21/18
Kimberly Carty Date
Board President
Millville Board of Education

EXHIBIT "A"

Bryce Kell
Board Secretary/School Business Administrator
Millville Board of Education
110 N. 3rd St.
Millville, NJ 08332

Re: Resignation

Dear Mr. Kell:

I, Matthew A. Harden hereby submit this irrevocable letter of resignation from my position as a School Security Aid with the Millville Board of Education. This irrevocable letter of resignation from my position shall become effective August 7, 2018.

Respectfully yours,

Matthew A. Harden

Angiulo, Nicholas

From: Cosmas Diamantis <cdiamantis@zwattorneys.com>
Sent: Friday, September 28, 2018 2:34 PM
To: Angiulo, Nicholas
Cc: Messina, JoAnn; Matt Wieliczko; Lauren E. Tedesco; Joseph F. Betley
Subject: [EXTERNAL] RE: IMO Matthew Harden, City of Millville School District - SETTLEMENT

Deputy Director Angiulo:

As you know, Zeller & Wieliczko, LLP represents the Petitioner, Matthew Harden, in the above-referenced matter.

I have had an opportunity to discuss your clarification request with counsel for the Millville School District. We are in agreement that Mr. Harden was on an "involuntary leave of absence without pay" during the period of time between his original separation from the District on December 18, 2017 and his eventual resignation on August 7, 2018.

Please advise us of any additional questions or clarifications you may have.

Thank you,

Cosmas P. Diamantis, Esquire
Associate
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034
Phone: 856-428-6600 ext. 131
Fax: 856-428-6314
Email: cdiamantis@zwattorneys.com
Website: www.zwattorneys.com

CONFIDENTIALITY NOTICE: This e-mail and any accompanying documents contain confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual(s) or entity(ies) named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this e-mail in error, please reply as such and delete the e-mail.

Go Green! Please think about our environment before printing this email.

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Thursday, September 27, 2018 12:15 PM
To: Joseph F. Betley <jbetley@capehart.com>; Cosmas Diamantis <cdiamantis@zwattorneys.com>
Cc: Messina, JoAnn <Joann.Messina@csc.nj.gov>
Subject: IMO Matthew Harden, City of Millville School District - SETTLEMENT
Importance: High

Mr. Diamantis and Mr. Betley:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Matthew Harden from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Harden agrees to, among other things, a resignation from his position effective August 7, 2018. However, the settlement does not reflect how to record the time period from his original separation (December 18, 2017) to his resignation date. Before the matter can be acknowledged by the Commission, we require all periods of time to be accounted for in an employee's personnel record. In this regard, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

STATE OF NEW JERSEY

In the Matter of Sheena Hunt
Woodbine Developmental Center
Department of Human Services

CSC DKT. NO. 2019-25
OAL DKT. NO. 10142-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10142-18

AGENCY DKT. NO. 2019-25

IN THE MATTER OF
SHEENA HUNT, DEPARTMENT OF
HUMAN SERVICES, WOODBINE
DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 27, 2018 Decided: October 1, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Sheena Hunt from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 17, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

October 1, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 10/2/18

Date Mailed to Parties: 10/2/18

cmo

OAL DKT. NO. CSV 10140, 10141, 10142-2018

AGENCY DKT. NO. 20 – 2019-27, 2019-26, 2019-27

SETTLEMENT AGREEMENT

IN THE MATTER OF

Sheena Hunt

AND

Workforce Development Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The three (3) **Final** Notice of Disciplinary Action dated 5/31/18(1); 6/12/2018(2) contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.2.3.	20 days Susp.	not served
2. A.2.4., NJAC 4A:2-2.3(a)4;	Removal	6/13/2018
3. A.2.5, " "	Removal	6/14/2018
4.		
5.		

B. The Appellant Sheena Hunt withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. A.2.3/A.2.4. Combined to become A.2.3.	SUSTAINED	5 days/suspension
2.		
3. A.2.5.	Withdrawn	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of without pay since 6/13/18 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 6/15/18 - 7/17/18.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: 5 days Suspension from 6/13/18 for 5 days back pay 6/18-7/17/18 remainder of time up to return to work is recorded as leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Sheena Hunt 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant understands + acknowledges that as an employee of Woodbine Developmental Center she is expected to report for work as scheduled and required.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-27-18
DATE

Sheena Hunt
Appellant

9-27-18
DATE

Respondent

9-27-18
DATE

Robert C. Little III
ON BEHALF OF Appellant

DATE

ON BEHALF OF

OAL DKT. NO. CSV 10140, 10141, 10142-2018

CERTIFICATION

I, Sheena Hunt, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9-27-18
DATE

NAME

STATE OF NEW JERSEY

In the Matter of Sheena Hunt
Woodbine Developmental Center
Department of Human Services

CSC DKT. NO. 2019-26
OAL DKT. NO. 10141-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10141-18

AGENCY DKT. NO. 2019-26

IN THE MATTER OF
SHEENA HUNT, DEPARTMENT OF
HUMAN SERVICES, WOODBINE
DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 27, 2018 Decided: October 1, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Sheena Hunt from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 17, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

October 1, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 10-2-18

Date Mailed to Parties: 10 3 18

cmo

OAL DKT. NO. CSV 10140, 10141, 10142-2018

AGENCY DKT. NO. 20 – 2019-27, 2019-26, 2019-27

SETTLEMENT AGREEMENT

IN THE MATTER OF

Sheena Hunt

AND

Woodbine Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The three (3) **Final** Notice of Disciplinary Action dated 5/31/18(1); 6/12/2018(2) contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A 2.3	20 days Susp.	not served
2.	A.2.4, NJAC 4A:2-2.3(a)6	Removal	6/13/2018
3.	A 2.5, " "	Removal	6/14/2018
4.			
5.			

B. The Appellant Sheena Hunt withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A.2.3/A.2.4. Combined to become A.2.3.	SUSTAINED	5 days/suspension
2.			
3.	A.2.5.	Withdrawn	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of without pay since 6/13/18 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 6/13/18 - 7/17/18.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: 5 days Suspension from 6/13/18 for 5 days back pay 6/18-7/17/18 remainder of time up to return to work is recorded as leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Sheena Hunt 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant understands + acknowledges that as an employee of Woodbine Development Center she is expected to report for work as scheduled and required.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-27-18
DATE

Sheera Hunt
Appellant

9-27-18
DATE

Respondent

9-27-18
DATE

Robert C Settlow
ON BEHALF OF Appellant

DATE

ON BEHALF OF

OAL DKT. NO. CSV 10140, 10141, 10142-2018

CERTIFICATION

I, Sheena Hunt, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9-27-18
DATE

NAME

STATE OF NEW JERSEY

In the Matter of Sheena Hunt
Woodbine Developmental Center
Department of Human Services

CSC DKT. NO. 2019-27
OAL DKT. NO. 10140-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10140-18

AGENCY DKT. NO. 2019-27

IN THE MATTER OF
SHEENA HUNT, DEPARTMENT OF
HUMAN SERVICES, WOODBINE
DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 27, 2018 Decided: October 1, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Sheena Hunt from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 17, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

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I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 1, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 10-2-18

Date Mailed to Parties: 10-3-18

cmo

OAL DKT. NO. CSV 10140, 10141, 10142-2018
AGENCY DKT. NO. 20 – 2019-27, 2019-26, 2019-27

SETTLEMENT AGREEMENT

IN THE MATTER OF

Sheena Hunt

AND

Woodbine Developmental Center
Department of Human Services

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2.	A.2.4., NJAC 4A:2-2.3(a)6	Removal	6/13/2018
3.	A.2.5, " "	Removal	6/14/2018
4.			
5.			

B. The Appellant Sheena Hunt withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A.2.3/A.2.4. Combined to become A.2.3.	SUSTAINED	5 days suspension
2.			
3.	A.2.5.	Withdrawn	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of without pay since 6/13/18 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 6/18/18 - 7/17/18.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: 5 days Suspension from 6/13/18 for 5 days, back pay 6/18-7/17 remainder of time up to return to work is recorded as leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Sheena Hunt's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant understands + acknowledges that as an employee of Woodbine Developmental Center she is expected to report for work as scheduled and required.

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-27-18
DATE

Sheena Hunt
Appellant

9-27-18
DATE

Respondent

9-27-18
DATE

Robert C Little IV
ON BEHALF OF Appellant

DATE

ON BEHALF OF

CERTIFICATION

I, Sheena Hunt, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9-21-18
DATE

NAME

STATE OF NEW JERSEY

In the Matter of Florence Louis
Hunterdon Developmental Center
Department of Human Services

CSC DKT. NO. 2018-3730
OAL DKT. NO. 10383-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10383-18

AGENCY DKT. NO. 2018-3730

IN THE MATTER OF
FLORENCE LOUIS, DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER.

Robert Little, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 27, 2018 Decided: October 1, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

This matter concerns the appeal of Florence Louis from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 20, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 1, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 10/2/18

Date Mailed to Parties: 10/3/18

cmo

OAL DKT. NO. CSV 10383-2018
AGENCY DKT. NO. 20 – 2018-3730

SETTLEMENT AGREEMENT

IN THE MATTER OF

Florence Lewis

AND

Hunterdon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 6/1/2018 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	B.10.1	Removal	1/4/18
2.	NJAC 4A:2-2.3(a)3, 12		
3.			
4.			
5.			

B. The Appellant FLORENCE LOUIS withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	PARTIES AGREED TO RESIGNATION IN GOOD STANDING AS		
3.	RESOLUTION TO THIS APPEAL, EFFECTIVE 1/4/18		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

✓ resignation in good standing

____ general resignation

which shall be effective 1/4/18 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Dept. of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Florence Lewis 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable; the remainder of this Settlement Agreement shall be fully enforceable.

I. IT IS ACKNOWLEDGED THAT APPELLANT WAS PLACED ON A TEMPORARY WORKERS COMPENSATION LEAVE OF ABSENCE FMLA 9/4/16 AND DID NOT RETURN TO WORK.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-27-18
DATE

Appellant

9-27-18
DATE

Respondent

9-27-18
DATE

ON BEHALF OF APPELLANT

9/27/18
DATE

ON BEHALF OF HDC

OAL DKT. NO. CSV 10383-2018

CERTIFICATION

I, Florence Louis, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9-27-18
DATE

Florence Louis
NAME

STATE OF NEW JERSEY

In the Matter of Robert Mapes
Morris County Sheriff's Office

CSC DKT. NO. 2018-2917
OAL DKT. NO. CSV 06418-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2018 BW

The appeal of Robert Mapes, County Correction Sergeant, Morris County Sheriff's Office, 30 working day suspension, on charges, was heard by Administrative Law Judge Ernest M. Bongiovanni, who rendered his initial decision on September 12, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 17, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Robert Mapes.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17th DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. CSV 06418-18
AGENCY REF. NO. CSC 2018-2917

IN THE MATTER OF ROBERT MAPES,
MORRIS COUNTY SHERIFF'S OFFICE.

Peter N. Gilbreth, Esq., or appellant, Robert Mapes

Robert J. Greenbaum, Esq., for respondent, Morris County Sheriff's Office

Record Closed: August 1, 2018 Decided: September 12, 2018

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Sgt. Robert Mapes (appellant/Mapes) challenges the Final Notice of Disciplinary Action (FNDA) dated January 8, 2018, imposing a thirty working days suspension for failing to interrupt inappropriate or excessive force by a fellow sworn staff member, in violation of the policy on Use of Force (UOF). He is also charged with failure to follow policy and procedure in reporting an incident involving the use of force without mentioning the nature of the use of force or injury to an inmate in the incident report, and for his failure to follow the reporting requirements of the Injury to Inmate reporting procedure.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13 to the Office of Administrative Law, where it was filed on May 4, 2018. The hearing was held on August 1, 2018 at which time the record was closed.

SUMMARY OF FACTS

The evidence consisted of joint exhibits following an investigation a Use of Force (UOF) incident conducted by the Internal Affairs unit of the Morris County Correction Facility (MCCF). The following facts were not disputed.

Mapes is a Sheriff's officer employed by the Morris County Sheriff's Office at the MCCF. In the early morning of April 4, 2017, Mapes was the supervising officer who, with four other officers, was responsible for transferring an inmate, Michael Utter, from Housing Unit 3A to 3D. The relevant part of the transfer was videotaped in color and with sound, by an officer per Departmental policy. During the transfer, Utter was placed in Cellblock #9. In the process of being uncuffed, a UOF incident against the inmate took place, at which time, fellow Officer Michael Provenzano used excessive force by employing unnecessary punches and a kick to the inmate's facial area while he was being pressed to the ground by Provenzano and three other officers.

Soon after the incident, Mapes completed an incident report (J-3) which did not mention the eight blows to the head/face received by Utter or any subsequent other blows to the inmate's face by Provenzano; nor did the report mention that the inmate had complained immediately of being beat up and struck in the face by the officers or officer. Mapes was supervising investigator of the incident. During that investigation, he failed to seek a witness statement from the inmate. He also signed two "Injury to Inmate" reports which also failed to mention the multiple blows to the face.

As a result of the UOF and the events that immediately followed it, Mapes was charged with failing to interrupt a fellow officer who was using excessive force and

failing in multiple reporting requirements to accurately report these events. (J-4). After a departmental hearing, Mapes received a 30 working days suspension. (J-5).

EVIDENCE

Corporal Santana Internal Affairs (IA) Investigator for the Morris County Sherriff's Office testified first. He has been employed by the Morris County Sheriff's Office for 22 years. He has worked for Internal Affairs at the Morris County Correctional Facility (MCCF)/ Correctional Facility) since 2012. Before that, he worked in the Intake unit at the Facility for several years. He was the administrative investigating officer for the investigation concerning the UOF Incident that occurred on April 4, 2017. The investigation included interviews of the officers involved in the incident, an interview of inmate Utter, and a review of the video recorded incident. Corporal Santana's detailed report (R-1), also included a summary of relevant policies which he claimed justified the charges against Sgt Mapes. Santana also presented the Video, (J-1) as evidence.

The Video

The following explanation of this evidence is a result of multiple examinations of the 16-minute video. For clarity, it is divided by into three sections.

1. The Transfer to cellblock #9

The inmate is first seen in cuffs with hands behind his back and being escorted by four officers, one each holding the arm on either side of him. Two others are close behind, with Mapes directing them, from one corridor on the 3rd floor of the MCCF into and out of an elevator to another floor towards what was later described as Cellblock #9 on the first floor. The transfer proceeds without incident for a minute, then Inmate Utter looks toward Officer Provenzano, who is holding the inmates left arm and says, "You have my arm tight." Just before being led into an elevator, the inmate is seen slightly pulling his shoulder away from Officer Provenzano. The transfer process without incident for about a minute, until soon after the inmate and officers enter Cellblock #9.

2. The Use of Force (UOF) Incident.

The inmate is guided to face a wall in the cellblock and is made to kneel on a bench while facing the wall. Officer Salonia begins to remove his cuffs. Just after Utter's left hand is freed from the cuffs, without being ordered to, the inmate places his left hand firmly against the wall, while Officer Provenzano remains with his grip on Utter's left side and holds his hand to the wall. Utter is ordered by Mapes to "Stay in that position until you hear the door shut." Although Utter's right arm, still behind his back, cannot be fully seen, Officer Salonia is apparently attempting to remove the cuff when something causes him to shout at Utter to "Stop it, stop!" Utter responds by saying "What are you doing bro?". Almost immediately after, the officers surge toward the inmate who yells in apparent anger or possibly pain and is then pushed to the ground by the combined force of the officers. Mapes almost immediately sounds an alarm by using his body radio and unhooks his "OC" (pepper spray) canister from his holster.

With the inmate's body pressed to the ground, Provenzano, still gripping the inmate, punches Utter's face and head with eight rapid blows with his right fist. Mapes is observed facing Provenzano and Utter just before the blows to the face are delivered. Mapes then goes to the other side of Utter's body, which is now seen to be pinned to the ground by the other three officers. Provenzano, who has now stood up and repositioned himself on the same side as Mapes, delivers another strike with his right fist to Utter's head. He also "knees" the supine inmate just before getting to the other side of him. Sergeant Shawn Johnston who entered the cell, in response to the alarm, directs Utter to "stop resisting". Provenzano then issues two more strikes to Utter's head/upper body. Sgt. Johnson issues another command to "stop resisting." Mapes sprays Utter's face with the OC. Soon thereafter, with some of the officers showing some effect of the spray (e.g. coughing, spitting)[1] the inmate is fully secured.

3. Decontamination of the OC and nurse's treatment following the Use of Force

[1] It is not clear when the pepper spray was first deployed. It may have been deployed soon after Sgt. Mapes is first seen pointing it in the direction of Utter, or while Mapes was going around Provenzano to the other side of Utter. Only one blast of spray is completely shown on camera, right after or just as Provenzano gives a final punch to the inmate. Within a second or two of that blast of OC the inmate and officers seem to show a clear reaction to the spray.

The remaining 13 minutes of the video show Utter being decontaminated in a shower, twice getting drops administered by a nurse, getting changed into dry clothes and slippers, being photographed and being led into another Cell (Cell#2) The relevant portions of the video shows that at various times beginning immediately after the Use of Force, Utter complains repeatedly of "being punched in the face" and questions why the officers they had to do that. Utter asks for the police to be called while repeating the repeated the allegations. After Utter to complains to all those around him "Why did you punch me in the face?", Mapes replies by saying "just be quiet till we get it checked and conned" (meaning decontamination). A few minutes later, during a medical assessment and treatment for the OC Spray near the Intake unit's work station, Mapes asks the Inmate "Claiming any injuries? Besides your face?" Mapes then has photographs taken of Utter's face. A minute later as Utter still complains of being hit in the face, Mapes tells him to "Be quiet."

After presenting the video of the incident, Corporal Santana also testified concerning the interviews he supervised of the inmate and the officers involved in the incident. Interviews of the Officers and the Inmate.

The inmate, interviewed one week after the UOF incident, admitted that during the uncuffing, after his one hand was freed, he tensed up his body because of the aggression used in placing his hand to the wall, and even clenched his fist. However, he believed the officers' actions were instigated not by any resistance by him, but rather by comments made between him and Officer Salonia just prior to the escort. He stated he never resisted nor intended to resist. He noted that during the UOF, his head bounced off the ground because of the blows to the head.

Officer Provenzano claimed the initial blows he delivered to the inmate's head and face were justified because as they both came down to the ground "he (Utter) had my arm." However, he conceded his very last strike to the inmate was not necessary.

R-1, page 16[2] The other officers made somewhat contradictory accounts of the events, none of which are relevant to the issues in dispute and are hence not detailed here.

Sgt. Mape's Interview

He was interviewed October 26, 2017, with his counsel present. His interview was audiotaped (J-2). Appropriate instructions and cautions, including a warning that it was a violation of his oath to fail to give truthful and complete information. Mapes stated:

He was the supervisor in charge of the transfer of the inmate. He reviewed the video after the incident and reviewed it before the interview. He described the inmate, with whom he had prior experience, as a "mouthy type" but who cooperates. When the UOF began, Mapes turned his attention away from the action to sound his body alarm and unholster his OC spray. He claimed he didn't see the first series of blows administered by Provenzano, but he did witness the final series of blows.

He admitted the use of force to the inmate was "excessive" or "borderline excessive." He said that a compliance hold would have been more correct and more effective. He said the strikes to the inmate's face were "questionable" and "weren't the best judgement to control the situation." He also admitted that Inmate Utter had repeatedly alleged to Mapes that he had been punched in the face during the incident.

Mapes claimed to have little experience in use of force incidents as a supervisor. He was unaware of the details of the Morris County Sheriff's Office Use of Force Policy and Procedure. The policy requires the staff officer to whom the allegation is first reported to complete an allegation of force incident report. Mapes admitted he did not make such report. About his unfamiliarity with the policy, Mapes said he was "still learning."

[2] His words regarding whether he thought that strike was necessary were "I wouldn't say necessary, no."

Similarly, Mapes was questioned about the written incident report he made soon after the event. His incident report, in pertinent part said that:

> A UOR 15-17 occurred...Inmate Utter was given numerous orders from me to stop resisting and failed to comply with all orders. This supervisor applied a short burst of OC to the facial area of Inmate Utter. After this was done, Inmate Utter was placed back in handcuffs, and escorted to the shower area to be decontaminated. This was done without further incident.

Thus, in describing the use of force, Mapes never mentioned the multiple blows administered to the inmate's head and face, nor that the inmate immediately thereafter complained of getting punched and kicked in the face. Mapes attributed any failings to being "overwhelmed" and having "lack of experience... I didn't know half what I needed to know."

The disciplinary charges and penalty

Corporal Santana stated that. Mapes failed to exercise the command presence required by a supervisor. Specifically, he was charged with failing to follow, MCCF Policy and Procedure, Use of Force, Number 1:8.6 Section II, which states:

> C. Sworn staff is expected to interrupt the flow of events to ensure that a fellow sworn staff member does not resort to employing an inappropriate or excessive use of force.

The Guidelines to this policy include:

> E. USE OF FORCE TECHNICQUES (NON-DEADLY FORCE) (which states, in pertinent part)
>
> The amount of force shall only be that which is necessary in the circumstances to restrain the inmate and control the situation. For example, blows should not be struck if control holds would be adequate to restrain the inmate. Multiple blows should not be employed if a single blow is adequate to stop the inmate's attack. Unless unavoidable, blows should be directed away from the head and kicks should not be used.

Regarding this charge, Santana stated that Mapes admitted witnessing the second series of blows to the head and face. During the incident, he issued no orders to resist. He failed to tell Officer Provenzano to stop punching the inmate and did not physically intercede in any way.

According to Santana, Mapes, also failed to follow, from the same Policy, IV Procedures E. Allegation of Force, which states:

> 1. If an allegation of force is made by an inmate, a witness statement will be requested from the inmate and forwarded to the shift commander
> 2. The staff member the allegation is first reported to shall complete an incident report and forward it to the shift commander.

While Mapes completed an Incident report (J-3) he neglected to state that he observed the blows to the head sustained by the inmate, or that the inmate repeatedly complained of these blows to him. Moreover, Mapes failed to request a witness statement from the inmate, so that it could be forwarded to the shift commander.

Finally, Mapes failed to follow Policy and Procedure, Injury to Inmate Report, Number 3.13.2 which provides:

> A.[A]ny inmate suspected of being injured and who claims to be injured is referred to the medical department for examination and treatment by appropriate medical personnel, accompanied by the Injury to Inmate Report...
> J. [T]he Investigating Supervisor shall ensure all information provided within the report is complete, accurate and concise. All investigations should be structured to answer the following questions:
>
> a. Where, when, how and who received the injury...

Regarding the injury to Inmate report, two such reports were generated, by officer John Henderson. Mapes signed the reports as Supervisor. The first report said, "OC sprayed to the face" and detailed the eyewash procedure following decontamination and ice pack issued to apply to the eyes. The second, reported an

hour after the incident, stated the inmate complained of pain and a bump to his head behind his left ear, and detailed the medical department's pain protocol that followed which included taking precautionary measures. Neither report mentioned that the bump on the head sustained by the inmate followed upon his receiving multiple punches to the head and facial area.

Warden Christopher Klein also testified. He has been the Warden of the Facility since 2013 and employed there since 1999. He oversees day to day operations at the facility and is the second highest ranking official there, after the Undersheriff for the County. He directed the matter to IA on the same morning of the event, after reviewing the Use of Force reports and the video. After IA completed the investigation and after consulting with the Sheriff and the Undersheriff he made the decision to bring the disciplinary charges against Mapes. He noted that the medical staff was not properly advised by Mapes. Regarding the penalty, he thought it was justified because it was "significant", and in fact "one of the worst uses of force" he has seen since being Warden. Further, Mapes actions and failures to act "could have resulted in significant injury" to the inmate. In issuing the penalty, he considered Mapes' past disciplinary record. He believes the egregiousness of the misconduct warranted going beyond the process of progressive discipline.

FINDINGS OF FACTS

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**.

1. Mapes was the supervisor in charge of an inmate transfer and was present while excessive force was used on the inmate by another officer.

2. Mapes witnessed the excessive force, which included initial rapid multiple blows to the head and face of an inmate partly cuffed while being held to the ground by three other officers. Mapes admitted seeing an additional three punches to the facial area

administered by a fellow officer. While interviewed later about these events, Mapes admitted the force used was "excessive" or "borderline excessive."

3. During the incident, Mapes remained silent and did not interject in the series of punches to the inmate's facial and facial area. Although supervising the officers involved, he issued no orders during the use of force. He said nothing and did nothing.

4. Soon after the incident, when the inmate complained repeatedly of being punched in the face, Mapes told the inmate to "keep quiet." He also asked if the inmates had any complaint "other than" those involving his face.

5. Mapes filed an incident report soon after the incident and never mentioned the blows to the face sustained by the inmate nor that the inmate complained of having been beaten to his face.

6. Mapes did not request a witness statement from the inmate, which was to be sent to the shift commander once obtained, although he was repeatedly made aware of the allegation of force by the inmate.

7. Mapes signed as an investigating supervisor two Injury to an Inmate reports which failed to state how the inmate was injured, or possibly injured.

LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n., 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to

provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees. Consistent with public policy and civil service law, a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(a). Major discipline involves removal or fine or suspension for more than five working days. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. Hearings at the Office of Administrative Law are conducted de novo and determine the appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). Ennslin v. Twp. Of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) cert. den., 142 N.J. 446 (1995).

In an appeal from a disciplinary action, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, 90 N.J. 550. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del Lackawanna and W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Maintenance of strict discipline is important in quasi-military settings such as police departments, prisons and correctional facilities. Rivelli v. Civil Serv. Comm'n, 115 N.J. 64, 72 (App. Div.), certif. den. 142, N.J. 446 (1995). City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). In such settings, the primary duty of the officers and supervisors is the safety and security of the facility.

DISCUSSION AND CONCLUSIONS

In this matter, Mapes' failures to exercise command endangered the safety and security of the Correctional Facility, Mapes' fellow officers, and the inmate. It was argued that that the excessive force used by Provenzano took place under chaotic circumstances, that at a critical point Mapes turned his body so that his back was to Provenzano and Utter, while he sounded his body alarm and grasped for and withdrew his OC spray canister. However, the video shows that Mapes only turned his back for two seconds or less. He immediately (at two minutes 51 seconds on the video) turned back to face Provenzano and Utter and pointed his OC spray toward the action before the first series of head blows (beginning at 2 minutes 53 seconds) by Provenzano were struck.

Moreover, it was argued that Mapes suffered a bad reaction to the OC which affected his judgement. The UOF Policy includes a "Special Note" which he argued required a finding that Mapes had to be "clearly convinced" that another officer is using force in violation of the Use of Force policy and/or state law It was posited that Mapes did not have sufficient time to become "clearly convinced" that the fellow officer was using excessive force.

I found these arguments unpersuasive and at variance with the facts and logical inferences from them. Despite his denial, Mapes was perfectly positioned to see and hear[3] the first series of eight repeated punches to the inmate and admitted seeing the second series of blows. Nearly everything an officer shouldn't do, Mapes' fellow officer Provenzano did while Mapes stood by and watched. Provenzano struck the inmate multiple times to the face when the inmate was on the ground. Once the inmate was on the ground which was almost immediately, none of the officers faced danger which would require strikes to the face, notwithstanding the slight, almost indiscernible struggle by the inmate who had an arm with a handcuff and key in it. The officer employed multiple punches without any concern for whether one punch was adequate.

[3] Owing to the acoustics in the barren cell, the punches and/or the inmates head being bashed on the floor by them, were accompanied with loud basketball-bouncing-like thuds.

Finally, all the blows were administered to the inmate's face or facial area. During all that, Mapes, the supervising officer, did nothing, not even making a minimal effort to warn the inmate to not resist. This was in marked contrast to Sgt. Johnson, who rushed into the scene after the UOF was underway and quickly yelled twice to Utter to "stop resisting!" Under the circumstances, it is not plausible that Mapes was "overwhelmed" by the events.

Regarding his actions taken after the UOF, Mapes heard all the inmate's many complaints of being punched in the face, including Utter's request to have the police called. Mapes responded twice to Utter's complaints to "Be quiet." He also asked Utter "Do you have any complaints, other than your face?" His incident report left out critical information. He failed to request a witness statement. He signed two Injury to Inmate reports which left out the required information to explain how the inmate was injured or possibly injured and who was responsible. Mapes actions and inaction can be fairly seen and characterized as impeding a required investigation of a Use of Force and Injury to and Inmate allegation, one in which he failed to act.

Additionally, some of Mapes explanations for his actions strain credibility. For example, Mapes went to great lengths to excuse his behavior after the UOF as simple negligence, rather than what can be construed as a "cover up." His first official act, after getting the injured inmate into another cell was to write an incident report that was bare of any essential facts and contained a self-serving inaccuracy. His report states inaccurately stated that the inmate was given "numerous orders by me to stop resisting." The video shows Mapes did not give a single order. Moreover, he admitted in his interview he gave no such order, and feebly suggested that there was no need to re-enforce another officer's command to stop resisting.

Regarding the two Injury to Inmate reports generated by Officer Henderson, Mapes signed the report as the "Investigating Supervisor". Under the policy the "Investigating Supervisor shall ensure all information within the report is complete, accurate and concise." Further the investigation is to be structured so as to answer questions, "where, when how and who received the injury." As there were two such

reports generated, Mapes as investigating supervisor had two opportunities to report the injuries to Utter in the complete and accurate manner as required by the policy. Instead he signed, approved and forwarded two incomplete and inaccurate reports concerning the source of injury to an inmate.

I **CONCLUDE** the charges constituting "other sufficient cause" under N.J.A.C. 4A:2-2.3(a) General cause; (12) other sufficient cause were proved by a preponderance of the credible evidence in that, Sgt. Mapes violated the Morris County Sheriff's Office Bureau of Corrections Standard Operating Policy and Procedures on Use of Force, 1:8.6 subsections II (C) subsection III (B) and subsection IV.(E) and the Morris County Sheriff's Office Bureau of Corrections, Standard Operating Procedure on Injury to Inmate reports, 3:13.2 subsections III (J)

PENALTY

There remains the issue of the imposition of a thirty working days suspension for this infraction. In deciding which penalty is appropriate, the courts have looked toward the concept of progressive discipline. W. New York v. Bock, 38 NJ at 523-524. The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature number and proximity to prior instances of misconduct can be considered in determining the appropriate penalty. The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

Mapes was the subject of seven prior disciplinary actions, the last being in 2012 (J-6), which resulted in a major discipline, with six days suspension. The parties stipulated that Officer Provenzano, had no prior disciplinary history and received a thirty-day suspension. Mapes seeks a lower penalty. The number of prior disciplines is mitigated somewhat by their apparent minor nature.

Mapes attempted to minimize both the seriousness of the infraction and his own culpability and failed to make a convincing case for a lesser penalty. Progressive

discipline need not be strictly followed considering an egregious violation, as occurred here. Further, a 30-day suspension following a 2012 six-day suspension is not a significant deviation from the goals of progressive discipline.

I **CONCLUDE** by the preponderance of the credible evidence that all the charges were proven, and that the Final Notice of Disciplinary Action should be upheld. I further **CONCLUDE** that the penalty of a thirty working days suspension is appropriate.

ORDER

It is hereby **ORDERED** that the appellant's Appeal is **DENIED.**

It is further **ORDERED** that the appellant's thirty working days suspension is hereby **AFFIRMED.**

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, who by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 12, 2018

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 9/12/18

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Appellant

Sgt. Robert Mapes (recording)

For Respondent

Corporal Edwin L. Santana
Warden Christopher Klein

LIST OF EXHIBITS IN EVIDENCE

For Appellant

None

For Respondent

R-1 Internal Affairs Report

Joint Exhibits

J-1 Video of Incident of April 4, 2017
J-2 Video of Robert Mapes interview
J-3 Incident Report, Use of Force report, Inmate witness statement, Morris County Injury to Inmate report
J-4 Preliminary Notice of Disciplinary Action
J-5 Final Notice of Disciplinary Action
J-6 History of Employee Disciplinary Actions

A-5

STATE OF NEW JERSEY

In the Matter of Neeham Roghanchi
Township of Union, Department of
Public Works

CSC DKT. NO. 2018-765
OAL DKT. NO. CSV 15252-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2018 BW

The appeal of Neeham Roghanchi, Laborer 1, Township of Union, Department of Public Works, release at the end of the working test period effective September 5, 2017, was heard by Administrative Law Judge (ALJ) Leslie Z. Celentano, who rendered her initial decision on September 26, 2018. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 17, 2018, accepted and adopted the Findings of Fact as contained in the attached Administrative Law Judge's initial decision. However, the Commission does not adopt the recommendation to uphold the release at the end of the working test period. Rather, for the reasons expressed in the initial decision, the Commission dismisses the appeal as moot.

ORDER

The Civil Service Commission dismisses the appeal of Neeham Roghanchi as moot.

Re: Neeham Roghanchi

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17th DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 15252-17
AGENCY DKT. NO. 2018-765

IN THE MATTER OF NEEHAM ROGHANCHI, TOWNSHIP OF UNION, DEPARTMENT OF PUBLIC WORKS.

Robert D. Kuttner, Esq., for appellant Neeham Roghanchi

Robert J. Merryman, Esq., for respondent Township of Union (Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

Record Closed: August 28, 2018 Decided: September 26, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Neeham Roghanchi ("appellant") appeals his termination as a laborer at the end of his working test period for respondent Township of Union ("Union"). Appellant had also been charged with conduct unbecoming, and those charges were sustained and resulted in his termination as of August 31, 2017, three days before the working test period expired.

Appellant did not appeal his termination for conduct unbecoming, and that decision is therefore final. Respondent asserts that appellant's appeal of his removal at the end of his working test period is therefore moot, and should be dismissed. On October 13, 2017, the matter was transmitted to the Office of Administrative Law for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On August 8, 2018, respondent filed a motion for summary decision asserting that appellant's appeal of the removal at the end of the working test period is moot, as he was previously terminated for misconduct. No opposition has been received to the motion, and would have been due on or before August 28, 2018.

FINDINGS OF FACT

Union filed the following statement of facts in support of its motion for summary decision. Since the motion is unopposed, I **FIND** it as **FACT**:

Appellant was hired as an entry-level laborer by the Township of Union on or about June 5, 2017. As a new employee, appellant was subject to a ninety-day probationary period which ran from June 5, 2017, through September 3, 2017.

On or about August 4, 2017, appellant was involved in an incident at work in which he physically assaulted another Township employee, Benny DelMauro. This incident occurred during the workday in the break room. After the incident, the Human Resources director, Karen Caulfield, investigated the matter and requested statements from the individuals who had witnessed the incident. Ms. Caulfield also interviewed the individuals who had witnessed the incident.

The eyewitnesses to the incident confirmed that appellant physically assaulted Mr. DelMauro without warning and without any immediate provocation. The witness statements further indicate that Mr. DelMauro never even had a chance to defend himself and was struck multiple times by appellant. When Ms. Caulfield interviewed appellant, he did not deny attacking Mr. DelMauro.

Based on the incident, appellant was immediately suspended, first with pay and then without pay. On August 31, 2017, appellant was served with a Preliminary Notice of Disciplinary Action charging him with conduct unbecoming a public employee based on his physical assault on a coworker without any immediate provocation. Appellant never requested a disciplinary hearing, despite written notice that he could request such a hearing within five days.

On September 7, 2017, appellant was served with a Final Notice of Disciplinary Action advising him that the penalty for his conduct was termination of his employment, with an effective date of August 31, 2017. Petitioner never appealed his termination, despite the fact that he received written notice that he could file an appeal with the Civil Service Commission within twenty days of the receipt of the Final Notice of Disciplinary Action.

CONCLUSIONS OF LAW

Under N.J.A.C. 1:1-12.5, summary decision may be rendered if no genuine issue of material fact exists and the moving party is entitled to prevail as a matter of law. In this case no genuine issue of material fact exists and Union is entitled to prevail as a matter of law for the reasons stated below.

The Constitution limits the judiciary to the adjudication of actual cases and controversies. U.S. Const. art III, § 2. Accordingly, "'[a] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 216 (3rd Cir. 2003) (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)). Specifically, it is "[t]he court's ability to grant effective relief [that] lies at the heart of the mootness doctrine." Ibid. (citation omitted). For instance, when developments evolve during the "course of adjudication" that negate the plaintiff's interest in the outcome of a case or thwart a court from being able to give the requested relief, the suit must be dismissed as moot. Ibid. (citation omitted). "This requirement that a case or controversy be 'actual [and] ongoing' extends throughout **all stages** of . . . judicial proceedings . . . ." Ibid. (citing Khodara Envtl., Inc. v. Beckman, 237 F.3d 186, 193 (3rd Cir. 2001) (emphasis supplied). In the

absence of an actual case or controversy, a ruling by a court would constitute an advisory opinion, disregarding the Constitution's limitation of jurisdiction. See id. at 217, n.3; see also Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 410 (3d Cir. 1992) (stating, "[Article III, section 2 of the Constitution] 'stands as a direct prohibition on the issuance of advisory opinions.'").

Similarly, the doctrine of mootness has utility in the administrative setting if no effective relief can be granted in a case. Benjamin v. Masciocchi, Comm'r of Educ., EDU 14102-11, Initial Decision (March 12, 2013), adopted, Comm'r (April 11, 2013), http://njlaw.rutgers.edu/collections/oal/ (citing In re Tenure Hearing of Mujica, EDU 5184-01, Initial Decision (March 15, 2006), adopted, Comm'r (April 25, 2006), http://njlaw.rutgers.edu/collections/oal/). An action is considered moot when it no longer presents a justiciable controversy, and the conflict between the parties has become merely hypothetical. Ibid. (citing In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983)). It is well-settled law in New Jersey that cases that have become moot prior to adjudication are no longer actionable. Ibid. (citing Mujica, EDU 5184-01). Cases in which the issues are hypothetical, a judgment cannot grant effective relief, or there is no concrete adversity of interest between the parties are moot. See Advance Elec. Co., Inc. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002) (citing Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976)).

In the within matter, appellant appealed from the termination at the end of his working test period when he had not appealed the separate removal effective August 31, 2017. The working test period concluded after the termination for cause on August 31, 2017, and appellant's failure to appeal the determination renders his working test period moot. Appellant cannot be reinstated even if successful in the working-test-period appeal by virtue of his failure to appeal his disciplinary termination. See In re Black, CSV 8953-06, Initial Decision (May 21, 2007), adopted, Merit Sys. Bd. (July 12, 2007), http://njlaw.rutgers.edu/collections/oal/. Respondent is entitled to prevail as a matter of law.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the decision removing appellant at the end of his working test period be and hereby is **AFFIRMED** and the appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: September 26, 2018

Date Mailed to Parties:

dr

STATE OF NEW JERSEY

In the Matter of Laurie Ross
Capy May County
Crest Haven Nursing Home

CSC DKT. NO. 2017-4011
OAL DKT. NO. 09630-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 09630-17
AGENCY DKT. NO. 2017-4011

IN THE MATTER OF LAURIE ROSS, CAPE MAY COUNTY, CREST HAVEN NURSING HOME.

Jeffery A. April, Esq., for appellant, Laurie Ross

William G. Blaney, Esq., for respondent, Cape May County, Crest Haven Nursing Home (Blaney & Karavan, P.C, attorneys)

Record Closed: September 24, 2018 Decided: September 25, 2018

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on July 10, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9-25-18
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 9-27-18

Date Mailed to Parties: 9-28-18

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on September 24, 2018.

Exhibit: J-1
Date: _____
I: _____
E: _____

NOTICE: This is a very important legal document, and you should thoroughly review and understand the terms and effect of this document before signing it. By signing this Settlement Agreement and General Release, you will be completely releasing the County from all liability to you. Therefore, you should consult with an attorney before signing this Settlement Agreement and General Release. You have twenty-one (21) days from the date of distribution of these materials to consider this document. If you have not returned a signed copy of this Settlement Agreement and General Release by that time, we will assume that you have elected not to sign the Settlement Agreement and General Release. If you choose to sign the Separation Agreement and General Release, you will have an additional seven (7) days following the date of your signature to revoke the Separation Agreement and General Release, and the Separation Agreement and General Release shall not become effective or enforceable until the revocation period has expired.

SEPARATION AGREEMENT AND GENERAL RELEASE

This Separation Agreement and General Release (the "Agreement") is made this _____ day of April, 2018 by and between Cape May County, (hereinafter referred to as the "County") and Laurie Ross (hereinafter referred to as the "Employee").

WITNESSETH

WHEREAS, the County served Employee with two Final Notices of Disciplinary Action (31-B) dated June 5, 2017 and September 15, 2017 removing her from her employment;

WHEREAS, Employee filed a timely appeal with the Civil Service Commission pursuant to N.J.S.A. 11A:2-15 and N.J.A.C. 4A:2-2.13. Said appeal was transferred to the Office of Administrative Law under Docket No. (CSV-09630-2017 S);

WHEREAS, the County and Employee have agreed that it is in both their best interests that Employee's employment with the County shall terminate by way of a resignation in good standing in accordance with the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and representations herein contained, and intending to be legally bound, the parties understand and agree as follows:

1. **Resignation from Employment.** Employee has submitted her resignation of employment with the County effective June 5, 2017. Employee's employment with the County shall terminate effective June 5, 2017. Employee further agrees that she is not entitled to any back pay from the time of her removal (June 5, 2017) through the execution of this Agreement. The County agrees to withdraw all pending disciplinary action including but not limited to the Final Notices of Disciplinary Action dated June 5, 2017 and September 15, 2017.

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JUL 31

2. **Removal of OAL Appeal**. In consideration of the acceptance of the withdrawal of the aforementioned discipline, Employee agrees to withdraw her pending appeal at the Office of Administrative Law under Docket No. (CSV-09630-2017 S) as moot.

3. **Payment for Accumulated Leave**. Within 30 days of the execution of this Agreement, Employee shall receive a check for the accumulated unused vacation leave, holiday leave, compensatory time and sick leave, less applicable taxes and deductions, which amounts to a total of two thousand dollars ($2,000.00) in compensation. Both the County and Employee acknowledge that this payment is of a disputed claim and constitutes good and valuable consideration for the Release contained herein.

4. **Waiver of Any Claim for Benefits and/or Emoluments of Employment.** The County and Employee agree that the Employee shall not be entitled to any compensation, back pay, front pay, separation allowance, vacation pay, holiday pay, sick pay, personal leave pay compensatory time pay and/or any other form of payment, benefit, or emolument of employment from the County other than what is specifically set forth in this Agreement.

5. **Release of Claims**. Employee, for herself, her heirs, executors, administrators, successors, and assigns, hereby releases and forever discharges the County and its departments, political subdivisions, successors, and assigns, and their respective past, present and future representatives, council members, commissioners, officers, agents, employees, citizens, insurance carriers, successors, and assigns, and the estate(s) of theirs from any and all action, causes of action, lawsuits, claims, charges, debts, sums of money, accounts, covenants, contracts, controversies, agreements, promises, trespasses, damages, liabilities, judgments, executions, and/or demands of any nature whatsoever, whether in law or in equity, or with any individual, agency, organization, or governmental body, whether known or unknown, which Employee ever had, now has, or can, shall, or may have under any contract, tort or common law theory, and/or under any Federal, State, local statute, including but not limited to: the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., as amended by the Older Worker's Benefit Protection Act, specifically §626; Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. §1981, et seq.; the Civil Rights Statues contained in 42 U.S.C. §1983, 1985 and 1986 and any related laws; the New Jersey Civil Rights Act, N.J.S.A. 10:6-2, et. seq.; the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, et seq.; the Federal Family and Medical Leave Act, 29 U.S.C. §2601, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. §1001, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq.; the Equal Pay Act, 29 U.S.C. §206(d); the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq.; the New Jersey Family Leave Act, N.J.S.A. 34:11b-1, et seq.; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq.; the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq.; the New Jersey Law against Discrimination N.J.S.A. 10:5-1; and any other Federal, State or local equal employment opportunity laws, regulations, or ordinances; or under a theory of negligence; interference with contract/business advantage, fraud; intentional infliction of emotional

distress; and/or any other duty or obligation of any kind or description. This release shall apply to all known, unknown, unsuspected, and anticipated claims, liens, injuries, and damages up to and including the day of the date of this Agreement. This release shall not apply to any current or future Worker's Compensation claim Employee may be seek.

7. **No Legal Action**. Employee represents that, she has not filed any complaint, claim or charge against any other party, with any local, state or federal agency or court aside from (CSV 09630-2017 S), and will not do so at any time hereafter, and that if any agency or court assumes jurisdiction of any complaint, claim or charge against the County, Employee will request such agency or court to withdraw from the matter. This provision shall not affect any rights Employee may have under the applicable law to challenge the validity of his waiver of claims under the ADEA.

8. **Integration; Representation by Counsel**. It is understood between the parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto.

EMPLOYEE ACKNOWLEDGES THAT SHE HAS BEEN ADVISED THAT HER LEGAL RIGHTS AND RESPONSIBILITIES WILL BE AFFECTED BY EXECUTING THIS AGREEMENT AND SHE ACKNOWLEDGES THAT SHE HAS CONSULTED WITH AN ATTORNEY (Jeffrey April, Esquire) AND HAS DONE SO PRIOR TO EXECUTING THIS AGREEMENT.

9. **Severability**. In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

10. **Governing Law; Jurisdiction.** The parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey and that any dispute involving the terms of this Agreement shall be brought in the Superior Court of New Jersey, Cape May County, which the parties agree shall have exclusive jurisdiction of any such claims.

IN WITNESS WHEREOF, the parties hereto have caused this Separation Agreement and General Release to be executed and signed the day and year first written above.

ATTEST:

Sara E. Maloney
Sara E. Maloney

Jeffrey A. Ado
Jeffrey A. Ado

Cape May County

BY: Jeffrey R. Lindsay
Jeffrey R. Lindsay

4.11.18
Date

Laurie Ross
Laurie Ross

4/20/18
Date

RECEIVED
2018 SEP [illegible] P 2:31
[illegible]

JEFFERY A. APRIL, ESQUIRE
200 South Shore Road
P.O. Box 1195
Marmora, New Jersey 08223
(609) 390-9078 (t)
(609) 390-9363 (f)
Attorney ID # 0010211974
Attorney for Plaintiff, Laurie Ross

IN THE MATTER OF LAURIE ROSS,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
CAPE MAY COUNTY, CREST HAVEN	:	OAL DOCKET NO.: CSV 09630-17
NURSING HOME	:	AGENCY DOCKET NO.: 2017-4011
	:	STIPULATION OF DISMISSAL

THE MATTER in difference in the above entitled action, having been amicably adjusted by and between the parties, it is hereby stipulated and agreed, that the same be and hereby is dismissed with prejudice.

LAW OFFICE OF
JEFFERY A. APRIL, ESQUIRE

JEFFERY A. APRIL, ESQUIRE
Attorney for Laurie Ross

BLANEY & KARAVAN, PA

WILLIAM G. BLANEY, ESQUIRE
Attorney for Cape May County

Date: September 24, 2018

STATE OF NEW JERSEY

In the Matter of Tasha Spencer
Ancora Psychiatric Hospital
Department of Health

CSC DKT. NO. 2018-1296
OAL DKT. NO. 01780-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 17, 2018 BW

The Civil Service Commission, at its meeting of October 17, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01780-18

AGENCY DKT. NO. 2018-1296

IN THE MATTER OF TASHA SPENCER, DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant (Nash Law Firm, attorneys)

Jana DiCosmo, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 21, 2018 Decided: September 25, 2018

BEFORE **DAVID M. FRITCH**, ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law ("OAL") on February 1, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On September 21, 2018, the parties appeared and submitted an executed Settlement Agreement in this matter. The Agreement is attached as J-1 and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

September 25, 2018
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: 9-25-18

Date Mailed to Parties: 9-26-18

/dw

OAL DKT. NO. CSV 01780-2018 S
AGENCY DKT. NO. 2018-1296
SETTLEMENT AGREEMENT

IN THE MATTER OF
TASHA SPENCER, APPELLANT

J-1

AND

DEPARTMENT OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL,
RESPONDENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated January 12, 2018 contained the following charges and proposed discipline:

	Charge	Discipline	Date Effective
1.	N.J.A.C. 4A:2-2.3(a)6 – Conduct unbecoming a public employee.	Removal	September 12, 2017
2.	N.J.A.C. 4A:2-2.3(a)7 – Neglect of duty.	Removal	September 12, 2017
3.	N.J.A.C. 4A:2-2.3(a)12 – Other sufficient cause.	Removal	September 12, 2017
4.	A.O.4:08 C-3.1 - Physical or mental abuse of a patient, client, resident, or employee.	Removal	September 12, 2017
5.	A.O.4:08 C-5.1 Inappropriate physical contact or mistreatment of a patient, client, resident, or employee.	Removal	September 12, 2017

6. A.O.4:08 C-8.1 Removal September 12, 2017
   Falsification; intentional misstatement of material fact in connection with work, employment, application, attendance, or any record, report, investigation, or other proceeding.
7. A.O.4:08 D-9.1 Removal September 12, 2017
   Failure to report injury, abuse or accident involving patient, resident or client.
8. A.O.4:08 E-1.1 Removal September 12, 2017
   Violation of a rule, regulation, policy, procedure, order, or administrative decision.

B. The Appellant Tasha Spencer withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Health, Ancora Psychiatric Hospital agrees that the following result will occur with regard to each charge:

1. The charge under Administrative Order 4:08 D-9.1 (Failure to report injury, abuse, or accident involving patient, resident, or client) shall remain in effect, and the penalty for same shall be modified to a 45-day unpaid suspension as resolution to the disciplinary appeal pursuant to N.J.A.C. 4A:2-6.3(b).
2. All other charges shall be withdrawn.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. The parties have agreed to the following:

1. To date, appellant has served a total of forty-five (45) days without pay based upon the above charges.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: zero (0).
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: An Authorized Leave of Absence Without Pay.

D. The Department of Health, Ancora Psychiatric Hospital (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health, Ancora Psychiatric Hospital will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and

Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9/21/2018
DATE

Appellant

9/21/18
DATE

ON BEHALF OF Appellant

William Nash

9/21/18
DATE

Donna Brown
ON BEHALF OF Respondent

DATE

Respondent

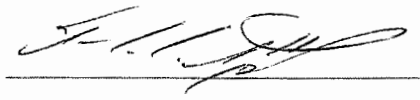
CERTIFICATION

I, Tasha Spencer, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/21/2018
DATE



A-2

STATE OF NEW JERSEY

In the Matter of Keisha Allen
Township of Hillside Police Department

CSC DKT. NOS. 2014-1966 and 2014-2618
OAL DKT. NOS. CSR 05767-14 and CSV 02286-14
(Consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 2, 2018 BW

The appeals of Keisha Allen, Police Officer, Township of Hillside Police Department, 10 working day suspension and removal effective April 28, 2014, on charges, were heard by Administrative Law Judge Michael Antoniewicz, who rendered his initial decision on September 21, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's (ALJ) initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 31, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. The Commission also acknowledged the appellant's withdrawal of her appeal of the 10 working day suspension as noted by the ALJ.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and removing the appellant was justified. The Commission therefore affirms those actions and dismisses the appeals of Keisha Allen.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31ST DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)
OAL DKT. NOS. CSV 02286-14
and CSR 05767-14
AGENCY DKT. NO. 2014-1966

IN THE MATTER OF KEISHA ALLEN, TOWNSHIP OF HILLSIDE POLICE DEPARTMENT.

Salvatore Bellomo, Esq., for appellant Keisha Allen (Law Offices of Salvatore Bellomo, attorneys)

Edward J. Kologi, Esq., for respondent Township of Hillside (Kologi & Simitz, attorneys)

Record Closed: September 5, 2018 Decided: September 21, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Appellant Keisha Allen, a former police officer for the Township of Hillside Police Department (Hillside), appeals her removal for: 1) conduct unbecoming a public employee; 2) insubordination; 3) neglect of duty; 4) failure to perform duties; and 5) other sufficient cause. The Hillside Rules of Conduct: 3:1.3, cooperation; 3:1.8,

performance of duty; 3:1.9, fitness for duty; 3:1.13, insubordination; 3:1.16, conduct toward superior and subordinate officers and associates; 3:1.22, criticism of official acts or orders; 3:1.33, withholding information—false reporting; 3:2.1, alcoholic beverages and legal drugs. The parties stipulated to the fact that this hearing did not concern suspensions imposed in the case docketed CSV 02286-14, as Allen did not appeal that action, and the only issue addressed in this hearing was Allen's termination contained in the Final Notice of Disciplinary Action (FNDA) dated April 28, 2014, in the case docketed CSR 05767-14.

PROCEDURAL HISTORY

Appellant waived her departmental hearing, and respondent issued a Preliminary Notice of Disciplinary Action (PNDA) on January 26, 2014, sustaining the charges for a ten-day suspension (under CSV 02286-14). On February 11, 2014, the respondent issued an FNDA seeking appellant's termination and her removal from her position as a police officer for the Township of Hillside.

The appellant requested a hearing, and the appeal was transmitted to the Office of Administrative Law (OAL) on February 25, 2014, as to CSV 02286-14. The hearing was held on March 20, 2017 and March 29, 2017. Subsequently, a second appeal was filed with the OAL on May 8, 2014, as to CSR 05767-14. I issued an order consolidating both matters on June 27, 2014. After numerous adjournment requests by both sides on many scheduled hearing dates for various reasons, including placing the matters on the inactive list, settlement discussions and unavailability of the attorneys and/or witnesses, the hearing was held on September 5, 2018, and the record closed on that date.

TESTIMONY

For Respondent

Police Chief Louis Panarese (Panarese) was the police chief for the Township of Hillside for about four years. Panarese worked for Hillside for thirty-four years and

was a detective supervisor for more than twenty years. Panarese also handled administrative discipline for the Hillside Police Department. Panarese identified J-1 as the ten-day PNDA suspension for Allen and J-2 as an FNDA for the termination of Allen.

Panarese recalled that Allen was involved in a minor car accident on March 19, 2013, when patrolling a car dealership while on duty. Panarese saw the written accident report, and the report noted that there was no one injured and basically no damage to the motor vehicles. Panarese identified the police report dated March 19, 2013, and written by Sgt. Paul White. Panarese described the accident as minor, with both cars being driven away. Panarese stated that Allen was a passenger in the police vehicle. Allen stated to the responding officer that she had no pain and no injury.

Panarese testified that the next day, March 20, 2013, Allen stated that she was experiencing extreme back pain, and she went to the emergency room at Overlook Hospital. Panarese identified the picture of the minor damage of the police vehicle in which Allen was a passenger. (R-2.) Panarese described the damage as a dent in the front bumper.

Thereafter, Allen submitted a doctor's note regarding her injuries. Panarese received information which stated that Allen could return to work on April 20, 2013. Allen did not return to work on that date. Allen was referred to Concentra Medical Center for a review and examination. As the chief of police, Panarese receives all medical paperwork for the Hillside Police Department.

Allen advised Panarese that she was in a lot of pain, with a lumbar strain, and Allen remained out of work. Allen was then instructed to report to Concentra once again. On March 28, 2013, Allen went back to Concentra, which found that the pain could be controlled with heat. The diagnosis by Concentra was a lumbar thoracic strain. On March 28, 2013, Allen still did not return to work. Allen remained out of work and used sick time. In April 2013, Allen returned to Dr. Lester. Allen advised Lester that she had pain in the lower lumbar area. Allen stated that her movements were extremely limited. Lester considered such statements as subjective in nature. On April 18, 2013,

Allen went back to Concentra for the third time. Concentra determined that Allen had a soft-tissue injury, with subjective pain and behavioral overlay.

An MRI was taken of Allen by Millburn Medical Imaging, and the MRI showed no herniated discs, with a normal examination. (R-3.) The report was dated April 26, 2013, and further confirmed no disc protrusion, and the impression was normal. Both Concentra and Overlook Hospital cleared Allen to return to work on April 20, 2013, full duty, without restriction. (R-4.) Despite this, Panarese stated that Allen did not return to full duty on April 20, 2013.

Allen did light duty. She worked the police desk in Hillside and answered the telephone. In this capacity, Allen worked for three days. On April 24, 2013, Dr. Lester discharged Allen to full duty. On April 29, 2013, Allen was sent back to Dr. Lester. Dr. Lester found that there was a normal MRI and that the subjective complaints were out of line with the findings. On this day, Dr. Lester cleared Allen for full duty.

Thereafter, Allen submitted a note from the Codella Family Practice that Allen needed to be out from May 2, 2013, until May 15, 2013, and that she could return to duty on May 16, 2013. Allen was once again sent to Concentra for a functional capacity evaluation (FCE). On May 7, 2013, Lester conducted an FCE. The FCE resulted in no report of any injury or re-injury. Allen reiterated that she was in pain. On May 14, 2013, Allen was placed on administrative leave with pay, pending an investigation. Thereafter, Allen went to the Codella Family Practice, which recommended her out from duty from May 15, 2013, until May 27, 2013.

An Internal Affairs (IA) investigation commenced to review Allen's conduct. The IA investigation was conducted by Captain Floyd. The IA investigation took approximately one month. Floyd provided Panarese his findings in a report. Thereafter, Allen was ordered back to work. There was a supplemental investigation after this order was given to Allen. As a result of this order to return to work and her failure to return to work, charges were brought against Allen, and those charges were sustained. The sustained charges were: 1) failure to perform duties; 2) insubordination; 3) conduct

unbecoming a public employee; 4) neglect of duty; and 5) other sufficient cause. (J-2.) There were also eight other violations of regulations.

Allen was out of work until June 14, 2013. Respondent ordered Allen to go for an IME with Dr. Aragona (Aragona), an orthopedist. (R-5.) This exam took place on June 18, 2013. Aragona found pain patterns on the left sacroiliac. There was pain on Allen's right side and a complaint of pain on the left side.

Aragona supplied the respondent with a complete report (R-8) dated June 18, 2013. Aragona found that Allen had one painful or achy spot in the region of the left buttocks. There is no radiating pain and no numbness or weakness to the lower extremities. The pain is constant, but is worse with sitting more than two to three hours. It is somewhat improved by walking, stretching, massage, and use of a TENS unit. Aragona provided an opinion within orthopedic medical probability. Aragona noted that Allen advised him that the only remaining area of pain is at the left pelvic area, which corresponds to the sacroiliac joint. Aragona stated in his report that Allen's pain patterns were entirely subjective, without objective evidence. There is no evidence of restricted motion, spasm, or weakness. It was Aragona's opinion that Allen can return to full duties at work.

Based on the results of Allen's IMEs, deputy chief of police John Robertson forwarded a letter to Allen ordering her to return to work for her next regularly scheduled shift on July 24, 2013. (R-9.) Allen's eight-hour shift was to start at 8:30 p.m. on July 24, 2013. Allen did not work that day, nor did she work on July 26 or July 27, 2013, as she called out sick on both days.

Respondent then received a note from Overlook Hospital stating that Allen could return to work on August 2, 2013. (R-10.) They also received a doctor's note from Premier Healthcare stating that Allen had piriformis syndrome on the left side and could return to work on August 20, 2013. On August 15, 2013, Allen was sent to Concentra to see Dr. Lester. Dr. Lester examined Allen once again and concluded that Allen had a lumbar flexion, but could not explain Allen's other complaints. Lester found that Allen had significant behavior overlay. Lester found that Allen's injury was to soft tissue, and

she could return to full-duty work. In his report dated August 15, 2013, Dr. Lester wrote that he could not explain this patient's subjective complaints. (R-6.) Lester explained that Allen's complaints had been completely nonspecific, generalized throughout the lumbar area, and now "all of a sudden are localized to the left buttock." It seemed unusual to Dr. Lester. "As she had a significant left SI joint injury or hip injury, I believe she would have been focusing our attention to the area much earlier in the injury treatment process."

Premier Healthcare determined that Allen could return to work on September 3, 2013. However, Allen did not return on September 3, 2013, and her suggested sick leave was extended until September 17, 2013. Panarese stated that Allen only came back to work for one half day. Respondent wrote to Aragona requesting a supplemental medical opinion. On September 6, 2013, respondent sent a letter to Aragona advising the doctor that they conducted an investigation into Allen and obtained footage of her daily activities. They further advised Aragona that they had received several doctor's notes that stated that Allen was in extreme pain as a result of left piriformis syndrome and sciatica and had been placed on sick leave through September 17, 2013. They requested from Aragona a supplemental medical opinion addressing the footage of Allen and the medical documents.

On September 10, 2013, Aragona provided Panarese with his report. (R-13.) Aragona found Allen to be miserable and very emotional. Aragona also referred to the video footage of Allen. Aragona describes the video as showing Allen exiting a motor vehicle and going up and down steps into a building. Allen is seen carrying objects in her hands without supporting herself on the handrails. In addition, on the video Allen is seen holding a cell phone and leaning over a rail, turning her body, and then re-entering the building. In another video, Allen exits a building holding a purse in one arm and locking the door with a key in her other hand. Allen uses the steps without the handrail and enters a vehicle smoothly. Allen is not walking with any limp. On one video, Allen is seen carrying trash to a disposal. Allen uses her left hand and closes the gate behind her. In another video, Allen walks with no limp and with objects in both hands. Allen also is seen pushing a shopping cart with both hands, with a few items in the cart, and Allen has no limp. Based on these reviews, Aragona gives his opinion within orthopedic

medical probability that Allen had reached maximum medical improvement and could return to full duties at work. Aragona again stated that Allen has subjective complaints. Aragona found that Allen's neurology status was normal and her lumbar examination showed complete motion. Allen did report pain on palpation and lumbar motion on the left side. Aragona stated that piriformis syndrome is characterized by sciatica symptoms, which do not originate from the spinal roots or spinal disc compression.

It was Aragona's position that based on his past examination and the video footage, he did not find medical evidence of physical findings consistent with extreme pain from piriformis syndrome with sciatica. Aragona stated that patients with these clinical complaints have pain-avoidance behavior and show signs of limping, supported ambulation, and difficulty with activities such as entering and exiting a vehicle. Allen did not show such behaviors in the video. (R-13.)

On September 20, 2013, Allen went to Manhattan Physical Medicine. It was Allen's fourth treating facility. Manhattan stated that Allen should be out of work for four weeks.

Respondent, based on Aragona's most recent report, ordered Allen back to work on October 12, 2013. Panarese wrote a letter to Allen dated October 10, 2013, ordering her back to work on Saturday, October 12, 2013. (R-14). On October 11, 2013, Allen came into the police department while taking prescription medication. Allen did not come to work on October 12, 2013. Aragona stated that Allen is fit for full duty, including the wearing of her duty belt. (R-18.)

On October 11, 2013, the acting chief of police, Nicola Lamonte, sent a letter to Allen ordering her to submit a doctor's note to provide information regarding Allen's prescription drugs in nine separate categories. Pending receipt of this note, there was no need to appear for her October 12, 2013, shift. (R-15.) On October 14, 2013, Dr. Wilkins drafted a note with the breakdown of Allen's drugs. (R-17.) Aragona reviewed Wilkins's note, and it was his opinion that Allen could not be on regular police duty while on those medications. (R-20.) On October 28, 2013, Aragona wrote a letter stating that it was his opinion that the only medication that Allen was required to be on

was an anti-inflammatory, such as diclofenac, and that he would not prescribe Percocet or Lorzone. Allen could still work as a police officer on an anti-inflammatory. (R-22.)

On October 18, 2013, Allen submitted a note from Manhattan for muscle spasms and lower-back pain. It stated that Allen could not stand, and should be out of work until November 18, 2013. On October 31, 2013, Allen was ordered to return to work on November 1, 2013, and not to take medication like Percocet. (R-23.) On November 1, 2013, Allen appeared for work and notified the lieutenant that she could not bend or kneel. On October 31, 2013, the respondent made a list for Allen to disclose her medications. On November 1, 2013, Allen took the drug Percocet. (R-24.) Based on taking this medication, Allen was not permitted to work that day and was required to take a sick day.

On November 2, 2013, Chief Panarese issued a letter with a Direct Order to return to work and not to take narcotic drugs. (R-25.) If Allen disobeyed this order she would be subject to progressive discipline. On November 2, 2013, Allen appeared at work after taking Percocet, even though she knew she was coming to work and was ordered not to take such drugs. (R-26.) Allen also took Skelaxin on that date. Allen stated that she gave this statement involuntarily, and that she was forced into giving this information.

On November 3, 2013, Allen called headquarters and called out sick. On November 4, 2013, the respondent sent a letter for Allen to provide an opinion as to Allen's need to take Skelaxin. It was Aragona's opinion that this medication was not necessary for Allen. Allen is only required to take an anti-inflammatory. (R-28.)

On November 11, 2013, Allen appeared for work under the influence of Percocet. (R-29.) Allen refused to fill out the Statement of Medications. Allen refused to sign the statement, and it was only signed by her lieutenant. Thereafter, Allen provided a note from Manhattan stating that Allen could not perform her duties, due to severe pain, until December 18, 2013.

On November 12, 2013, the respondent (Panarese) sent a letter to Allen ordering Allen to appear for work not under the influence of Percocet. The previous orders of October 31 and November 2, 2013, remained in effect. (R-30.) This was the third order issued to Allen by the respondent. This order further stated that if Allen continued to take Percocet, Lorzone, and Skelaxin, which would impair her ability to function, it would be considered an "unexcused" absence. An unexcused absence is like being absent without leave, explained Panarese. On November 12 and 13, 2013, Allen called out sick, and those absences were recorded as unexcused.

Accordingly, an Internal Affairs complaint form was filed against Allen. Allen was told to be compliant and forthcoming at the interview. Allen was interviewed on November 27, 2013, and the interview was recorded with the knowledge of Allen.

From November 21 through 25, 2013, December 1 through 5, 2013, and December 11 through 15, 2013, Allen called out sick. These were unexcused absences. On December 16, 2013, a note from Manhattan was submitted by Allen. The note stated that Allen was in severe pain and should be out of work until January 20, 2014. From December 15, 2013, until January 28, 2014, Allen did not appear for work, and those absences were noted as unexcused. Allen went on medical leave until February 17, 2014, and those absences were further unexcused absences.

On January 28, 2014, Allen was served with minor discipline, a ten-day suspension. In addition, on January 28, 2014, Allen was served with a Final Direct Order to Report to Work. (R-32.) This order stated that Allen must report to work on January 30, 2014. Allen was advised of possible termination if she disobeyed the order. Allen appeared to work on January 30, 2014, and completed the medical form. Allen stated that the answers on the form were given under duress. Allen had to requalify with firearms. Allen was required to kneel, and she stated that she could not kneel four times. Allen was unable to fire a round off. Allen grabbed her right side with pain. Allen refused medical attention, and she was taken home.

From January 31, 2014, until February 3, 2014, Allen was absent from work without excuse. On February 4, 2014, Allen waived the disciplinary hearing on the ten-

day suspension. On February 10, 2014, a second IA compliant was issued against Allen. On February 11, 2014, the FNDA was served, and she was served with a second IA complaint. From February 9, 2014, until February 12, 2014, Allen refused to appear for duty, and those absences were recorded as unexcused. Allen submitted another note from Manhattan, which stated that she should be out of work until March 17, 2014. Allen just did not come in from February 17 until February 23, 2014. Allen also did not come in from March 1 through March 5, 2014, and those absences were cited as unexcused absences.

On March 10, 2014, Allen appeared for an IA interview. Allen had an attorney as her representative and was not on any medication. On March 12, 2014, the charges against Allen were sustained. Floyd found that Allen was absent without authorization. Floyd issued a report in April 2014. Allen did not report to work in March and April 2014.

The discipline issued against Allen was removal, with the specifications for the termination. It was stated that Allen did not follow the rules, and not following rules can result in chaos in the police department. The video of the IA interview shows Allen limping into the interview room. The interview lasted seventeen minutes and twenty-nine seconds.

There was also surveillance conducted of Allen by Creative Solutions (CS). Based on this surveillance, CS created a report. (R-35.) The report described in words what was seen on the videotapes of Allen.

On cross-examination, Panarese confirmed the date of the accident. Panarese stated that Allen complained of pain the next day. Panarese also confirmed that Allen went to the ER at Overlook the next day. Panarese said that Allen went to Concentra for a medical review. At that time Allen was reviewed and diagnosed with a lumbar strain. Panarese also stated that an MRI was done on Allen which showed no herniated discs. (R-3). In addition, Lester provided a report regarding his evaluation. Lester stated that the pain could be well controlled with heating pads. Lester believed that the

pain in the lower back was subjective. Overlook also cleared Allen for work as of April 20, 2013.

Panarese admitted that he accepted the note from Codella. Concentra did an FCE and found no objective injury. Allen was excused from work from May 15 to May 27, 2013, by a note from Codella. Allen was further excused from work after May 30, 2013. Respondent ordered an IME by Aragona which resulted in a report of June 18, 2013. The report was submitted to Panarese. (R-8.) Panarese confirmed that Allen went to Overlook Hospital with complaints of lower-back pain.

Panarese admitted that the job of a police officer required the officer to sit for long periods of time. The officer had no weapon at the desk when sitting at the front desk. When Allen appeared at work she complained of pain, and was taken away in an ambulance; Allen walked to the ambulance.

Dr. Lester's report notes non-specific pain in the lumbar area. Panarese also stated that he contacted Aragona in order to obtain a supplemental report. Panarese confirmed that Manhattan treated Allen for lower-back pain and excused her from work for four weeks. On October 12, 2013, Allen was ordered back to work. On October 11, 2013, Allen returned to work, but she was on medication at that time.

Panarese described the police officer's belt as having a gun, handcuffs, two magazines, and other things. The belt can be cumbersome, and the officer can be in the car for hours at a time. Panarese did not find the belt to be uncomfortable. Captain Lamonte documented what happened when Allen said she could not wear the belt. On October 11, 2013, Chief Lamonte sent a letter to Aragona about the ability of Allen to wear her police belt. (P-1.) There were IA investigations in November 2013 and March 2014, and videos were taken of Allen.

The form regarding disclosure of medicines was created by counsel and is now a part of the general forms presently used at the department. Failure to complete the form will subject the officer to possible discipline. It is not voluntary, because the officer is required to fill it out.

Panarese stated that Aragona is paid by Hillside, as he is a township physician. Wilkins, on the other hand, was paid by Allen. The shooting exam was conducted by the firearms instructor. Allen was required to kneel on her left knee. Allen grabbed the right side of her back.

The order to require Allen back to work was based on Aragona's information. From January 2014 and after, the last doctor's note received by respondent was on March 11, 2014.

On redirect examination, Panarese stated that Allen received order after order, and that Allen did not obey the orders. Allen was free to take appropriate legal action to address these orders, but she did not. Concentra is also Hillside's medical facility. Panarese did not know about Aragona. Panarese also stated that it was not unusual to take nine months to do an IA investigation.

David Coleman (Coleman) has been employed by and is the owner of Creative Solutions Investigative Services. Coleman is licensed in both New York and New Jersey and has been doing investigations for more than four years. Coleman was asked to do an investigation of Allen. He took pictures of her and used social media. The investigation was done from August 2013 through December 2013. Coleman used both cameras and videos.

Coleman stated that he did not edit the video in any manner. Based on the surveillance, Coleman created a report, which was provided to Hillside. (R-35.) Coleman also provided a copy of the video on disc. (R-37.)

On cross-examination, Coleman stated that he was hired prior to August 3, 2013, and the first date of surveillance was August 3, 2013. The dates of surveillance were: August 3, 2013; August 5, 2013; August 6, 2013; October 10, 2013; October 31, 2013; and November 1, 2013. Coleman witnessed Allen carrying her purse and carrying other items. He also saw Allen going up and down steps. Coleman had been informed of Allen's complained-of symptoms by the attorneys representing Hillside.

On re-direct examination, Coleman said that he was a detective and a private investigator. Coleman was a county detective for the Morris County Prosecutor's Office. Each file had a date and used military time.

Dr. Michael Bercik (Bercik) was a doctor who did an examination of Allen. Bercik reviewed Dr. Aragona's reports. Bercik took a history from Allen and found that Allen was in a motor-vehicle accident, which was minor. The damage to Allen's vehicle, where she was a passenger, was not bad. Allen sought no medical treatment at the time and directly after the accident. Bercik also reviewed the surveillance videos of Allen.

After the accident, Allen went to the emergency room at Overlook Hospital. Hillside then referred Allen to Concentra for treatment and evaluation. Bercik also looked at the police report for the automobile accident. Bercik found that the police report noted a statement by Allen of no pain and no injury. Bercik stated that it was not a common sequence of events to go from no pain to extreme pain. A person can feel worse after the accident, just not that extreme. Bercik also found that Allen made inconsistent statements; first she said there was no pain, and then she stated that she had pain at the accident. As Allen was a passenger in a car, the pain should be on the right side, if there is any pain at all.

Bercik completed a physical exam on Allen and took a history. Allen referred Bercik to upper-back, lower-back and left-hip pain. X-rays were taken of the lumbar spine and other areas, which were normal. In addition, an MRI was taken of Allen, which also was normal. Bercik stated that if there were problems, there would be swelling.

It was Bercik's opinion that the complaints were subjective in nature, which is based on the patient's statements, and not objective, which cannot be controlled by the patient. Allen went to Concentra in September 2013 and the MRI was conducted on April 26, 2013.

In addition, an FCE was conducted and showed that Allen had difficulties not associated with her back. On August 15, 2013, Dr. Lester determined that Allen could continue with full-capacity work. An EMG was conducted, which checked Allen's nerves. The results of the EMG showed right and left piriformis syndrome. This syndrome is usually associated with a herniated or bulging disc.

Bercik described piriformis syndrome as a controversial position. The muscle is found in both legs, but Allen only had symptoms in the left leg. Such a diagnosis draws into question the EMG test. Bercik stated that even assuming piriformis syndrome, one does not need to suffer an injury or an accident to have such a syndrome occur. If a person has piriformis syndrome, it affects the person's hip, and thus the way the person walks.

Bercik reviewed the surveillance discs and videos of Allen. Bercik noted that upon reviewing those discs, he found that Allen bent and walked without any sign of distress. The videos were not consistent with piriformis syndrome or other ailments. Bercik noted that in one video he saw Allen carrying bags, with good balance. Bercik stated that this video was not consistent with any injury. Allen stated that she had pain in her left lumbar spine in the buttock, and that she had increased pain when walking.

Bercik compared those videos to the video during the IA investigation. This video, unlike the other videos, showed Allen walking unevenly and favoring the right leg. Bercik noted that this was not the leg she complained about. On the way out of the room, Allen favored her left leg. This showed inconsistent walking by Allen. Bercik noted that Allen demonstrated behavioral overlay based on subjective statements which were not based on objective evidence. This generally means that people think they are injured when in fact they are not. Bercik noted that Allen had no complaints regarding her neck or upper back. In the end, Bercik's exam was normal. There was no swelling or spasms in the lower back.

Bercik found that Allen had full range of motion. Bercik found normal muscle tone and strength and normal muscle power. Bercik found the left hip to be unrestricted and pain free. Bercik also reviewed Aragona's reports of June 18, 2013, September 10,

2013, and October 17, 2013, and agreed with the assessment that Allen could return to full duties. Allen had reached maximum medical improvement, as opined in Aragone's report dated October 17, 2013.

Bercik's opinion was that Allen had a diagnosis of post-lumbar sprain. Allen had no active injury, after the above injury had healed. Bercik determined that Allen had subjective complaints of pain without any supporting objective findings. Bercik found that Allen had a good prognosis. He had no difference of opinion with Aragona's findings. Bercik did not believe that any medical prescriptions were needed. Any pain could be adequately addressed with Advil, Tylenol, or Aleve, all of which are safe to take. Taking these medicines would permit Allen to continue her regular activities without restriction.

Bercik stated that he had taken care of many police officers in the past. Bercik was fully aware of the job requirements for police officers. Bercik was of the opinion that there was a definite way to confirm piriformis. He did not believe that Allen had piriformis.

On cross-examination, Bercik stated that Allen had a sprain in her back. Allen was hit on her right side. Allen would then move to the right and front. Allen complained of lower-back pain. In the Lester report of August 16, 2013, there was a complaint of left-buttock pain. Neither the MRI nor the x-rays would show a sprain or strain. However, one could see swelling. The MRI would not show piriformis. Piriformis is located where the thigh meets the buttock. Piriformis is very rare.

Bercik also stated that an FCE is based on subjective information. It does not show whether a person can or cannot lift a box, but rather whether the person will not lift a box. Bercik does not put a lot of stock in an FCE. It would not show Allen's ability to return to the police department.

Bercik saw a video that showed Allen carrying two bags, but Bercik did not know the weight of the bags. Bercik saw that Allen had objects in both hands. Bercik did not see any sign of pain, although Bercik admitted that she could have been in pain. Bercik

stated that it is unusual for pain to be constant. Bercik stated that the video could have been taken when Allen was having a good day. However, Bercik stated that he did not see Allen in any pain, ever. Allen had stated that she had constant pain. Bercik stated that duty belts can be heavy (about ten pounds). It was Bercik's opinion that the belt would not have put pressure on her piriformis muscle. On examination, Allen's pain was not near her piriformis.

On redirect, Allen stated to Bercik that she had pain in her lower spine and buttocks. Allen stated that the pain was constant. Allen told Bercik that the pain was a lot during the day. Any serious injury would show in the MRI. Lester said that Allen was able to go back to work.

On recross-examination, Bercik stated that pain is a symptom, and Allen told him that the pain was constant. On another redirect, Bercik referred to the report of Dr. Nehmer. (P-2.) The medical records reviewed were the same as those reviewed by Bercik. Both doctors did a physical exam. Allen had the same subjective complaints to consider, but came to different conclusions. It was Bercik's opinion that there was piriformis syndrome. Allen has full range of motion. Bercik found that Allen walked unevenly but had no limp. Bercik found that Nehmer relied on Allen's complaints. Nehmer gave no weight to the lack of objective evidence found. On another recross, Bercik stated that there was no contusion of Allen's buttocks and the MRI was normal.

For Appellant

Dr. Steven Nehmer (Nehmer) testified as an expert in the field of orthopedics. Nehmer completed an exam on March 23, 2016, and issued a report dated March 24, 2016. (P-2.) Nehmer took a history from Allen and heard her complaints of back pain and pain in the left buttocks. Nehmer reviewed the records as set forth in his report. Nehmer also reviewed the MRI and EMG tests that were done. The EMG measures the function of nerves. Nehmer also reviewed Dr. Fishman's records. Dr. Fishman diagnosed Allen as having piriformis syndrome, and performed pain-relief injections at left S1-S2 and the left sacroiliac joint. These blocks help in stopping the feelings of pain

and assist function. Nehmer found that there was a lumbar strain and a left-buttock contusion.

Nehmer explained that piriformis syndrome is a nerve that is irritated by the muscle. The muscle becomes injured, and thus is less flexible. An x-ray does not show a piriformis. The MRI would not show piriformis. The diagnosis is left piriformis syndrome, lumbar strain, and the left gluteal contusion. Nehmer calls such injuries permanent with a loss of function. At the time of the exam, it was three years post-injury. The prognosis was guarded, as Allen did not make a full recovery.

On cross-examination, Nehmer confirmed the list of records reviewed. Nehmer admitted that he did not review the police report, but read the narrative on page two. Nehmer stated that experiencing no pain at the time of the accident is not uncommon in a motor-vehicle accident. Nehmer referred to appellant's accident as a minor accident. Nehmer did not review the photo of the accident damage to the car. In addition, Nehmer did not review the surveillance video. Nehmer called it another piece of information, and it was important to review. Nehmer also reviewed the records and report of Aragona, Lester, and Hutter.

Nehmer called the accident a factor, but not a key factor. It was not unusual to not feel a contusion until the next day. Nehmer understood that Allen went to Overlook Hospital in the emergency room. The contusion could be caused by the motor-vehicle accident, which can be caused by blunt trauma. Nehmer is aware that Allen complained of back pain. Nehmer made no mention at first of buttocks pain. The primary complaint by Allen was low-back pain.

Nehmer stated that Allen went to Concentra on March 25, 2013. Allen spoke of intermittent tingling. This was mentioned in the ER. Nehmer confirmed that she spoke of tingling and not pain. When Allen returned to Overlook, Allen stated that her pain was in her back. Nehmer testified that medical records do not always reflect everything about the patient.

Nehmer stated that piriformis is principally located in the buttocks. Nehmer admitted that there is a difference between buttock pain and back pain. Nehmer stated that Lester made an inaccurate conclusion. Allen made the first mention of left-buttock pain well after the accident, and thereafter there is complaint of pain in left buttock. There was behavioral overlay as reported in the records and reports. Lester stated that Allen had complaints tied to her emotional state. Nehmer did not review Dr. Hutter's records. Hutter found that Allen's complaints were out of proportion to the objective findings. Nehmer did not agree with Hutter.

There was an EMG by Dr. Wilkins and a finding of bilateral piriformis syndrome in both buttocks. It was only symptomatic on the left side. Nehmer stated that piriformis can be caused by trauma, but there does not have to be a significant impact. Nehmer stated that he had seen six cases of piriformis in the past. Nehmer could not recall if there was significant trauma. The nerve is irritated. It can be asymptomatic, and then symptomatic after an accident. This condition can also be caused by overuse or exercise.

On redirect examination, Nehmer stated that an EMG is an objective test, and it showed bilateral piriformis. Nehmer again testified that records are never complete. Allen had thoracic pain in Concentra but not in Overlook. The police stated that Allen's gait was unsteady two days after the accident. This is consistent with piriformis. Allen may have full range of motion, but painful.

On recross examination, Hutter stated that spasms can cause piriformis. In Exhibit P-1 it stated, "She can no longer run, gym or roller skate."

Keisha Allen (Allen) testified on her own behalf. Allen stated that she was a police officer in Hillside. She went to the Academy in Union County. Allen became an employee in Hillside in January 2006. After the motor-vehicle accident, Allen filed for disability. Allen was terminated from the department in April 2014.

At the time of the accident at work, she was working the night shift from 8:30 p.m. to 7:15 a.m. The shifts were five days on and five days off. The accident occurred on

March 18, 2013. Allen was a passenger in a police car, with her seat belt on. The police car was in the parking lot of a car dealership. It was nearly midnight when the accident happened. Allen described the accident as another vehicle backing up at a slow speed and coming in contact with the vehicle she was in. At the point of impact, she grabbed the hand rail. After the accident, she radioed headquarters and advised them of the motor-vehicle accident. Allen stated that she felt no pain at that time. Allen declined the use of an ambulance or the aid of an EMT. Sergeant White from the Hillside Police Department made out the accident report. Allen continued her tour of duty on that date and worked until 7:15 a.m. on March 19, 2013.

Allen went home after work, and while at home she felt no pain or discomfort. While at home Allen took a shower and sent her daughter off to school, and then went to bed. Later that day, Allen began to feel tight and could not get comfortable. Thereafter, Allen started to experience pain in her back. Accordingly, Allen went to Overlook Hospital because of this tightness on the sides of her back and top of her buttocks. Her pain began to get worse.

Allen did not call police headquarters on March 20, 2013, because she was not scheduled to work on that day. While at Overlook, they took her vitals, and she explained the motor-vehicle accident to the medical personnel. X-rays were then taken. The medical personnel advised her to see her primary-care doctor upon discharge. Allen was prescribed Motrin and a muscle relaxer. Allen was told that she would probably feel worse after discharge. When Allen went home she was able to sleep with the medications. When the medications ran out, the pain returned. There were times she could not get out of bed.

At this point in time, the pain was on and off. Allen then went to Concentra, while she was still on her days off. Captain Lamonte advised Allen to go to Concentra. Allen advised Lamonte that she was injured and had a note from the Overlook emergency room. Allen went to Concentra and saw a female doctor and a male doctor. Allen advised the doctors that she had pain on her side and the top of the buttocks. Thereafter, Allen went to Concentra for physical therapy (PT). PT went on for five days.

At some point, her workers' compensation case was closed. Allen did not go back to work. Allen then went to see her primary-care doctor, Vincent Codella, D.O. Allen told Codella about the motor-vehicle accident and her pain. Codella then began to treat her. Codella treated Allen for several months, and Allen had PT in Woodbridge. Allen's pain continued, although the pain was less at times, and worse at times. The pain on the left side was greater.

Allen was still employed by Hillside, and she was ordered into work. Allen went back to work and did some light duty for some days. Allen stated that because of her pain she could not sit to urinate or defecate. In addition, Allen stated that she could not run, and could not sleep or have sex. Allen had problems with sitting and wore a back brace.

When Allen went to work, she left work three or four times to go to the emergency room. She would get doctors' notes and give them to her supervisor in order to be out of work. Chief Panarese advised Allen that there was no light duty available. The medication she was prescribed was Percocet. Allen was ordered back to full duty, but she had a doctor's note to stay out of work. In addition, Chief Panarese and Captain Lamonte ordered her to stop taking narcotics; however, Allen kept on taking the narcotics. The Hillside Police Department required Allen to fill out a medication-disclosure form. Allen was ordered not to take Percocet at least twenty-four hours before work. Allen stated that she continued to take these medications because she was in pain.

In February 2014, Allen applied for accidental disability. In order to obtain such a benefit, Allen was required to see a State of New Jersey doctor. Allen went to two such doctors and was denied accidental disability, but was granted ordinary disability. In December 2014, Allen's ordinary disability stopped. Allen still cannot work and has no income. Allen testified that she is still in pain. Allen stated that she cannot lift objects because this causes the pain to increase. Allen stated that she can get in and out of a car, but steep stairs are difficult. Between five and six steps are no good. Allen stated that she can bend.

Allen stated that she has pain in her left buttocks area, and there is no pain on her right side. Allen still treats with Dr. Fishman, who had previously provided her with pain-relief injections.

On cross-examination, Allen stated that she has no employment at this time. Allen tried to get employment with NJ Transit, but she knew that she would not pass the drug test. Allen understood that corporate America would generally not hire her because of her use of medications. She got this information from speaking with other people and not from the employers themselves. She did not use a headhunter, nor did she follow up with those companies. Recently she lived on her savings to pay her bills.

Allen admitted that the damages to her car were minor, and she did not want any medical attention because she had no pain. Thereafter, the symptoms gradually increased. The pain started late on March 19 and into March 20 in 2013. Allen admitted that at first, right after the accident, she did not mention the pain in the buttocks, but only mentioned the lower-back pain. The records from Overlook Hospital referenced lower-back pain and nothing in the buttocks.

While Allen was at Concentra, she first mentioned discomfort in the buttocks by mentioning a tingling in that area. Allen also confirmed that as per Nehmer's report, she could not run, go to the gym, or roller skate. Allen would only go to the gym with someone else. She had no paid membership to a gym. She would go about three times a month to the gym. Allen stated that she was not an avid runner, and would only roller blade once a week. Allen would do yoga at home. Allen stated that she had to stay in shape in order to be a police officer.

Allen confirmed that the medical records did not show any pain into her leg. When she felt "electricity" in her leg, she went for PT in Woodbridge. Allen also saw Codella for treatment. Allen also confirmed that she had an FCE.

She recalled that she was ordered not to take narcotic medication, but Allen decided to take her medication anyway because of her pain. Allen admitted that she did not comply with the order not to take narcotic medication. Allen stated that orders must

be followed unless they are illegal or will cause harm. Allen did not cite any rule, regulation, or case law to support her actions. Allen stated that she got an order again not to take medication, and she admitted that she did not follow this order. Allen said that she felt the order was going to harm her. She said that she sought out other medications, but they did not help.

Allen filed a claim for accidental disability after being on the job for eight years. In April 2014, Hillside filed a charge against her, seeking her termination. In September 2014 there was a decision from the Public Employees' Retirement System denying her application for accidental disability, but granting ordinary disability. Allen appealed the denial of accidental disability.

In a letter drafted by Allen, dated May 3, 2018, with copies to a large number of other people, Allen set forth a complaint for discrimination in the Hillside Police Department. The complaint focused mainly on Captain Lamonte and his actions. There was a proposed meeting about Lamonte to attempt to work out the issues, but that was unsuccessful, and Lamonte continued his comments to Allen, she alleged. Allen stated that his comments made her feel uncomfortable. Allen believed that Lamonte's motivation was to get Allen out of the police force.

Allen denied telling Lester that pain went up her back. Allen reviewed the specifications contained in the FNDA and admitted the following specifications: 8; 9; 10; 11; 12; 13; 14; 15; 16; 17; 19; 20; 22; 23; 24; 25; 30; 32; 41; and 58.

On redirect examination, Allen admitted that the chief was a superior officer, and she went to him in order to complain. Allen also complained to the mayor several times. These complaints were not acted upon. Allen kept supplying doctors' notes to the respondent to support her claims. Aragona believed that Allen could return to work. Allen stated that Aragona did not do an examination, but asked her to walk for him. She only went to Aragona one time. Allen denied that she told anyone that she had pain only in the right side. Allen stated that she told doctors that she had pain across the top of the buttocks.

Allen stated that she did not file any complaints with the police department regarding harassment. Allen believed she could have sued, but was unsure she should do that. Allen wanted to continue to work as a police officer. Allen would rather go back to work if she felt better. For every day she was out of work, she had a doctor's note. The police department found her absences to be unexcused. Allen was sure that the respondent was notified of her application for disability in February 2014.

FINDINGS OF FACT/CREDIBILITY

In view of the contradictory testimony presented by appellant's and respondent's witnesses for medical testimony, the resolution of the charges against appellant requires that I make a credibility determination with regard to the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (1963).

A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. 514, 521–22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, I deem Dr. Michael Bercik credible. His testimony was consistent with the evidence and his opinions were based on a greater depth of information relevant to the basis for his opinion. With respect to appellant's medical witness, Dr. Steven Nehmer, he did not

review the motor-vehicle-accident report, nor did he review the videos taken of Allen, which upon review by the undersigned were in conflict with Nehmer's opinions as well as the subjective complaints of Allen. Nehmer, although an experienced and well-intended doctor, testified in a vague and inconsistent manner.

I also question the credibility of Allen's testimony. I find Allen's testimony to be evasive, contradictory, and without detail. Her testimony seemed well rehearsed, which made it seem not credible. It would appear that her testimony was based on factors beyond an objective injury, and seemed to be motivated by hostility against some members of the Hillside Police Department and a general hostility against the police department as a whole.

Accordingly, I **FIND AS FACT**:

1) Allen was a police officer for the Township of Hillside.

2) On March 18, 2013, Allen was involved in a low-speed, low-impact motor-vehicle accident while on duty.

3) Allen, directly after the accident, advised the responding officer that she had no pain and no injury as a result of the accident.

4) The motor-vehicle accident report confirmed such a statement by Allen.

5) On March 20, 2013, Allen reported intense back pain and went to Overlook Hospital Emergency Room.

6) At the request of the Hillside Police Department, Allen was evaluated by Concentra Medical Center, where she reported that her back was painful.

7) Allen was diagnosed with a lumbar strain, with some symptom magnification, and a thoracic strain.

8) On March 28, 2013, Allen visited Concentra with reports of pain being well controlled and that heating her back gave her temporary pain relief. The diagnosis for Allen was a thoracic strain and a lumbar strain with some symptom magnification.

9) On April 18, 2013, Allen visited Dr. Jonathan P. Lester, M.D., of Concentra, a physiatrist, who evaluated Allen's complaints of pain. Allen described pain that started in the lower lumbar area and radiated up. Lester concluded that Allen's lumbar movements were profoundly self-limited and her reported complaints of severe low-back pain were subjective, and that his examination was suggestive of some degree of behavioral overlay.

10) On April 23, 2013, Overlook Hospital advised Hillside via a note that Allen was cleared to full duty without restrictions, effective April 20, 2013.

11) On April 24, 2013, Concentra advised Hillside that Lester would be discharging Allen to full duty.

12) On April 29, 2013, Allen visited Concentra for an additional evaluation by Lester. Lester certified that Allen's lumbar flexion in the standing position was markedly self-limited.

13) In addition, Lester noted that the patient now has a normal MRI and that her subjective complaint continued to be out of proportion to objective findings.

14) On April 29, 2013, Lester released Allen from care and noted that she may return to regular duty on April 29, 2013. Lester certified further that Allen had achieved maximum medical improvement effective April 29, 2013.

15) Allen submitted a physician's note from Codella Family Practice to Hillside stating that Allen must be excused from work from May 2, 2013, to May 15, 2013, and may return to work on May 16, 2013.

16) On May 7, 2013, Hillside ordered Allen to report to Concentra for a functional capacity evaluation (FCE) on May 14, 2013.

17) The FCE report concluded that there was no report or observation of injury or re-injury during or at the conclusion of the FCE.

18) Allen reported that she was in pain and was limited in certain movements, and thus she did not demonstrate the ability to work as a police officer.

19) Allen then submitted additional doctor's notes from Codella saying that Allen must be excused from work from May 15, 2013, to May 27, 2013, and that she may return to work on May 28, 2013, pending reexamination.

20) Thereafter, Allen submitted an additional doctor's note from Codella stating that Allen must be excused from work from May 30, 2013, to June 6, 2013, and may return to work on June 14, 2013.

21) On June 14, 2013, Hillside ordered Allen to attend an independent medical examination (IME) with Dr. James Aragona, an orthopedist, on June 18, 2013.

22) The IME was ordered because the FCE did not address whether Allen had any orthopedic impairments or conditions that would preclude Allen from performing as a police officer.

23) On June 18, 2013, Aragona sent his IME report to Hillside finding that Allen's reported pain focused on her left sacroiliac joint, even though her prior medical records discussed lumbar pain and right-sided piriformis pain.

24) In addition, Aragona found that Allen's pain patterns are entirely subjective, without objective evidence of musculoskeletal or related neurologic impairment. Aragona found that there was no evidence of restricted motion, spasm, or weakness, and that Allen could return to work without restriction.

25) Hillside, relying on Aragona's report, ordered Allen on July 23, 2013, to return to work for her next scheduled shift on July 24, 2013.

26) Allen did report for her next scheduled shift; however, she stated that she was in pain and required an ambulance. Allen walked to the ambulance and was transported to Overlook Hospital.

27) Allen called out sick on July 26, 2013, and submitted a doctor's note from Overlook that stated that she may return to work on August 2, 2013.

28) On August 5, 2013, Allen submitted a doctor's note from a new healthcare provider, Premier Healthcare Center, LLC, which provided that she was receiving care for left piriformis syndrome and sciatica and that she may return to work on August 20, 2013.

29) August 5, 2013, was the first date that Allen advised Hillside that she had piriformis syndrome.

30) On August 15, 2013, Allen visited Concentra, and Lester noted that Allen's lumbar MRI was normal. Lester found that the lumbar flexion was markedly self-limited.

31) Lester noted that Allen's complaints for more than five months had been completely nonspecific, generalized throughout the lumbar area, and now "all of a sudden" are localized to the left buttock. It seemed unusual to Lester.

32) Lester also found that there continued to be significant behavioral overlay. Lester also stated that he felt that Allen could continue full-duty work, to which Allen responded, in very emotional terms, that she could not do this.

33) On August 19, 2013, Allen submitted a physician's note from Premier Healthcare Center which stated that she was receiving care for left piriformis syndrome/sciatica and that she may return to work on September 3, 2013.

34) On September 3, 2013, Allen submitted a doctor's note from Premier which stated that she was under its care for a musculoskeletal condition and that she may return to work on September 17, 2013.

35) On September 6, 2013, Hillside wrote to Aragona and requested that he provide a supplemental medical opinion regarding whether Allen exhibited symptoms of left piriformis syndrome and sciatica during the IME and whether she made complaints to this effect.

36) On September 10, 2013, Aragona supplemented the results of the IME report by stating that he did not find medical evidence of physical findings consistent with extreme pain from a piriformis syndrome with sciatica.

37) Aragona further felt that Allen had reached maximum medical improvement and may return to work.

38) On September 20, 2013, Allen submitted a doctor's note from a new healthcare provider, Manhattan Physical Medicine and Rehabilitation (Manhattan), which stated that Allen was receiving care for low-back pain and piriformis syndrome. Manhattan stated that Allen had difficulty walking and sitting and standing for longer periods of time.

39) Manhattan further stated that Allen should rest and be excused from work for a period of four weeks.

40) Based on Aragona's reports, Hillside ordered Allen, on October 10, 2013, back to work for her regular shift starting on October 12, 2013, at 8:30 p.m.

41) On October 11, 2013, Allen visited the Hillside Police Department and stated that she would not return to work because she was taking prescription medications.

42) In addition, Allen confirmed with Hillside that she was not receiving workers' compensation benefits and that she would return to work, but could not wear her duty belt.

43) On October 11, 2013, Hillside wrote to Aragona and asked whether Allen may return to work as a patrol officer and complete all of her essential job functions while wearing her full-duty belt, which weighs about ten pounds.

44) On October 11, 2013, Hillside wrote to Allen and ordered her to submit a doctor's note by October 15, 2013, with the following information: 1) name of drugs prescribed; 2) date first prescribed each drug; 3) date each prescription was filled; 4) date she began taking drug; 5) the dosage of the drug and amount of times each day she was required or permitted to take drug; 6) dosage of the drug and amount of times each day actually taking the drug; 7) the side effects experienced while taking the drugs and the duration of any side effect; 8) whether the drug was prescribed for left piriformis syndrome/sciatica; and 9) how long she expected to be prescribed the medications.

45) Hillside then advised Allen not to appear for her next scheduled shift.

46) On October 14, 2013, Allen submitted a doctor's note from Manhattan which stated that Allen was prescribed Percocet, diclofenac, and Lorzone for left piriformis syndrome and sciatica and that the only side effect was vomiting.

47) On October 15, 2013, Aragona informed Hillside that Allen is fit for full duties, including wearing her duty belt.

48) On October 16, 2013, Hillside wrote to Aragona and asked whether Allen was required to take Percocet, diclofenac, and Lorzone for the reasons stated by Manhattan. Hillside also asked Aragona whether Allen is able to perform her duties while taking these medications.

49) On October 17, 2013, and October 28, 2013, Aragona wrote to Hillside and stated that Allen did not need to take Percocet and Lorzone for the reasons stated by Manhattan and that Allen could not be on regular police duty while taking Percocet or Lorzone, but Allen could work while taking diclofenac. Aragona also said that Allen would need to stop taking Percocet and Lorzone twenty-four hours prior to her shift.

50) On October 18, 2013, Allen submitted a note from Manhattan which stated that Allen was being treated for muscle spasms, piriformis syndrome, and lower-extremity pain. Further, it stated that Allen should be out on medical leave until November 18, 2013.

51) On October 31, 2013, based on Aragona's medical opinions, Hillside ordered Allen to return to work, setting forth Aragona's medical basis for this finding, including no medical impairment precluding her from work; that she can wear her duty belt; that it was not necessary to take Percocet and Lorzone; that she must cease taking Percocet and Lorzone at least twenty-four hours prior to work; that Allen would need to complete a written document regarding medications taken that may impair her job performance; that she should return to work on November 1, 2013, without

taking Percocet and Lorzone in the previous twenty-four hours; and that she should be ready for full duty.

52) On November 1, 2013, Allen appeared for her shift and put on her duty belt. Allen advised Lieutenant Cureton that she could not bend or kneel. Allen also completed a Statement of Medications form and advised Cureton that she had taken Percocet earlier in the day and would be taking it every three to four hours. Hillside then transported Allen home and she did not work that day.

53) In addition, Allen amended the Statement of Medications form without authorization to state that the answers given were not voluntary and were given with coercion.

54) On November 2, 2013, Chief Panarese issued to Allen a "Direct Order" which set forth the following: 1) Aragona's conclusion that Allen did not need to take Percocet and Lorzone prior to her work schedule; 2) that Allen had no authorization to amend the Statement of Medications; 3) and that Allen's actions in taking her prescription medications, which Aragona found not to be medically necessary, were in direct violation of his order of October 31, 2013, thus disciplinary charges would be issued to Allen and she would be subject to a suspension without pay. By amending the Statement of Medications to say that the answers were not voluntary, Allen engaged in an act of insubordination that would subject her to a suspension without pay.

55) The November 2, 2013, Order required that Allen bring in, during her next shift, her prescription bottle of her "unknown" drug.

56) The November 2, 2013, Order provided that the October 31, 2013, Order remained in full force and effect, and that Allen may consider it a Direct Order that she return to work under the previous Order.

57) Allen was directed to report fit for work, and not under any influence of Percocet or Lorzone. Allen was required to complete a Statement of Medications form at her next scheduled shift.

58) In addition, the November 2, 2013, Order stated: if you refuse to obey this direct order, you will be subject to more progressive discipline. Hillside will consider each shift for which you fail to appear fit for duty as a separate violation warranting more severe discipline. Allen was reminded that no officer may be equipped with a service weapon under the influence of a narcotic that could impair them.

59) Allen was advised in writing that she would be subject to progressive discipline of increasing severity if she continued to disregard Hillside's Orders.

60) After receipt of this Direct Order, Allen reported to work for her next scheduled shift and Cureton presented her with the Statement of Medications form, and Allen certified that she had taken Percocet and Skelaxin the same day. Accordingly, Allen was deemed unfit for duty. Allen further stated that her answers were not given voluntarily, and they were given with coercion.

61) On November 3, 2013, Allen called police headquarters and stated that she would be out sick that evening. Hillside asked Allen whether she was ordered in that evening, and she said that she did not have anything in writing ordering her to report to work.

62) On November 4, 2013, Hillside wrote to Aragona and asked whether Allen was required to take Skelaxin for any orthopedic reason and whether Allen could perform her functions as a police officer on this medication.

63) In response, Aragona wrote to Hillside and stated that Allen was not required to take Skelaxin, and that the only medication an officer could

require would be an anti-inflammatory such as diclofenac, as prescribed by Dr. Wilkins. Aragona also said that Allen could not perform as a police officer while taking Skelaxin in combination with Percocet, diclofenac, or Lorzone.

64) On November 8, 2013, Chief Panarese wrote to Lieutenant Floyd, the IA investigator, to request an IA investigation regarding a complaint Hillside filed against Allen.

65) On November 11, 2013, Allen reported to work under the influence of Percocet. Allen also refused to sign the Statement of Medications form, and, instead, submitted a letter stating that she was ordered back to work and ordered not to take medications, but she was taking her medications prescribed by her treating doctor. Allen also submitted a letter from Manhattan which stated that she was being treated for left piriformis syndrome, muscle spasms, and lower-extremity pain, and that she has impaired sitting, standing, and transferring. It also stated that Allen was unable to assume her duties because of pain, and she should be on medical leave until December 18, 2013.

66) Because Allen reported to work on Percocet on November 11, 2013, on November 12, 2013, Chief Panarese wrote to Allen to clarify her duty to report to work. Panarese confirmed that his October 31 and November 2, 2013, Orders remained in full force and effect; Allen was "Ordered" that she may not appear for her shift under the influence of Percocet or any other medication that would impair her ability to perform her job as a police officer. Accordingly, if Allen should wish to take Percocet, Lorzone, Skelaxin, or any other medication impairing her ability to perform her job duties, her nonappearance at work would be considered "unexcused" and she would be subject to progressive discipline.

67) On November 12–15, 2013, Allen called out sick, and Hillside deemed these absences to be unexcused.

68) On November 18, 2013, Lieutenant Floyd of IA sent Allen an IA Complaint Notification form advising her of an IA complaint against her.

69) On November 21–25, 2013, Allen called out of work sick, and Hillside deemed these absences unexcused.

70) On November 27, 2013, Allen appeared at the Hillside for her IA Administrative Interview. During this interview Allen was represented by an attorney; she was not under the influence of any medication and could proceed with the interview. The interview proceeded as scheduled.

71) On December 1–5, 2013, Allen called out of work sick, and Hillside designated these absences as unexcused.

72) In addition, Allen called out of work sick on December 11–15, 2013, and these absences were deemed unexcused.

73) On December 16, 2013, Allen submitted a note from Manhattan stating that she was being treated for piriformis syndrome, muscle spasms, and lower-extremity pain. Manhattan stated that Allen should be on medical leave until January 20, 2014.

74) On December 17, 2013, Lieutenant Floyd of IA issued a detailed report in response to Hillside's complaint against Allen, and Lieutenant Floyd found sufficient cause for numerous charges to be filed against Allen.

75) From December 15, 2013, to January 28, 2014, Allen did not appear for work for any scheduled shifts, and Hillside deemed these absences unexcused.

76) On January 17, 2014, Allen submitted a note from Manhattan stating that she was being treated for left piriformis syndrome, muscle spasms, and

lower-extremity pain. It further stated that Allen was in severe pain and should be out of work until February 17, 2014.

77) On January 28, 2014, Hillside served Allen with a PNDA for a two-day suspension and a PNDA for a ten-day suspension with regard to her prior conduct. In addition, Hillside served Allen with a Final Direct Order to Report to Work, which stated: "the letter shall serve as my FINAL DIRECT ORDER for her to report to work on January 30, 2014, at 8:30 p.m. for duty in accordance with previous orders. Any additional disciplinary charges filed against you will seek TERMINATION of your employment."

78) On January 30, 2014, at 8:30 p.m., Allen reported to work for her shift and completed Hillside's Statement of Medications form, and she wrote that the answers were given under duress. Allen certified that she had not taken any medications within twenty-four hours of her shift. Allen then attempted to qualify her firearm; however, when it came time to kneel and fire her firearm, Allen was unable to kneel. On the fifth try to kneel, Allen was successful on her left knee, but was unable to fire any rounds and said she couldn't continue. Once Allen stood up, she grabbed her right lower back, at which point the firearm qualification was terminated. Allen refused medical attention that was offered to her, and Hillside escorted her home.

79) From January 31, 2014, to February 3, 2014, Allen was absent without authorization, and those absences were deemed unexcused.

80) On February 4, 2014, Allen waived her disciplinary hearing in connection with the ten-day PNDA and the two-day notice of minor disciplinary action.

81) On February 10, 2014, Hillside filed a second IA Complaint against Allen based on her continued failure to work her scheduled shifts and her modification of the Statement of Medications form on January 30, 2014.

82) On February 11, 2014, Hillside served an FNDA and a Final Notice of Minor Disciplinary Action. In addition, on February 11, 2014, Hillside served a second IA Complaint Notification Form informing Allen of new potential charges.

83) From February 9, 2014, to February 13, 2014, Allen was absent without authorization, and Hillside deemed these absences unexcused.

84) On February 17, 2014, Allen submitted a letter to Hillside from Manhattan recommending that Allen be on medical leave until March 17, 2014.

85) From February 21, 2014, to February 23, 2014, Allen was absent without authorization, and Hillside deemed these absences unexcused.

86) From March 1, 2014, to March 5, 2014, Allen was absent without authorization, and Hillside deemed these absences unexcused.

87) On March 10, 2014, Allen appeared at Hillside for her IA Administrative Interview, where she was represented by an attorney. Allen was not under any medication that would influence her ability to proceed. This interview proceeded as scheduled.

88) During Allen's IA interview, she stated that she had taken AMRIX and Valium on March 9, 2014.

89) On March 12, 2014, Lieutenant Floyd of IA issued a detailed report for the second IA complaint against Allen. Floyd sustained all of these charges and specifications against Allen.

90) Floyd noted that Allen was absent without authorization on January 31; February 1–3; February 9–13; February 21–23; March 1–5; and March 11,

2014, and that Hillside had sufficient cause to discipline her for these unauthorized absences from work.

91) Allen did not appear for any scheduled shifts in March 2014 and April 2014, and Hillside designated those absences as unexcused.

92) Allen's failure to perform her full duties on January 10, 2014, even though Allen had been issued an October 31, 2013, Order, a November 2, 2013, Direct Order, and a January 28, 2014, Final Direct Order compelling her to attend her regularly scheduled shifts fit for duty on a continuing basis, provided Hillside with sufficient cause to charge Allen with insubordination, failure to perform duties, and conduct unbecoming a public employee.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory, and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

Conduct unbecoming a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)).

Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Unbecoming conduct has also been defined as any conduct which adversely affects the morale or efficiency of the department or which has a tendency to destroy public respect for employees and confidence in the operations of government services. Id. at 40.

The Merit System Board and its predecessor and now successor, the Civil Service Commission (CSC), and the courts have generally held that law-enforcement officers are held to a higher standard than other public employees. Police officers are law-enforcement officers to which this higher standard applies. "It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public . . . ." Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant. An appeal to the CSC requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

I **CONCLUDE** that Allen did not sustain an objective injury that would prevent her from fully doing her job as a police officer for Hillside. I further **CONCLUDE** that Allen

was fully aware of the numerous orders given to her to appear at work, fit for duty, and her decision to disobey those orders was without a sound basis.

As a result, this matter rests on the issue of whether or not appellant was insubordinate. Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corp. Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Furthermore, on cross-examination of Allen, she for all intents and purposes admitted that she was aware that she was ordered to appear for work, fit for duty, and that her decision was to not obey that order. The reason for not obeying the order was her understanding that she could disobey an order that was "harmful." There was no definitive basis provided to support this understanding. Based upon the testimony provided, in addition to the findings set forth above, I **CONCLUDE** that appellant's conduct was insubordinate.

Respondent had more than sufficient evidence and information from numerous medical personnel and entities supporting the fact that Allen could fully and properly do her job as a police officer. This makes their orders enforceable, and the failure of Allen to obey those orders was insubordination. The respondent painstakingly addressed Allen's countless failures to appear for her job with the intent to participate fully as a police officer, without taking unnecessary medications. Her attempt to rely on self-serving medical notes which continually placed her on medical leave was not sufficient to support her numerous failures to obey those orders. I can only characterize Hillside's explanations to Allen as detailed, clear, and generous.

Applying the law to the facts in this case, I **CONCLUDE** that the respondent has proven all the charges by a preponderance of the credible evidence. I **CONCLUDE** that appellant engaged in conduct that constituted insubordination, failure to perform duties, and conduct unbecoming an employee. I further **CONCLUDE** that this same conduct also constituted a violation of rules regarding failure to perform duties, insubordination, and conduct unbecoming a public employee.

Appellant further argues that although she admitted in her testimony that she violated direct legal orders, she was permitted to not follow those orders because they would cause her harm. Nowhere in her testimony nor in her attorney's closing argument was there any reference to any rule or case law that supports this position. In addition, neither Allen nor her counsel specifically referenced the harm that would be caused by following those orders. Therefore, I **CONCLUDE** that Allen was aware that there was a legal order (on numerous dates) requiring Allen to appear for work, fit for duty, and Allen knowingly and purposefully disobeyed those orders.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary

proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee." Bock, 38 N.J. at 524.

As the Supreme Court explained in In re Herrmann, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct.
>
> . . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. . . .
>
> [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration . . . when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Herrmann, 192 N.J. at 30–33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Merit System Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who

must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, 191 N.J. at 486 (citation omitted).

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the administrative law judge imposed removal. The CSC modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the CSC for reconsideration.

I am satisfied that appellant's conduct in this case was egregious, such that progressive discipline need not be considered. The police department requires that legal and supportable orders be followed to the best of the officer's ability. Allen's conduct fell well short of that requirement. To expect otherwise is to invite disorder and confusion in responding to certain functions in the police department. Such behavior cannot be tolerated. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from her position was justified.

ORDER

I **ORDER** that the action of the appointing authority removing Keisha Allen is **AFFIRMED** and the appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this

matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 21, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: September 25, 2018

Date Mailed to Parties: September 25, 2018

jb

APPENDIX

WITNESSES

For Appellant:

Dr. Steven Nehmer

Keisha Allen

For Respondent:

Police Chief Louie Panarese

Daniel Coleman

Dr. Michael J. Bercik

EXHIBITS

Joint:

J-1	Preliminary Notice of Disciplinary Action, dated 4/23/2014
J-2	Final Notice of Disciplinary Action, dated 4/28/14

For Appellant:

P-1	Letter from Lamonte to Aragona, dated October 11, 2013
P-2	Medical report from Steven Nehmer, M.D., dated March 24, 2016
P-3 to P-15	Supporting background medical records for Allen

For Respondent:

R-1	Police Report
R-2	Photos of accident
R-3	MR, Millburn Medical Imaging
R-4	Overlook Medical Records
R-5	IME letter to Dr. Aragona
R-6	Dr. Lester records, 8/15/13
R-7	Not admitted

R-8	June 18, 2013, Dr. Aragona Report
R-9	July 23, 2013, letter to Allen
R-10	July 26, 2013, Return to Work authorization
R-11	Not admitted
R-12	September 6, 2013, letter to Dr. Aragona
R-13	September 10, 2013, Dr. Aragona Report
R-14	October 10, 2013, letter to Allen
R-15	October 11, 2013, letter to Allen
R-16	Not admitted
R-17	October 14, 2013, Statement of Medications from Manhattan
R-18	October 15, 2013, Dr. Aragona Work Authorization
R-19	October 16, 2013, letter to Dr. Aragona
R-20	October 17, 2013, Dr. Aragona Medication report
R-21	Not admitted
R-22	October 28, 2013, Aragona Supplemental Report
R-23	October 31, 2013, Order to Return to Work
R-24	November 1, 2013, Statement of Medications
R-25	November 2, 2013, Order to Return to Work
R-26	November 2, 2013, Statement of Medications
R-27	Not admitted
R-28	November 5, 2013, Dr. Aragona Supplemental Report
R-29	November 11, 2013, Statement of Medications
R-30	November 12, 2013, Order to Return to Work
R-31	Not admitted
R-32	January 28, 2014, Order to Return to Work
R-33	Not admitted
R-34	Not admitted
R-35	Creative Solutions August 6, 2013, Report
R-36	Not admitted
R-37	Surveillance video disc of Allen
R-38	Curriculum vitae of Dr. Michael Bercik
R-39	Letter from Allen to Chief Ricciardi, dated May 5, 2018

10-31-18

A-3

STATE OF NEW JERSEY

In the Matter of Patricia Aybar-Rodriguez Middlesex County Sheriff's Department	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2017-1354 OAL DKT. NO. CSV 16869-16 and PTC 16990-16 **(Consolidated)**	

ISSUED: NOVEMBER 2, 2018 BW

The appeal of Patricia Aybar-Rodriguez, Sheriff's Officer, Middlesex County Sheriff's Department, removal effective September 20, 2016, on charges, was heard by Administrative Law Judge Kathleen M. Calemmo, who rendered her initial decision on August 10, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Commission, at its meeting of October 31, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Patricia Aybar-Rodriguez.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31ST DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
AUG 20 2018
NJ DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION

INITIAL DECISION

PATRICIA AYBAR-RODRIGUEZ,
Petitioner,
v.
MONMOUTH COUNTY POLICE ACADEMY,
Respondent.

OAL DKT. NO. PTC 16990-16
AGENCY DKT. NO. N/A

IN THE MATTER OF PATRICIA RODRIGUEZ, MIDDLESEX COUNTY SHERIFF'S DEPARTMENT.

OAL DKT. NO. CSV 16869-16
AGENCY DKT. NO. 2017-1354
(CONSOLIDATED)

Jeffrey S. Ziegelheim, Esq., for petitioner/appellant Patricia Aybar-Rodriguez (Alterman and Associates, attorneys)

Benjamin D. Leibowitz, Senior Deputy County Counsel, for respondent Middlesex County Sheriff's Office (Thomas F. Kelso, County Counsel)

Steven W. Kleinman, Special County Counsel, for respondent Monmouth County Police Academy (Andrea I. Bazer, County Counsel)

Record Closed: June 26, 2018 Decided: August 10, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

In this consolidated proceeding, petitioner/appellant Patricia Aybar-Rodriguez (Aybar-Rodriguez) appeals both her dismissal from the Monmouth County Police Academy (the Academy) and her removal from employment with the Middlesex County Sheriff's Department (Middlesex) for inability to perform her duties. N.J.A.C. 4A:2-2.3(a)(1).

PROCEDURAL HISTORY

On September 19, 2016, the Academy dismissed Aybar-Rodriguez for failing to achieve an average score of eighty percent on the handgun qualification course during firearms training with her issued duty firearm. On October 17, 2016, Middlesex issued a Final Notice of Disciplinary Action (FNDA) removing Aybar-Rodriguez as a sheriff's officer effective September 20, 2016, stating that her employment was conditioned upon completion of the required Academy courses. (RE-10.)

Aybar-Rodriguez appealed to the Police Training Commission (PTC) by letter dated October 3, 2016, and the contested case was transmitted to the Office of Administrative Law (OAL) on November 9, 2016 pursuant to N.J.S.A. 52:14F-1 to -13A. Aybar-Rodriguez appealed Middlesex's decision via letter dated October 26, 2016, and the Civil Service Commission transmitted her appeal to the OAL on November 4, 2016. An order consolidating the two appeals was entered on February 23, 2017, determining that the PTC has the predominant interest with regard to the charges based upon the Aybar-Rodriguez's termination from an approved school or program for failure to meet the standards of N.J.S.A. 52:17B-71 and N.J.A.C. 13:1-7.2(a)(8).

The matter proceeded to hearing on August 2, 2017 and October 11, 2017. Due to difficulty in receiving the transcripts of the hearings, post-hearing submissions were not filed until June 26, 2018, after which I closed the record.

FINDINGS OF FACT

The underlying facts are uncontroverted, and I **FIND**:

On June 13, 2016, Aybar-Rodriguez was offered employment by Middlesex as a Sheriff's Officer, conditioned upon successful completion of all requirements from a PTC Certified Academy. (RE-1.) On July 25, 2016, Aybar-Rodriguez started her employment with a week-long training program provided by Middlesex that included a day spent in firearms training. Middlesex sent Aybar-Rodriguez to the Academy on August 1, 2016. Prior to starting the Academy, Aybar-Rodriguez was examined by a physician and deemed medically fit to participate in all aspects of the basic course for police officers without limitations. (R-7.)

To graduate from the Academy with a Law Enforcement Officer Certification, Aybar-Rodriguez was required to achieve a minimum qualifying score in handgun training. (R-10 at 19.) Part of her Academy training was geared to develop the skills necessary to obtain firearms qualification. Aybar-Rodriguez received firearms classroom training on September 6, 7 and 8, 2016. (RE-2b.) During classroom training, the recruit learns how the weapon works and the principles of shooting. The next phase is the "dry-training" where weapons are issued without ammunition to focus on the mechanics of drawing and holstering the weapon, gripping the weapon, and squeezing the trigger. After these sessions, Aybar-Rodriguez advanced to live firearms training at the shooting range. She received training on September 9, 2016 and September 12, 2016. (RE-2b.) After the September 13, 2016 firearms training session, Aybar-Rodriguez completed a form that noted her difficulties with her shooting and contained the instructor's comments. (R-3.) This process was repeated after the September 14, 2016 firearms training session with a listing of similar problems. (R-3.) On September 15, 2016, Aybar-Rodriguez took the initial handgun qualification testing. She had a total of 112 hits out of a possible 180 rounds fired, resulting in a score of 62.2 percent which was below the passing score of eighty percent. Aybar-Rodriguez was informed that she failed to shoot a qualifying score and she completed the forms noting her perceived difficulties. (R-3.) On September 15, 2016, Sergeant David Wentworth, the Range Master at the Academy, notified Undersheriff Kevin Harris of Middlesex of Aybar-Rodriguez's results and identified four

problems that contributed to her failure to qualify. (R-4.) Wentworth recommended that Middlesex provide further training designed to help her pass her remedial qualification testing scheduled for September 19, 2016. Aybar-Rodriguez received another training session at the Academy on September 18, 2016. (RE-2b.)

The "Basic Course Firearms Manual" requires additional training for any trainee who fails to qualify and achieve an average score of at least eighty percent. (R-10.) Aybar-Rodriguez was part of a group of six Academy recruits who received remedial firearms training on September 18, 2016 with Firearms Instructor Ken Nguyan of Middlesex. The following day, Aybar-Rodriguez attempted her remedial qualification testing and scored 117 hits out of 180 for a total score of sixty-five percent. Because Aybar-Rodriguez failed to achieve the passing score of eighty percent, she was dismissed from the Academy effective September 19, 2017 (RE-4) and removed from her position as a sheriff's officer (RE-8).

In addition to the evidence that forms the foundation of the above findings of fact, a summary of pertinent testimony follows.

Chief Darryl Breckenridge, Sr. was the Director of the Academy in 2016. He explained that all trainees at the Academy receive training in accordance with the "Basic Course Firearms Manual." (R-10.) Each trainee receives the Academy's "Guidebook" that contains a provision on Firearms Training. (R-11.) On September 19, 2017, as the Academy's director, Breckenridge signed Aybar-Rodriguez's Dismissal Notice for her failure to attain an average score of eighty percent on the handgun qualification course. (R-1.) Director Breckenridge testified that the handguns used by a particular trainee are sent to the Academy by the sending agency. In this case, the handgun used by Aybar-Rodriguez was a .45 caliber, model H&K, determined by Middlesex. Director Breckenridge did not recall anything out of the ordinary about Aybar-Rodriguez's experience at the Academy.

Sergeant David Wentworth was the Range Master at the Academy. After Aybar-Rodriguez failed her qualifying round, Wentworth notified Undersheriff Kevin Harris at Middlesex and identified four areas that contributed to her failing score: 1. Poor sight

alignment and sight picture; 2. Poor trigger control; 3. Poor use of time; and 4. Anticipation. He recommended that Middlesex provide additional training. (R-4.) On cross-examination, Wentworth testified that he was familiar with the H&K and noted that its first trigger pull requires a heavier pull than the second. He also testified that the holster draw is a timing issue that requires repeated practice. The guns and the ammunition given to the recruit are supplied by the sending agency. Aybar-Rodriguez's H&K was issued to her by Middlesex. Instructors were encouraged to identify problems early in the training, so they could be fixed prior to the qualifying rounds. The Academy instructors are all PTC certified. The range instructors stand behind the trainees to coach them as they are firing their shots. There were certain dry-fire exercises that could be performed at night that the recruits were encouraged to practice. However, the trainees were not encouraged to go to a firing range on their own because practice without proper instruction could prove detrimental by reinforcing bad technique. Aybar-Rodriguez's problems were identified during dry-fire training and continued through the live fire sessions and qualifying tests. There were no equipment issues so Wentworth attributed Aybar-Rodriguez's problems to be performance related. He testified that Aybar-Rodriguez never complained about her training. Wentworth only recommended remedial training after Aybar-Rodriguez failed the qualifying test. On cross-examination, Wentworth stated that although the "dummy" gun could be used to practice at home, it is of little use with "holster draw" or trigger pull. Wentworth stated that Aybar-Rodriguez would have benefitted from more range practice with a certified instructor; however, more practice could lead to fatigue which is also detrimental to performance. On re-direct examination, Wentworth was not aware of any regulation that required Middlesex to provide extra practice time or provide a different handgun to a struggling recruit.

Middlesex County Sheriff's Officer Ken Nguyen is a certified firearms instructor who conducted the remedial training session on September 18, 2016 for six Middlesex trainees who failed the qualifying test for handguns. He recalled that Aybar-Rodriguez's problems were with weapon anticipation, trigger control, and time management. He designed drills to help her hold her weapon steady. Her time management issues stemmed from her inability to quickly remove the weapon from her holster. On cross-examination, Nguyen admitted that he did not know anything about Aybar-Rodriguez's

problems until he observed her during remedial training. Aybar-Rodriguez was one of six individuals in Nguyen's remedial class that was held as a four-hour training session.

During the testimony of Undersheriff Kevin Harris of Middlesex on cross-examination, it was determined that of the fifteen recruits in Aybar-Rodriguez's Academy class, six recruits initially failed to qualify for firearms and needed remediation training. Three recruits were subsequently discharged by Middlesex after failing the remediation testing. Harris also testified that the H&K handgun is the required handgun for sheriffs in Middlesex. Therefore, it is used by Middlesex recruits for firearms qualification at the Academy.

Ercilia Riordan was in the same Academy class with Aybar-Rodriguez and a recruit from Middlesex. She failed to pass the handgun qualifying and remediation tests. She testified that she was informed by her instructor during the "dry rounds" that she needed additional training. She stated that Instructor Bruce noticed that certain members of her Middlesex class were struggling with the mechanics of getting the weapon out of the holster and pulling the trigger. Her deficiencies were identified by Instructor Bruce, who told her she needed additional training before the live fire training. Riordan failed the qualifying test for firearms.

Aybar-Rodriguez testified that Middlesex provided one week of training prior to the Academy with one day for firearms. She recalled shooting sixty rounds. There were three instructors for fifteen recruits. Her instructor from Middlesex noted that she did not have strength in her trigger finger and she was "slapping the trigger and anticipating." At the Academy, the firearms training is divided into three parts: classroom instruction; dry-firing where the recruits practice without bullets; and live range firing. Instructor Bruce was her firearms instructor during the dry-firing, before she proceeded to the live range. Bruce pointed out her errors and told her that herself and the other Middlesex recruits needed further training before proceeding to live firing. To ask for additional training from Middlesex, Aybar-Rodriguez stated she went to Andrew Ferreira, who had been designated as their class liaison with Middlesex. She testified that she asked Ferreira whether he could arrange range time with Middlesex for remedial training prior to the live

firing. According to Aybar-Rodriguez, she was told it was not possible for Middlesex to provide any range time.

On cross-examination, Aybar-Rodriguez testified that she was not disputing any of her scores on her training forms. (R-2.) In addition, she did not dispute that the Academy Instructors, including Bruce, tried to help her pass her firearms test. Aybar-Rodriguez admitted that she had never fired a firearm before her training week at Middlesex. She was able to strengthen her trigger finger at home by purchasing a training tool and practicing at home; however, she could not take her handgun home for additional practice. The agency-issued firearms stay at the Academy and cannot be utilized for practice. Aybar-Rodriguez stated that she never contacted Middlesex directly about her need for remedial training but contacted the designated liaison, Andrew Ferreira, for the Middlesex recruits to make the request.

Instructor Bruce and Andrew Ferreira were not called as witnesses to testify at the hearing. The statements attributed to them through the testimony of Riordan and Aybar-Rodriguez are hearsay. Hearsay statements are admissible in an administrative proceeding subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.
>
> [Id. at 51.]

The statement attributed to Instructor Bruce that he identified the need for remedial training for certain Middlesex recruits after the dry-firing and prior to the live range firing was corroborated by the testimony offered by both Riordan and Aybar-Rodriguez. In addition, Aybar-Rodriguez's inability to quickly remove her weapon from her holster plagued her throughout firearms training. (R-3.) In addition, Sergeant Wentworth testified

that the instructors' job was to identify problem areas early on so they could be corrected prior to the qualifying test. Therefore, I **FIND** that Instructor Bruce identified that Aybar-Rodriguez was having difficulty with performance after the dry-fire training.

The statement attributed to the liaison, Ferreira, that Middlesex did not have any available range time for remedial training prior to the start of live range training lacks the necessary corroboration. Although I **FIND** that Aybar-Rodriguez asked Ferreira to inquire about remediation training before live training, I cannot find from this record whether Ferreira complied with her request. There is nothing in the record corroborating any conversation that allegedly occurred between Ferreira and Middlesex about additional training.

It was apparent from the tenor of the testimony that the witnesses had no bias toward or against Aybar-Rodriguez. There is no dispute about Aybar-Rodriguez's failing score on the firearm's qualification test. After failing that test, she received remediation firearms training by a certified instructor from Middlesex. During her remediation round of shooting, the following day, Aybar-Rodriguez still failed to qualify by shooting a sixty-five percent instead of the required eighty percent.

The only issue for this appeal was whether Middlesex had an equitable duty to provide additional training or make an accommodation available for a trainee who had been identified by an instructor as having difficulty mastering a required task.

CONCLUSIONS OF LAW

Dismissal from the Monmouth County Police Academy

A recruit is eligible for certification by the PTC when the Academy director affirms that "[t]he trainee has achieved the minimum requirements set forth in the basic course applicable to his or her appointment and has demonstrated an acceptable degree of proficiency in the performance objectives contained in the particular basic course." N.J.A.C. 13:1-5.1(a)(1). The Academy has the power and responsibility "[t]o implement the required curriculum" and "[t]o dismiss a trainee who has demonstrated that he or she

will be ineligible for Commission certification, for unacceptable behavior or for other good cause." N.J.A.C. 13:1-7.2(a)(8). "Good cause" has been defined as protection from arbitrary discharge, and requires that termination be motivated by legitimate performance-related concerns. See Greenwood v. State Police Training Ctr., 127 N.J. 500 (1992).

N.J.A.C. 13:1-2.1 provides that the rules may be relaxed or dispensed with by the PTC in any instance where it shall be apparent to the Commission that strict adherence would result in an injustice to an individual or a law enforcement agency. However, based upon the facts and circumstances in this matter, and in view of the testimony and evidence in the record, I **FIND** that Aybar-Rodriguez has failed to show how strict adherence to the requirements for handgun qualification would result in an injustice.

I **CONCLUDE** that good cause existed for Aybar-Rodriguez's termination by the Academy. Despite her efforts, Aybar-Rodriguez could not successfully complete the Academy's firearms handgun qualification. She does not contend otherwise. Pursuant to N.J.A.C. 13:1-7.2(a)(8), the Academy has the authority to dismiss a trainee who has demonstrated that she will be ineligible for certification by the PTC. In order for Aybar-Rodriguez to obtain a certification, it was necessary for her to achieve a minimum average score of eighty percent on the three highest consecutive matches during the handgun qualification course. Aybar-Rodriguez failed to achieve the necessary score, having finished her remedial training with an average of sixty-five percent for three matches.

The PTC's "Basic Course Firearms Manual" states that the firearms "[t]raining and qualification for the record shall be conducted with a handgun approved for official duty use by the trainee's law enforcement agency." (R-10 at 11.) Because Middlesex sheriff officers use a .45 caliber H&K handgun, Aybar-Rodriguez was issued a .45 caliber H&K handgun at the Academy. While other jurisdictions may allow for different weapons of varying sizes and dimensions, Middlesex did not offer such an accommodation. Aybar-Rodriguez did not issue any complaints about her weapon. There is nothing in the record to show that Aybar-Rodriguez was treated differently than any of the other trainees from Middlesex. Therefore, I **CONCLUDE** that there is no justification that would permit a relaxation of the rule requiring the trainee to use an agency-issued handgun.

In accordance with the PTC Manual, to pass the firearms qualification, a trainee must achieve an average score of eighty percent on three consecutive firings. If the trainee does not achieve an average score of eighty percent on three consecutive firings, the trainee receives additional training. "This remedial training must be given before the trainee is again allowed to re-attempt qualification." (R-10 at 12.) Aybar-Rodriguez acknowledged that she was given remedial training with six other Middlesex recruits on September 18, 2017 by Middlesex after failing to qualify. However, she maintains that she needed additional training when her difficulties where first discovered after "dry-firing." Aybar-Rodriguez does not dispute that she received the basic course firearms training as detailed on the training calendar. (RE-2B.) Because remedial training must be given after a trainee fails to achieve an average score of eighty percent, I **CONCLUDE** that Aybar-Rodriguez received remedial training prior to her second attempt at qualification. Middlesex provided remedial training at its range on Sunday, September 18, 2016 for four hours under the direction of Nguyan, a certified firearms instructor. In accordance with the PTC Manual, failure to pass the test upon requalification results in dismissal from the Police Academy, and possible dismissal from county employment. Although it appears that Aybar-Rodriguez's difficulties with her handgun were consistent, there is nothing in the record to suggest that her training was not adequate or in keeping with the standards of the Academy. The Academy contends that the rules should not be relaxed when the question is weapon's qualification. There is nothing in the record to support a relaxation of the rules in this instance. I **CONCLUDE** that Aybar-Rodriguez received appropriate handgun training and remedial training in accordance with the PTC Manual but was unable to achieve the required eighty percent qualifying average score.

In this case, Aybar-Rodriguez did not successfully complete basic training because she failed the firearms qualification. Given the clarity of the rules and the consequences of failure, I **CONCLUDE** that the Academy's action in dismissing Aybar-Rodriguez from the basic training course was consistent with applicable law and should be upheld.

Discharge from the Middlesex County Sheriff's Department

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3.

Middlesex terminated Aybar-Rodriguez's employment due to her inability to perform her duties. That inability was a direct result of her failure to successfully complete the firearms qualification at the Academy. N.J.A.C. 4A:2-2.3(a)(1). I **CONCLUDE** that Middlesex's action was consistent with the statutory scheme. In Gottlieb v. Monmouth County Sheriff's Office, 95 N.J.A.R. 2d (CSV) 573, the administrative law judge held:

> The controlling statute, N.J.S.A. 52:17B-68.1, leaves no room for discretion. Before permanent appointment, there must be completion of the Basic Police Training Commission course for correction officers. . . . [C]ivil Service rules do not anticipate continued employment of law enforcement officers who do not complete the Police Training Commission course, if so required. . . .
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> . . . [T]he New Jersey Department of Personnel and the Merit System Board may only look to the fact, or not, of course completion. Here, there was none. For that reason, with a threshold condition unmet, the appointment must cease.

Accordingly, I **CONCLUDE** that Middlesex's determination to terminate petitioner's employment for failure to complete the Academy, a sine qua non to a permanent appointment, was within the scope of its authority.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the action of respondent Monmouth County Police Academy dismissing Aybar-Rodriguez from the basic training course for failing to attain an average score of eighty percent on the handgun qualification course during firearms training is **AFFIRMED**.

I further **ORDER** that the action of respondent Middlesex County Sheriff's Department removing Aybar-Rodriguez is **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **POLICE TRAINING COMMISSION**.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **POLICE TRAINING COMMISSION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 10, 2018
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at **POLICE TRAINING COMMISSION**: August 10, 2018

Date Mailed to Parties: August 10, 2018

cmo

APPENDIX

WITNESSES

For Petitioner/Appellant:

Patricia Aybar-Rodriguez
Ercilia Riordan

For Respondent Monmouth County Police Academy:

Darryl Breckenridge
David Wentworth

For Respondent Middlesex County Sheriff's Department:

Ken Nguyen
Kevin Harris

EXHIBITS

For Petitioner/Appellant:

None

For Respondent Monmouth County Police Academy:

R-1 Dismissal Notice
R-2 Basic Course Trainee Score Input Form
R-3 Instructor/Trainee observations on Firearms Training
R-4 Trainee Firearms Failure Notification
R-5 Firearms Range Exercise Notes
R-6 Firearms Safety Acknowledgement Form
R-7 Medical Certification Form

R-8 Rules and Regulations Acknowledgement

R-9 Recruit Orientation Handouts

R-10 Basic Course Firearms Manual

R-11 Guidebook

R-12 Bull's – Eye Course

R-13 HQCP#1, #2, and #3 – HQC#1, #2, and #3 – HQCR#1, #2, and #3

For Respondent Middlesex County Sheriff's Department:

RE-1 Offer of Conditional Employment

RE-2 (a) Middlesex Training Course calendar, (b) Academy Calendar

RE-3 September 15, 2016 Notification

RE-4 Dismissal Notice

RE-5 Internal Affairs Investigation Report

RE-6 Acknowledgement of Receipt

RE-7 Loudermill hearing memo

RE-8 PNDA

RE-9 Green Return Receipt Cards

RE-10 FNDA

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION
PO BOX 085
TRENTON, NJ 08625-0085
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GURBIR S. GREWAL
Attorney General

VERONICA ALLENDE
Director

PATRICIA AYBAR-RODRIGUEZ,

Petitioner

v.

MONMOUTH COUNTY
POLICE ACADEMY,

Respondent

FINAL DECISION

OAL Docket No. PTC 16990-16

OAL Docket No. CSV 16869-16

(CONSOLIDATED)

BY THE COMMISSION:

The Police Training Commission received the Initial Decision in this matter on August 20, 2018. The Commission requested and was granted an Order of Extension on August 31, 2018, pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8. This final decision was rendered within the time limits prescribed by N.J.A.C. 1:1-18.6 and N.J.A.C. 1:1-18.8.

The Police Training Commission, at its meeting of October 3, 2018, considered the attached Initial Decision, dated August 10, 2018 from Kathleen M. Calemmo, ALJ. There were no exceptions filed by the parties. The Initial Decision is hereby **ADOPTED** without modification as the **FINAL DECISION** of the Police Training Commission.

This is the final administrative determination by the Police Training Commission in this matter. Any appeal of this Final Decision should be made pursuant to N.J. Court Rules, R. 2:2-3.

POLICE TRAINING COMMISSION

By: _____
John F. Cunningham, Designated Chairman

Date: 10-4-18

10-31-18

A-1

STATE OF NEW JERSEY

In the Matter of Antoine Buggs
City of East Orange Police Department

CSC DKT. NO. 2015-2470
OAL DKT. NO. 03451-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 31, 2018 BW

The Civil Service Commission, at its meeting of October 31, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31st DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03451-15
Agency No. 2015-2470

IN THE MATTER OF ANTOINE BUGGS, CITY OF EAST ORANGE POLICE DEPARTMENT.

Wolodymyr Tyshchenko, Esq., for appellant (Caruso Smith Edell Picini, PC, attorneys)

Rachel M. Caruso, Esq., for respondent (Roth D'Aquanni, LLC, attorneys)

Record Closed: September 27, 2018 Decided: September 27, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 11, 2015, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Stipulation of Settlement was submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 27, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

dr

2015 SEP 26 P 12:12

CARUSO SMITH PICINI, P.C.
60 Route 46 East
Fairfield, NJ 07004

IN THE MATTER OF

ANTOINE BUGGS

EAST ORANGE POLICE DEPT.

ESSEX COUNTY, NEW JERSEY

STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, Antoine Buggs ("Employee") and East Orange ("City"), hereto that the above-captioned matter be and is hereby settled upon the following terms and conditions:

1. The following charges in the Final Notice of Disciplinary Action dated February 19, 2015, attached hereto and incorporated by reference herein, issued and served upon Employee, are hereby dismissed with prejudice: N.J.A.C. 4A:2-2.3(a)(11) Other Sufficient Cause and Rules and Regulations 3:1.9 Neglect of Duty. Furthermore, the Department hereby withdraws any allegation that Employee engaged in any conduct, which was knowingly false, including, but not limited to, providing a false statement of fact to a Supervising Officer and preparing and submitting a departmental administrative report containing information which was knowingly false.

2. The following charge in the Final Notice of Minor Disciplinary Action dated February 19, 2015, to Employee charging him with violations of East Orange Rules #3:5.10 Emergency Calls and Use of Red Light Siren shall be sustained. As such, the City shall issue an amended Final Notice of Disciplinary Action sustaining said charge and the specification for same shall be as follows: On September 24, 2013, Detective Antoine Buggs, while a passenger in marked police vehicle #96, failed to insure the emergency lights and siren to vehicle #96 were activated.

3. The penalty for the sustained charge as set forth in paragraph 2 herein shall be a suspension of three 3) days without pay, which penalty Employee has already served.

4. The City agrees, that within thirty (30) days of execution of this Stipulation of Settlement, to pay Employee forty-two (42) days of back pay, less appropriate deductions.

5. Each party shall be responsible for their respective pensions payments regarding the forty-two (42) days of back pay.

6. The parties voluntarily enter into this Stipulation of Settlement.

7. Employee voluntarily and in consideration of the above, hereby releases the Department, its employees, officials, agents and assigns from all claims that he may have regarding the events, circumstances, facts and penalty imposed incident to the disciplinary charges enumerated in paragraph 1 of this Agreement against the County, its employees, officials, agents and assigns from the date of his initial employment with the County, including but not limited to all claims, liabilities, costs, and attorney fees under the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.), the Civil Rights Act of 1964, as amended (42 U.S.C. 2000(e) et seq.), the Americans With Disabilities Act, the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.), the New Jersey Civil Rights Act or any other state or federal statute or the common law. Employee's release is limited to the specific events, circumstances, facts and penalty. Nothing herein shall be construed as as a General Release.

8. Each party shall bear the costs of their own legal fees.

9. Employee shall not institute any appeal or request any other relief with respect to this matter, other than that provided for by this Agreement.

10. This settlement agreement is not intended to establish precedent in any future disciplinary matters.

11. Employee has read the above stipulation and conferred with his Union representative and/ or Attorney and hereby agrees to abide by the terms of this settlement agreement.

EMPLOYEE

DATED: 4/5/2017

ANTOINE BUGGS

ATTORNEY FOR EMPLOYEE

DATED: 4/7/17

WOLODYMYR P. TYSHCHENKO

EAST ORANGE POLICE DEPT.

DATED:

ALLAN C. ROTH, ESQ.
Special Counsel for Dept.

DATED:

WILLIAM SENANDE, ESQ.
City Administrator

DATED: 4 April 17

SHEILAH COLEY
Public Safety Director

DATED: 4/ April 17

PHYLLIS BINDI
Chief of Police

A-4

STATE OF NEW JERSEY

In the Matter of Carolyn Inge
Mercer County Corrections Center

CSC DKT. NO. 2018-1209
OAL DKT. NO. CSV 16368-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 2, 2018 BW

The appeal of Carolyn Inge, County Corrections Officer, Mercer County Corrections Center, 15 working day suspension, on charges, was heard by Administrative Law Judge Susan L. Olgiati, who rendered her initial decision on September 28, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 31, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Carolyn Inge.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31ST DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16368-17
AGENCY DKT. NO. 2018-1209

IN THE MATTER OF CAROLYN INGE,
MERCER COUNTY CORRECTIONS CENTER.

Mark W. Catanzaro, Esq., appearing for appellant Carolyn Inge (The Law Offices of Mark W. Catanzaro, attorneys)

Stephanie Ruggieri D'Amico, Assistant County Counsel, appearing for respondent, Mercer County Corrections Center (Paul Adezio, County Counsel)

Record Closed: August 14, 2018 Decided: September 28, 2018

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

Appellant, Carolyn Inge, a Mercer County Corrections Officer, appeals the disciplinary action imposed by respondent, Mercer County Corrections Center (County) seeking a fifteen working day suspension for Conduct Unbecoming a Public Employee in violation of N.J.A.C. 4A:2-2.3(a)(6); Neglect of Duty in violation of N.J.A.C. 4A:2-2.3; and Other Sufficient Cause (Insubordination; intentional disobedience or refusal to accept reasonable order, assaulting or resisting authority, disrespect or use of insulting or

abusive language to supervisor) in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically by refusing to comply with an order given by her supervisor. Appellant denies the allegations.

PROCEDURAL HISTORY

On November 16, 2015, the County served appellant with a Preliminary Notice of Disciplinary Action. On October 3, 2017, a departmental hearing was held in the matter. On October 18, 2017, the County served the appellant with a Final Notice of Disciplinary Action suspending her for fifteen working days to be served from November 3, 2017, through November 23, 2017. She filed a timely notice of appeal, and on November 2, 2017, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case. N.J.S.A. 52:14-1 to -15 and N.J.S.A. 52: 14F-1 to -13.

On April 6, 2018, the County filed a motion for summary decision. On April 16, 2018, the appellant filed a letter brief in opposition to the motion. By Order dated May 29, 2018, the Motion for Summary Decision was denied and the matter was scheduled for hearing.

The matter was heard on July 30, 2018, and the record remained open until August 14, 2018, to allow for written summations. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

I. Undisputed Facts

The following facts are not in dispute:

1. Appellant is a Corrections Officer employed by the Mercer County Corrections Center.

2. On November 6, 2015, appellant was assigned to work as the jail entrance officer during the 3:00 P.M to 11:00 P.M. shift

3. Appellant's duties included responsibility for the mail and processing money orders.

4. On November 6, 2015, appellant was ordered by her supervisor, Sergeant Michael Murzda, to pick up a money order that had been left over from the prior shift.

5. She did not pick up the money order as directed.

6. After talking with Sergeant Murzda, appellant asked another officer to pick up the money order for her.

II. Testimony

For respondent:

Michael Murdza , is a Sergeant with the Mercer County Corrections Center. On November 6, 2015, petitioner was working as the jail entrance officer whose responsibilities include processing excess mail from the previous shift and relieving other officers. On that evening, Murzda received a call advising that an inmate had given the unit a money order[1]. Murzda learned from Officer Paige, that Paige had asked appellant to pick up the money order but she refused.[2] Murzda contacted appellant and ordered her to pick up the money order. She refused. Murzda explained that he did not remember the exact words they used, but that appellant argued it was not her responsibility but rather was the responsibility of the prior shift. Murzda and appellant "went back and forth" for a while. Murzda ordered appellant to pick up the money order because she was the next jail entrance officer on duty and as such, it was her responsibility to pick up and process same. Murzda told appellant she needed to pick up the money order; then she hung up on him.

[1] Inmates receive money orders from outside the Corrections Center for use to purchase items at the commissary. The money orders must be logged in and deposited into the inmate's account.

[2] Paige is not a supervisor of appellant. His request that she pick up the money order was not an order.

Michael Kownacki has been a Captain with the Mercer County Corrections Center since January 2018. As Captain, he is responsible for disciplinary charges. He did not draft the charges against appellant[3], but had reviewed same. Appellant had a prior 2013 discipline consisting of a Final Notice of Disciplinary Action for insubordination which imposed a three day suspension. (R-3)

Kownacki believed the current charges to be consistent with progressive discipline. The Mercer County Public Safety Table of Offenses and Penalties, provides for a fifteen day suspension for a second infraction, (also known as "Step Two" violation) for insubordination. Id. Kownacki explained that it did not matter where appellant was at the time she received the order from Murzda. The order was given and she needed to follow it. If a lawful order is given, it must be followed.

For Petitioner:

Carolyn Inge is a Corrections Officer with the Mercer County Corrections Center. On November 6, 2015, she was working as the jail entrance officer. Her duties in this position included finishing the mail, entering money orders, and relieving other officers who were going on break. On November 6, 2015, when she received the call from Murzda, she was relieving Office Smith in Control Room One (CR-1). She did not sign the log book for CR-1, as required, when she relieved Officer Smith that evening. She told Murzda that she didn't like picking up money orders from the previous shift. She explained that the reason she didn't like to do this was because she cannot confirm where the money orders had come from. She suggested that other officers, (contrary to rules/regulations) sometimes bring in money orders for inmates. She did not want anyone to think that she had brought in the money order.

Appellant told Murzda that she could not pick up the order at the time of his call because she was relieving an officer in CR-1. She told Murzda she would pick up the money order when she was done relieving another officer. Upon questioning by this ALJ, Appellant stated that Murzda replied it was "no problem." Appellant claims she did not

[3] The October 18, 2017 FNDA was prepared prior to Kownacki's promotion to Captain.

refuse Murzda's order and she did not hang up on him. After speaking with Murzda, she contacted Officer Smith and asked him to pick up the money order. He brought it to her and she processed the money order. She did not advise Murzda that she had asked another officer to pick up the money order for her.

Findings:

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

As to the credibility of the witnesses, I cannot accept the testimony of the appellant as credible. She admitted that she refused to pick up the money order when Paige, a fellow, non-supervising officer, asked her to do so. She also acknowledged that she did not like to take responsibility for money orders that had come from a previous shift. Her actions in refusing to comply with Sergeant Murzda's order are consistent with her prior refusal to pick up the money order and her expressed dislike for taking responsibility for same. Her actions are further consistent with her expressed belief that it was not her responsibility, and her opinion that this was something that should have been done by the prior shift.

Additionally, her explanation that she does not like to take responsibility for money orders from a previous shift because she was unable to verify the source of the money order and was concerned that she might be viewed as the source of same, simply does not make sense. She was told by Murzda that the money order had been left over from the prior shift. She was being ordered by her supervisor to pick it up. This being the case, there is no rational reason for appellant to believe that she might be viewed as the source of the money order.

Additionally, appellant's testimony that Murzda replied it was "no problem" in response to her alleged statement that she could not pick up the money order when directed but would pick it up later, is not only contrary to Murzda's testimony and incident report, it is also inconsistent with her own incident report. In her November 11, 2015, report, prepared just six days after the incident, appellant makes no mention of Murzda's alleged "no problem" reply.

Finally, appellant's testimony is best described as motivated by her desire to avoid discipline.

Conversely, Sergeant Murzda testified credibly. His testimony was forthright, consistent, and probable under the totality of the circumstances. He acknowledged that three years after the incident he did not recall the exact words of his conversation with appellant. He testified that he told her to pick up the money order, she argued with him that it was not her responsibility, and then hung up. Murzda's testimony as to these issues is consistent with his report which was prepared on November 6, 2015, the same date of the incident.

Finally, while Captain Kownacki was also credible, his testimony was limited to his review of the discipline and the appropriateness of the penalty. He had no direct knowledge of the facts that gave rise to the charges against the appellant.

After having the opportunity to review the evidence and consider the testimony of the witnesses, I **FIND** the following additional **FACTS:**

1. The appellant received a reasonable order from her supervisor, Sergeant Murzda and she did not comply.

2. Appellant failed to provide a reasonable excuse for not complying with the order.

3. After arguing that the directive was not her responsibility, appellant hung up on her supervisor.

LEGAL ANALYSIS AND CONCLUSIONS

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal, based on the charges. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Appellant's status as a correction's [law enforcement] officer subjects her to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

In the present matter, appellant is charged with Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); Neglect of Duty; in violation of N.J.A.C. 4A:2-2.3(a)(7); and Other Sufficient Cause (Insubordination) in violation of N.J.A.C. 4A:2-2.3 (a)(12)

A. Conduct Unbecoming

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, appellant acknowledged that she was ordered by her supervisor to pick up a money order that had been left over from the prior shift. She admitted that she did not pick up the money order as directed. Appellant also admitted that she did not like to take responsibility for money orders from another shift. It is incumbent upon the appellant to comply with an order from her supervisor. She cannot argue with her supervisor over the directive, and she cannot refuse to comply simply because she does not like to do a particular task. Further, it is irrelevant where appellant was at the time of the order. If she was unable to immediately comply with the order she should have complied as soon as she was able. She cannot ignore the order by asking another officer to perform the task for her. Compliance is essential to the morale and efficiency of a governmental unit. Compliance, or lack thereof, adversely impacts the operations of the Corrections Center

as maintenance of strict discipline is essential in para-military settings such as the Corrections Center.

Accordingly, I **CONCLUDE** that the respondent has demonstrated, by a preponderance of the credible evidence, that appellant's conduct constitutes Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), and that such charge must be **SUSTAINED.**

B. Neglect of Duty

Neglect of duty has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, 2009 N.J. AGEN LEXIS 112, OAL DKT. No. CSV 5072-07. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

Here, appellant acknowledged that processing money orders is part of the duties of the jail entrance officer. She acknowledged that she received an order from her supervisor to pick up a money order that had been left over from the previous shift, and that she did not do it herself. By her own admission, appellant neglected to perform an act required by her job.

Accordingly, I **CONCLUDE** that the respondent has demonstrated, by a preponderance of the credible evidence, that appellant's conduct constitutes Neglect of Duty, in violation of N.J.A.C. 4A:2-2.3(a)(7), and that such charge must be **SUSTAINED.**

C. Other Sufficient Cause - Insubordination

Here, the appellant is charged with insubordination specifically, failure to obey a direct order. (Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Appellant acknowledged that she did not get the money order as directed by Sergeant Murzda. Rather, she argued that it was not her responsibility, hung up the phone, and thereafter, asked another officer to pick up the money order for her.

Accordingly, I **CONCLUDE** that the respondent has demonstrated, by a preponderance of the credible evidence, that appellant's conduct constitutes Other Sufficient Cause, Insubordination, in violation of N.J.A.C. 4A:2-2.3 (a)(12), and that such charge must be **SUSTAINED.**

PENALTY

The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

Typically, numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record are considered. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Here, appellant is charged with a second infraction (also known as a "Step 2" violation) of N.J.A.C. 4A:2-2.3 (a)(12) Other Sufficient Cause, (Insubordination). In addition to the present charge of insubordination arising from the November 6, 2015, incident, appellant has a prior 2013 charge of insubordination. That prior charge resulted in the imposition of a three day suspension. The Mercer County Public Safety Table of Offenses and Penalties provides that the penalty for a second infraction of insubordination is a fifteen day penalty.

In mitigation, appellant has been a Corrections Officer for eight years and her only other discipline occurred five years ago. This however, does not outweigh the appellant's failure to comply with an order from, and disrespectful conduct towards, her supervisor. As this is appellant's second infraction for insubordination and the proposed penalty is consistent with respondent's table of progressive discipline, it is reasonable.

Accordingly, I **CONCLUDE** that the penalty of a fifteen working day suspension is appropriate, and must be **SUSTAINED.**

DECISION AND ORDER

I **ORDER** that the charges of Conduct Unbecoming a Public Employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); Neglect of Duty in violation of N.J.A.C. 4A:2-2.3(a)(7), and Other Sufficient Cause (Insubordination), in violation of N.J.A.C. 4A:2-2.3(a)(12), are sustained, and that the action of the respondent appointing authority imposing a fifteen working day suspension on appellant is hereby **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 28, 2018
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 9/28/18

Date Mailed to Parties: 9/28/18

SLO/vj

APPENDIX

LIST OF WITNESSES

For Appellant:

Carolyn Inge

For Respondent:

Michael Murdza

Michael Kownacki

LIST OF EXHIBITS

For Appellant:

P-1 Incident Report by Inge, November 11, 2015

For Respondent:

R-1 Incident Report by Murdza, November 6, 2015

R-2 FNDA, 10/18/17

R-3 FNDA, 9/23/13

R-4 Mercer County Public Safety Table of Offenses and Penalties—Correction Center

R-5 Log Book for E-Tour

R-6 Log Book for C-Tour

10-31-1

A-1

STATE OF NEW JERSEY

In the Matter of Desiree Jones
Union County, Department of the Clerk

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2017-1330
OAL DKT. NO. 17324-17

ON REMAND
OAL DKT. NO. 17084-16

ISSUED: OCTOBER 31, 2018 BW

The Civil Service Commission, at its meeting of October 31, 2018, acknowledged the attached settlement, as clarified, in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31st DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P.O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17324-17
Agency No. 2017-1330

IN THE MATTER OF DESIREE JONES, UNION COUNTY DEPARTMENT OF THE CLERK.

ON REMAND

OAL DKT. NO. CSV 17084-16

Corey M. Sargeant, Esq., for appellant (Loccke, Correia & Bukosky, attorneys)

Heather J. Fay, Esq., for respondent

Record Closed: October 9, 2018 Decided: October 10, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 15, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Stipulation of Settlement was submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 10, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

dr

ROTH D'AQUANNI, LLC
150 Morris Avenue, Suite 303
Springfield, NJ 07081
973-258-1288

DESIREE JONES, Petitioner, and COUNTY OF UNION COUNTY, DEPARTMENT OF CLERK, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: CSV 17084-2016N STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, Desiree Jones ("Employee") and the Union County Department of Clerk ("County"), hereto that the above-captioned matter be and is hereby settled upon the following terms and conditions:

1. The following charges in the Final Notice of Disciplinary Action dated October 14, 2016, to Employee, charging her with N.J.A.C. 4A:2-2.3(a)1: Incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)12: Other sufficient cause: violation of the statutory requirements set forth in NJSA 46:26A-6 related to timely recording and/or return of legal documents shall be sustained.

2. The following charges in the Preliminary Notice of Disciplinary Action dated March 29, 2018, to Employee, charging her with N.J.A.C. 4A:2-2.3(a)2; Insubordination; N.J.A.C. 4A:2-2.3(a)6: Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)7: Neglect of Duty shall be withdrawn.

3. The penalty for the Final Notice detailed in paragraph 1 hereto shall be amended to five (5) working day suspension on the record. The parties agree that the Employee has previously served an eight (8) day suspension. Employee hereby agrees and acknowledges that she waives any back pay for the three (3) days she has previously served regarding the implementation of the October 14, 2016 Final Notice of Disciplinary Action.

4. Employee voluntarily withdraws her appeal of the October 14, 2016 Final Notice of Disciplinary Charges OAL Docket No.: CSV 17084-2016N with prejudice.

5. Employee voluntarily enters into this Stipulation and Settlement.

6. Employee voluntarily and in consideration of the above, hereby waives and releases the County, its employees, officials, agents and assigns from all claims, stemming from the instant charges or the basis of these charges, that she may have or have had as of the date of this Agreement, against the County, its employees, officials, agents and assigns, including but not limited to all discrimination claims, liabilities, costs, and attorney fees under federal, state and local statutory and or common law, including Title VII of the Civil Rights Act ("Title VII," 42 U.S.C. 2000(e) et seq.), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act (the "ADEA," 29 U.S.C. 621 et seq.), the Equal Pay Act ("EPA"), the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) and the New Jersey Civil Rights Act.

a. This Waiver and Release specifically does not in any way waive or limit Employee's right to file a charge with or testify, assist or participate in an investigation, hearing or proceeding conducted by the U.S. Equal Employment Opportunity Commission ("EEOC") under the ADEA, Title VII, the ADA or the EPA.

b. Employee hereby agrees to waive his right to any monetary or equitable recovery should he or any federal, state or local administrative agency pursue any claims on his behalf arising out of or related to the instant disciplinary charges and/or the basis of these charges and promises not to seek or accept any award, settlement or other monetary or equitable relief from any source or proceeding brought by any person or governmental entity or agency on his behalf or on behalf of any class of which he is a member with respect to any of the claims s/he has herein waived.

7. Each party shall bear the costs of their own legal fees.

8. Employee shall not institute any appeal or any other action with respect to this matter.

9. Employee has read the above stipulation and conferred with counsel and/or Union representative and hereby agrees to abide by the terms of this settlement agreement.

10. This settlement agreement is not intended to establish precedent in any future

[INTENTIONALLY LEFT BLANK]

disciplinary matters.

DATED: 09/28/2018

EMPLOYEE

DESIREE JONES

EMPLOYEE ATTORNEY

DATED: 9/28/18

COREY SARGEANT, ESQ.

COUNTY OF UNION

DATED: 10/1/18

ALLAN C. ROTH, ESQ.
SPECIAL COUNSEL TO THE
COUNTY OF UNION

10-31-18

A-1

STATE OF NEW JERSEY

In the Matter of Bruce Stokes
Ancora Psychiatric Hospital
Departmen of Health

CSC DKT. NO. 2018-331
OAL DKT. NO. 11520-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 31, 2018 BW

The Civil Service Commission, at its meeting of October 31, 2018, acknowledged the attached settlement, as clarified, in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31st DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11520-17
AGENCY DKT. NO. 2018-331

IN THE MATTER OF BRUCE STOKES,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., appearing for appellant (Nash Law Firm, LLC, attorneys)

Aaron J. Creuz, Deputy Attorney General, appearing for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: October 2, 2018 Decided: October 5, 2018

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 10, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, who by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 5, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 10.5.18

Date Mailed to Parties:

/cb

OAL DKT. NO. CSV 11520-2017S
AGENCY REF. NO. 2017-331
SETTLEMENT AGREEMENT

IN THE MATTER OF Bruce Stokes
AND
Ancora Psychiatric Hospital

J-1

STATE OF ... 2018 OCT 2 ...

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated July 13, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C.4A:2-2.3(a)6- Conduct unbecoming	Removal	4/19/2017
2 N.J.A.C. 4A:2-2.3(a)12- Other sufficient cause	" "	" " " "
3. 4:08 C-3.1 Abuse	" "	" " " "
4. 4:08 C-5.1 Inappropriate Contact	" "	" " " "
5. 4:08 E-1.4 Violation of Policy	" "	" " " "

B. The Appellant **Bruce Stokes** withdraws his appeal and request for a hearing, and the Respondent Appointing Authority agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C.4A:2-2.3(a)6- Conduct unbecoming	WITHDRAWN
2 N.J.A.C. 4A:2-2.3(a)12- Other sufficient cause	WITHDRAWN
3. 4:08 C-3.1 Abuse	WITHDRAWN
4. 4:08 C-5.1 Inappropriate Contact	WITHDRAWN
5. 4:08 E-1.4 Violation of Policy	WITHDRAWN

C. The parties have agreed to the following:

1. To date, appellant has been suspended for a total of N/A days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the appellant is as follows: NINE MONTHS

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Authorized Leave of Absence without Pay

4. THE APPELLANT HAS AGREED TO ACCEPT A RESIGNATION IN GOOD STANDING and THE MATTER IS HEREBY RESOLVED.

5. The Parties agree that Appellant shall not seek or accept reemployment with Respondent Department of Health or its subsidiaries.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Ancora Psychiatric Hospital (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Heatlh will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Bruce Stokes's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to

the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Both parties agree not to file exceptions or cross exceptions in this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 10/2/18

Bruce Stokes, APPELLANT

DATE: 10/2/18

WILLIAM A. NASH, Esq.
ON BEHALF OF APPELLANT

DATE: 10/2/18

Marc Malfara, ERC
ON BEHALF OF RESPONDENT

CERTIFICATION

I, Bruce Stokes, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 10-2-18 Bruce Stokes

Bruce Stokes

Angiulo, Nicholas

From: Bill Nash <wnash@thenashlawfirm.com>
Sent: Wednesday, October 10, 2018 6:27 PM
To: Angiulo, Nicholas; Aaron Creuz
Cc: Messina, JoAnn
Subject: [EXTERNAL] RE: In the Matter of Bruce Stokes, Department of Health, Ancora Psychiatric Hospital - OAL Docket No. CSV 11520-17 and CSC Docket No. 2018-331 - SETTLEMENT

Importance: High

Dear Mr. Angiulo—I have conferred with DAG Creuz regarding the below inquiry. We are both agreeable that Mr. Stokes will receive nine months of back pay from April 17, 2017 to January 17, 2018 and the time thereafter until his resignation date is an approved leave of absence without pay. His resignation is October 2, 2018.

Please do not hesitate to contact me if I can be of any assistance.

William A. Nash, Esq.

NASH LAW FIRM LLC
ATTORNEYS AT LAW

Nash Law Firm LLC
1001 Melrose Ave., Suite A
Blackwood, NJ 08012
Tel: (856) 228-2206
Fax: (856) 228-1885

This message may have been dictated with speech recognition software and not proofread. Please excuse any spelling errors.

TAX COMPLIANCE STATEMENT: Department of Treasury Circular 230 requires that we notify you that (i) any statement contained in this message or in an attachment to it relating to any Federal tax transaction or matter was not intended or written to be used, and it cannot be used, by the taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer and (ii) such statement may not be used by any person to support the promotion or marketing of or to recommend any Federal tax transaction(s) or matter(s).

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10-31-18

A-1

STATE OF NEW JERSEY

In the Matter of Precious Waters
Hudson County, Department of Roads and Public Property

CSC DKT. NO. 2018-2882
OAL DKT. NO. 06416-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 31, 2018 BW

The Civil Service Commission, at its meeting of October 31, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31st DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 06416-18

AGENCY REF. NO. 2018-2882

IN THE MATTER OF PRECIOUS WATERS, HUDSON COUNTY DEPARTMENT OF ROADS AND PUBLIC PROPERTY.

Arnold S. Cohen, Esq., (Oxfeld Cohen, attorneys) for appellant Precious Waters

Sean Dias, Esq., (Scarinci Hollenbeck, attorneys) for respondent Hudson County Dept. of Roads and Public Property

Record Closed: September 24, 2018 Decided: September 26, 2018

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Civil Service Commission on May 4, 2018, for hearing as a contested case, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties reached an amicable resolution of the matter, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 26, 2018
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 24th day of September 2018 between the County of Hudson, (hereinafter referred to as the "County") and Precious Waters (hereinafter referred to as "Waters" or the "Employee"), in full resolution of all issues related to Employee's employment with the County.

WHEREAS, the County instituted disciplinary action against Waters in the Preliminary Notice of Disciplinary Action dated February 26, 2018 and in the Final Notice of Disciplinary Action dated March 28, 2018, wherein the penalty of removal from the position of Building Maintenance Worker was effective March 22, 2018 (hereinafter referred to as the "Disciplinary Action"); and

WHEREAS, Waters filed an appeal of the Disciplinary Action with the Office of Administrative Law (hereinafter referred to as the "OAL"), specifically docket number CSV 06416-2018 N; and

WHEREAS, Waters and the County desire to resolve all outstanding issues with respect to the Disciplinary Action and the appeal pending in the OAL.

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the County and Waters agree as follows:

1. **TERMS.**

a. The County agrees to withdraw the Preliminary Notice of Disciplinary Action issued against Waters, dated February 26, 2018 and the Final Notice of Disciplinary Action issued against Waters, dated March 28, 2018. The County also

agrees to make a payment to Waters for thirty (30) working days of back pay, which payment is subject to all required deductions and withholdings. In exchange for the withdrawal by the County of the Disciplinary Action and the aforesaid payment of back pay, Waters agrees that she has resigned from her position with the County effective March 22, 2018 in good standing. Waters agrees that her execution of this Agreement shall serve as her written notice of resignation from employment with the County in good standing. The County will amend Water's personnel records to reflect that she resigned from the County effective March 22, 2018, in good standing.

b. Waters acknowledges that her employment with the County is permanently and irrevocably severed, effective March 22, 2018. Waters further agrees that she will not apply for or accept employment with the County and/or any of its independent but related agencies and that any such employment which may nevertheless occur in the future for whatever reason shall be deemed null and void ab initio. Waters hereby waives any reinstatement or reemployment with the County and/or any of its independent but related agencies in any capacity at any time in the future. Waters will neither appeal nor challenge in any court of law, administrative agency, governmental body or any other forum any refusal by the County and/or any of its independent but related agencies to hire her.

c. Waters acknowledges that she has been paid and/or has received all compensation, wages and benefits to which she accrued during her employment with the County, and she agrees that no other compensation, wages or benefits or any other monetary claims are due to her other than those payments and benefits set forth above in this Agreement. Waters also waives any claims for attorney's fees.

2. **COMPLETE RELEASE.**

In further consideration of the settlement hereinabove, Waters, her heirs, assigns and agents (hereinafter collectively referred to as "Releasor") voluntarily enter into this Agreement, and certify that Releasor has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character of description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of the Disciplinary Action and her separation from employment. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual

orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any claim, cause of action, demand or complaint arising out of or under Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which, among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA) which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.

vi. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that she reasonably believes are incompatible with a clear mandate of law or public policy concerning the public health, safety or welfare.

The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2.a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of

defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

d. This Release does not apply to any Workers' Compensation matters.

3. **NON ADMISSION**

This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the County, by whom any such obligation or liability is expressly denied.

4. **NO DISPARAGING STATEMENTS**

Waters agrees that she will not make any statement that has, have or can be expected to have the effect of disparaging the County.

5. **CONSULTATION WITH ATTORNEY.**

Waters has consulted with her attorney with respect to this Agreement and reviewed with her attorney all the terms and conditions of this Agreement prior to executing this Agreement.

6. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between Waters and the County, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the County to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

9. **WATERS ATTESTS.**

Waters represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Waters represents and warrants that she enters into this Agreement voluntarily, of her own free will, without any pressure or coercion from any person or entity including, but not limited to, the County and the Releasees.

10. **REASONABLE PERIOD OF TIME.**

Waters agrees that she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but Waters may waive this 21 day period by signing the space provided at the end of this Agreement.

11. **REVOCATION.**

Waters may revoke this Agreement within seven (7) days after the date this Agreement is signed by Waters. This revocation must take the form of written notice by

Waters that Waters intends to revoke this Agreement. This revocation must be provided directly to the County, c/o Denise D'Alessandro, at the Department of Roads & Public Property, 257 Cornelison Avenue in Jersey City. This seven (7) day revocation period may not be waived by Waters.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Precious Waters, executed the foregoing Agreement this ____ day of September, 2018.

PRECIOUS WATERS

Sworn and Subscribed to before me
this 24TH day of SEPTEMBER, 2018.

Notary Public State of New Jersey
ATTORNEY AT LAW, STATE OF NEW JERSEY
WILLIAM P. HANNAN, ESQ.

COUNTY OF HUDSON

BY: _____

DATED: 9/24/18

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 days period referred to in the 10th recital on page 7 of this Agreement.

PRECIOUS WATERS

DATED: 9/24/18

10-31-18

A-1

STATE OF NEW JERSEY

In the Matter of Lyudmila Wittie
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-1091
OAL DKT. NO. 15968-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 31, 2018 BW

The Civil Service Commission, at its meeting of October 31, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31st DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15968-17

AGENCY DKT. NO. 2018-1091

IN THE MATTER OF LYUDMILA WITTJE,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant (The Nash Law Firm, LLC, attorneys)

Shareef Omar, Deputy Attorney General, for respondent (Gurbir S. Grewel, Attorney General, State of New Jersey, attorney)

Record Closed: October 11, 2018 Decided: October 15, 2018

BEFORE **JACOB S. GERTSMAN,** ALJ t/a:

This matter, concerning petitioner's appeal of her removal as Human Services Assistant at Ancora Psychiatric Hospital, was transmitted to the Office of Administrative Law on October 26, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties appeared before me on October 11, 2018 and stated that they have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1.) After the terms of the settlement were entered into the record, I conducted a voir dire of appellant to confirm that she understood and agreed to the settlement terms, that she is doing so voluntarily

and is not suffering from any impairment that would interfere with her judgment to enter into this agreement.

Based on the above and my review of the Settlement Agreement, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 15, 2018
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: rejected

Date Mailed to Parties: rejected
nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

OAL DKT. NO. CSV 15968-2017 S
CSC DKT. NO. 2018-1091
SETTLEMENT AGREEMENT

LYUDMILA WITTJE
v.
DEPARTMENT OF HEALTH, ANCORA PSYCHIATRIC HOSPITAL

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final Notice of Disciplinary Action** dated September 13, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)(3) – Inability to perform duties – removal effective 2/9/17;
2. N.J.A.C. 4A:2-2.3(a)(6) - Conduct unbecoming a state employee – removal effective 2/9/17;
3. N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause – removal effective 2/9/17; and
4. B-10.1 – Inability to discharge one's duty due to mental or physical incapacity – removal effective 2/9/17.

B. The parties have agreed to the following:

1. Appellant Lyudmila Wittje ("Appellant") withdraws the instant appeal and request for a hearing against Respondent the State of New Jersey, Department of Health, and Ancora Psychiatric Hospital ("Respondent") with OAL Docket No: CSV 15968-2017 S.
2. Appellant has agreed to return to work in the former position.
3. The **Final Notices of Disciplinary Action** dated September 13, 2017 will be modified as follows:

a. The above-listed charges and the Penalty of Removal shall be withdrawn. Appellant's time away from work will be marked as an approved leave of absence without pay.

4. Appellant's reinstatement is contingent upon successfully obtaining medical clearance by her treating physician, authorizing her return to work.
    a. The parties agree that Appellant has until January 2, 2019 to obtain clearance from her treating physician to return to work.
    b. If she does not obtain clearance by January 2, 2019, this agreement will convert to **a general resignation**.
5. Appellant's reinstatement is contingent upon successfully completing Respondent's (re)hiring pre-requisites.
6. The Appellant will not receive any back pay or attorney's fees from the appointing authority.
7. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records will be kept intact. Nothing herein shall preclude Respondent from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

E. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New

Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

G. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

H. The parties waive the right to file exceptions and cross exceptions.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

10/11/18
DATE

L Wittje
Lyudmila Wittje

10-11-18
DATE

William A. Nash, Esq.
ON BEHALF OF Appellant

10-11-18
DATE

Marc Malfara
ON BEHALF OF Respondent

CERTIFICATION

I, Lyudmila Wittje, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10/11/18
DATE

L Wittje
Lyudmila Wittje

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of Debra McCauley
Camden County Correctional Facility

CSC DKT. NO. 2019-1176

Hearing Denied

ISSUED: NOV 14 2018 BW

The Civil Service Commission considered the request for a hearing concerning Debra McCauley, from her appeal of six working day suspension from the position of County Correction Officer, Camden County Correctional Facility and made the following findings of fact:

1. The appeal rights letter was personally served on September 27, 2018.

2. The letter of appeal was postmarked October 24, 2018.

Since the appeal in this matter was not perfected within 20 days of receipt of the appeal rights letter, the request for a hearing was denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
DIRECTOR, DIVISION OF APPEALS
AND REGULATORY AFFAIRS
ON 11/14/18

CHRISTOPHER S. MYERS
DIRECTOR

Inquiries
And
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Hearings Unit
PO Box 312
Trenton, NJ 08625-0312

c: Debra McCauley
Jacqueline M. Vigilante, Esq.
Agency Services
Pensions
Camden County Correctional Facility

11-20-18

A-4

STATE OF NEW JERSEY

In the Matter of Sean Tonner
East Jersey State Prison,
Department of Corrections

CSC DKT. NO. 2018-1063
OAL DKT. NO. CSV 15786-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 21, 2018 BW

The appeal of Sean Tonner, Senior Investigator, Parole and Secured Facilities, East Jersey State Prison, Department of Corrections, 60 working day suspension and demotion to Correction Sergeant on charges, was heard by Administrative Law Judge David M. Fritch, who rendered his initial decision on November 15, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 19, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and demoting the appellant was justified. The Commission therefore affirms those actions and dismisses the appeal of Sean Tonner.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF NOVEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 15786-17
AGENCY DKT. NO. 2018-1063

IN THE MATTER OF SEAN TONNER,
EAST JERSEY STATE PRISON,
NEW JERSEY DEPARTMENT
OF CORRECTIONS.

Brian M. Cige, Esq., for appellant (Law Offices of Brian M. Cige, attorney)

Karen Campbell, Esq., Legal Specialist, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: October 11, 2018 Decided: November 15, 2018

BEFORE **DAVID M. FRITCH**, ALJ:

STATEMENT OF THE CASE

Senior Investigator Sean Tonner ("appellant") appeals the decision of the New Jersey Department of Corrections ("DOC"), East Jersey State Prison ("respondent") to impose a sixty-day-working suspension and demotion to the rank of corrections sergeant for charges of conduct unbecoming a public employee, other sufficient cause, threatening, intimidating, harassing, coercing, or interfering with fellow employees on

state property, and violation of a rule, regulation, policy, procedure, order, or administrative decision. The appellant denies the allegations.

PROCEDURAL HISTORY

The DOC issued a Preliminary Notice of Disciplinary Action ("PNDA"), dated July 11, 2017, notifying Tonner of the charges against him. (R-1.) After a departmental hearing held on September 18, 2017, DOC sustained the following charges which were incorporated into a Final Notice of Disciplinary Action ("FNDA"), dated October 10, 2017, with a proposed penalty of a sixty-day-working suspension and demotion to the rank of correction sergeant: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, DOC Human Resources Bulletin ("HRB") 84-17 §§ C-11, conduct unbecoming an employee, C-24, threatening, intimidating, harassing, coercing, or interfering with fellow employees on state property, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision.

The appellant timely requested a hearing and the matter was transferred to the Office of Administrative Law ("OAL"), where it was filed on October 24, 2017, to be heard as a contested case. N.J.S.A. 52-14B-1 to 15 and 14F-1 to 13. The matter was heard on June 7, 2018, and July 11, 2018. The record remained open for the parties to provide post-hearing submissions and closed on October 11, 2018.

TESTIMONY AND FACTUAL DISCUSSION

For Respondent

Duane Grade, Chief Investigator, DOC Special Investigations Division ("SID"), has been with DOC for twenty-two years, assigned to SID since 1996, and has served as the chief investigator for SID since 2017. SID, which used to be called Internal Affairs, is the investigative arm of DOC. SID investigates crimes occurring in DOC

facilities and charges of crimes involving DOC employees. Grade reports directly to the director of DOC.

At the time of the incident giving rise to this matter, Grade was asked by Manuel Alfonso, who was the chief investigator of SID at that time, to join him in a meeting with the appellant and Adrian Ellison. The meeting was held at DOC headquarters in Trenton, New Jersey. Both Tonner and Ellison were senior investigators with SID at that time. Ellison was also president of the Fraternal Order of Police ("FOP"), the labor union that represented SID investigators. The purpose of the meeting was for Chief Alfonso to give discipline to Tonner arising from a prior incident. After the meeting, Tonner and Ellison were going to the Edna Mahan Correctional Facility[1] ("Mahan") where Tonner worked so that Tonner could gather his personal items from his office. There was also a request made that Tonner's supervisor not be present at the facility when Tonner returned to Mahan that afternoon.

Grade had read reports that, subsequent to the meeting, Tonner had made statements threatening his supervisor. That conduct, as alleged, would be in violation of DOC rules and regulations. (R-3.) Grade knew that these allegations were referred to the Hunterdon County Prosecutor's Office ("HCPO") for possible criminal charges, but he was not aware of when the charges were referred or when a response from HCPO declining to bring criminal charges was received. As a matter of policy, anytime there is an allegation of possible criminal conduct, DOC refers the matter to the appropriate prosecutor's office for review and determination if criminal charges are appropriate.

Adrian Ellison, Senior Investigator with DOC, has been with DOC for twenty-five years and with SID since 2008. He is also president of the FOP and part of his duty as FOP president is to accompany union members to disciplinary meetings.

Ellison was present at the February 15, 2017, meeting at DOC headquarters with Chief Alfonso, Tonner, and others. At that meeting, Tonner was served with a notice of

[1] The Mahan facility is located in Clinton, New Jersey. (See R-2.)

disciplinary charges, and notified he was going to be demoted. After being served with these charges, Tonner was visibly shaken and clearly upset. Chief Alfonso asked Ellison to accompany Tonner back to Mahan to gather his belongings from his office since Tonner was going to be transferred to another DOC facility. Ellison knew that Tonner's supervisor, Gene Scott, was part of the complaint that led to the disciplinary charges raised at this meeting. He was also aware that Scott and Tonner did not get along, so Ellison asked that Scott not be present at Mahan when they went there to collect Tonner's belongings. After leaving the meeting, Ellison ran into DOC Investigator Valisa Leonard at DOC headquarters and asked her to accompany them to Mahan. Leonard also served as the sergeant-at-arms for the FOP.

When Ellison, Tonner, and Leonard arrived at Mahan, DOC Investigator Renee Caldwell-McCray was there. Tonner and Ellison entered Tonner's office, while Leonard and Caldwell-McCray remained outside. Once inside the office, Tonner asked Ellison "why the fuck did you tell them not to have that pussy Gerome [Scott] here?" Tonner added that "I was going to shoot that motherfucker." Surprised at what he had heard, Ellison asked Tonner to repeat himself because he could not believe that the situation between Tonner and Scott had gotten to that point, but Ellison was sure that that there was no ambiguity as to what Tonner had just said. Ellison noted that Tonner was armed with his service weapon at the time he made the statement about Scott.

Ellison tried to calm Tonner down and called for Leonard to come into the office while Tonner continued to pack his personal items. Tonner continued to blurt out expletives regarding that "big steroid motherfucker," and told Ellison that he had been wanting to get out of Mahan for a year. Ellison asked Tonner to repeat what he had said in front of Leonard but Tonner refused, saying "every time I say something in front of you, I get in trouble." Ellison left the building and asked Leonard to come with him. Outside, he explained to Leonard what happened and Leonard went back inside to ask Tonner to turn over his weapon. Tonner told Leonard that he was just venting and there was no need for him to surrender his weapon. Tonner made no additional comments after that.

Ellison explained that he held no animus towards Tonner and that he was in a very difficult position as the union president having to testify against a union member like Tonner. He and Tonner had a good relationship to that point, and Tonner would often call Ellison in his role as the union president with issues regarding his supervisor. Based on what he had heard Tonner say at Mahan, Ellison believed he had a duty to report the incident and sent Chief Alfonso an email detailing what had happened. (R-3.) After sending this email, Ellison did not take any further action on this matter.[2]

Gerome Scott, DOC Principal Investigator, SID has been with DOC for twenty-three years and has been the principal investigator at the Mahan facility since 2015. In that capacity, he supervises two investigators in the SID unit as well as two investigators in the fugitive unit. Tonner worked for Scott from 2015 until Tonner was transferred to DOC's Mountainview facility in 2017.

Chief Alfonso called Scott to tell him that Tonner was being disciplined with a fifteen-day suspension and demotion to a uniform rank. He was told that Tonner was upset due to the discipline imposed and was on his way back to Mahan. Alfonso asked Scott to leave the facility when Tonner came back because it would be in everyone's best interest to avoid a potential confrontation with Tonner. Scott complied and left the facility, not returning until around 4:00 p.m. that day. Later, he received a "duty to warn" call from DOC Investigator Edwin Soltys to warn him that Tonner had threatened him and let him know that Soltys was going to go and get Tonner's weapon.

Scott was involved in prior disciplinary incidents involving Tonner. One was an exchange where Tonner had used profanity in an email copying the chief. The chief administered verbal counselling to Tonner, and Scott had to issue a written letter of counselling to Tonner from that incident.

Another prior incident involved the investigation of an allegation from a female inmate against a prison administrator under the Prison Rape Elimination Act ("PREA").

[2] Ellison also gave a recorded interview to Investigator Soltys of DOC's internal affairs unit regarding this incident on March 31, 2017. (R-10.) The interview with Soltys was consistent with Ellison's hearing testimony.

The victim inquired as to the status of the complaint and Tonner reported that he had interviewed the victim, gathered reports, and forwarded the information to the PREA coordinator, Investigator Soltys, and the chief. When the Commissioner's office sought to follow up on the status of the investigation, however, Tonner could not locate the videotaped statements, and the investigation had to be reopened a year later. Tonner was disciplined for his failure to complete that investigation when he reported that the investigation had been completed.

In July 2016, Tonner's then-girlfriend was involved in a domestic incident with Tonner, and she was arrested in Pennsylvania. After her arrest, the authorities notified DOC because she was also a DOC employee. Upon learning of the incident, Scott tried to contact Tonner to see if he was "ok," calling his state-issued cell phone, but Tonner did not answer. When Scott had local police do a wellness check on Tonner, they learned that Tonner had put his phone on vibrate and forgot to put the ringer back on. Tonner was subsequently disciplined for his failure to respond to Scott's phone calls since he was on call at the time.

Another prior disciplinary incident from October 2016, was due to Tonner's work at DOC's Mountainview facility on a weekend with the Drug Interdiction Unit ("DIU"). Tonner submitted his time on this assignment as overtime, but he should have put the time in as "comp time" since time on DIU jobs were compensated with comp time. The chief disciplined Tonner, and he had to pay back the overtime paid to him. When Ellison first notified Tonner that he was being disciplined for the overtime incident, Ellison reported that Tonner called Scott a "black monkey." Upon hearing this, Scott filed an Equal Employment Discrimination ("EED") complaint against Tonner so he could be separated from him, but no findings were proven.

There is a policy within SID that personnel involved in a personal relationship with someone who also works for DOC cannot work together in the same facility. Tonner, however, was dating someone who also worked at Mahan. When Tonner left Mahan to work at the Mountainview facility, he wrote to the chief and indicated, in writing, that he was no longer in a relationship with someone working at Mahan. Tonner

did not correct this when he was transferred back to Mahan—even though he was still in a relationship with this individual. At the February 2017, meeting, Tonner received notice of discipline for his failure to inform DOC that he was in a personal relationship with another DOC employee who also worked at Mahan. Tonner was contesting the discipline in that matter, and it is still under appeal within the OAL.

When he was informed about Tonner's verbal threat, Scott was concerned because of his prior interactions with Tonner. He believed that Tonner blamed him every time he was disciplined, and the current discipline was going to cause Tonner to lose his current position and impact his livelihood. Scott was aware that the incident had been reported to HCPO for possible criminal charges, and he was called by the first assistant prosecutor from HCPO to tell him that they did not believe the incident, as reported to them, met all the criteria to constitute a terroristic threat, so they were not filing criminal charges against Tonner. Scott could not recall, however, when he received that call.

Valisa Leonard, DOC Senior Investigator, SID, has been with DOC since 2000 and has worked in SID/internal affairs since 2012. On the day that Tonner received disciplinary charges from Chief Alfonso, Ellison saw her at the DOC central office and asked her if she would accompany him and Tonner to Mahan. Leonard believed Ellison asked her to come along because of her role as Sergeant-at-Arms with the FOP and because she was a friend of Tonner's who might be able to give Tonner a little personal support.

When they arrived at Mahan that day, DOC Senior Investigator Renee Caldwell-McCray was in the back office. Tonner arrived after Leonard and Ellison. Tonner and Ellison went into Tonner's office and Leonard stayed outside talking to Caldwell-McCray. Leonard was not present in Tonner's office when she heard Ellison calling her into the office. When she entered the office, she saw Tonner packing up, putting things in boxes, and Ellison asked Tonner to say what he just said. Tonner told Ellison, "look man, let me get this done, I'm just upset." Tonner appeared red-faced, and his eyes were watering while he continued to pack. Tonner kept repeating that he was upset and

mad, he was complaining about not bringing home enough money to pay the bills and wanting to transfer to another SID office to get away from "that steroid motherfucker" which Leonard believed was a reference to Scott. (See R-4.) Leonard's written report of the incident also confirmed that, when Ellison asked Tonner to repeat what he had said, Tonner responded "every time I talk to you (Ellison), I get in trouble." (R-4.)

Ellison left the office and went to his car. Leonard went with him and they spoke in Ellison's car. Ellison told her that Tonner just said that he would shoot Scott if Scott was there and they had to get Tonner's gun. Because they had a good rapport, Leonard went back inside to get Tonner's gun and talk to him. She told Tonner what Ellison had told her about what he said regarding Scott. Tonner told Leonard that he was "venting" because he was mad. Leonard asked Tonner for his weapon, but Tonner refused to turn it over to her, saying that he did not feel there was any reason for him to give it up, he was not going to hurt anybody. During their conversation, Tonner never denied making any threat or statement to Ellison regarding Scott. He just did not agree that he needed to surrender his weapon but offered no further explanation. Leonard's report of the incident documented that, when asked to surrender his duty weapon, Tonner told her he "was not going to do anything to that man." (R-4.) Leonard and Tonner hugged, and Leonard went back outside to see Ellison and left.

While Leonard did not hear the exchange between Ellison and Tonner, she does not believe that Ellison would make this story up. During her testimony, Leonard was visibly crying. The reason for this, she explained, was that it was difficult for her to testify in this hearing because she and Tonner remain friends. Leonard wrote a report about the incident at the direction of Soltys documenting her interactions with Tonner that day. (R-4.)

Renee Caldwell-McCray, DOC Senior Investigator, SID, has been with DOC for seventeen years and, since 2007, holds the title of investigator. She worked at Mahan with Tonner and both she and Tonner were supervised by Scott. She was present at Mahan when Tonner and Ellison arrived with Leonard to clear out Tonner's office. She knew that Scott had been asked to leave the facility that day but did not know why. She

did not witness any conversation between Ellison and Tonner while at the facility first hand but was told by Ellison about a conversation he had with Tonner where Tonner made a threat against Scott. Ellison told her that Tonner had said if Scott were there, he would have shot him. After telling her about his conversation with Tonner, Ellison left the facility. She heard some additional conversation going on in Tonner's office after Ellison left, but she could not hear what was being said. She did not talk to Tonner that day.

Michael Alfonso, DOC Chief Investigator (retired), SID has been with DOC for over twenty-eight years and was the chief investigator of SID from November 2015, until he retired in April 2017. As the chief investigator of SID, Alfonso supervised over 100 people and was the highest-ranking law enforcement officer within SID. Alfonso called for the meeting on February 15, 2017, so Tonner could be issued disciplinary paperwork. After the meeting, Tonner was going back to Mahan with Ellison to gather his personal belongings because Tonner was going to be temporarily transferred to DOC's Mountainview facility.

At Ellison's suggestion, Alfonso called ahead to Mahan to have Tonner's supervisor, Scott, leave before Tonner arrived. He agreed with Ellison's suggestion to ask Scott to leave Mahan before Tonner got there because he saw that Tonner was visibly upset in the meeting and appeared to be blaming Scott for the disciplinary action taken against him that day. Alfonso felt that, because emotions were running high, it would be better if Scott were not present when Tonner returned to Mahan in order to avoid a situation or confrontation. Later that day, Alfonso got a call from Ellison telling him that Tonner threatened Scott when they went up to Mahan. Ellison told Alfonso that Tonner called Scott a "steroid motherfucker" and asked why Scott was not present because Tonner was going to shoot him.

Alfonso was particularly concerned with this information because he saw how Tonner was upset in their meeting that day. Alfonso told Ellison to write up the incident for him, and he contacted Soltys and directed him to get a few more DOC investigators

and go to Tonner's home to seize Tonner's service weapon. This was done as a precaution to minimize any danger to the people involved, including Tonner himself.

The email he received from Ellison (R-3) suggested to him that there may be potential criminal charges brought as a result of Tonner's conduct, which is why it was referred to HCPO. While DOC has the ability to investigate criminal matters, only a prosecutor's office has the authority over bringing any criminal charges, so the prosecutor's office makes the ultimate determination if a matter proceeds criminally or administratively.

Alfonso directed Soltys to contact the HCPO to advise them of the incident, gather preliminary facts, and send his findings to HCPO to allow them to ultimately make a determination if criminal charges would be brought. Because of the potential for criminal charges, Soltys' investigation was limited to interviewing persons who were not subject to possible criminal charges since they did not want to compel testimony from a DOC employee in an internal investigation that may lead to criminal charges against that employee because doing so would infringe upon their rights in any potential criminal proceeding.

Alfonso reviewed a letter from HCPO (P-2) which indicated that they received the investigation report from DOC on May 25, 2017. Alfonso suggested that this was the date they received a report on the incident from Soltys, but not the date that the matter was referred to them by DOC. HCPO declined to bring criminal charges and referred the matter back to DOC on June 12, 2017. (Id.)

Edwin Soltys, DOC Deputy Chief Investigator, SID, has been with DOC for over twenty-one years and has been assigned to SID since 2000. Soltys was promoted to the rank of deputy chief of SID earlier this year. Alfonso called Soltys to tell him about an incident at Mahan involving Tonner making a verbal threat against Scott and directed him to go to Tonner's home and take custody of Tonner's service weapon. Soltys went to Tonner's home with three senior investigators from DOC and some local police officers from the Palmer, Pennsylvania Police Department. Soltys' report documents

that he and three other DOC investigators, along with assisting officers from the Palmer Police Department, arrived at Tonner's home around 8:00 that evening. (R-2.) After they arrived at Tonner's home, Tonner surrendered his weapon without incident.

Soltys also contacted Scott to warn him about the verbal threat made by Tonner against him. This was done as part of a standard "duty to warn" protocol. When SID is made aware of a threat made by an inmate, or even a DOC employee, they contact the individual against whom the threat is made to advise them of the nature of the threat and the actions that are being taken. The day after he went to retrieve the weapon from Tonner, Soltys received a call to tell him that a complaint was made with the FOP about him entering Tonner's home and that Tonner may file criminal charges against him. Soltys does not recall who the call was from, but he advised Alfonso about the call. Alfonso advised that Soltys should "hold off" on leading the investigation into the incident until they determine if any charges were filed against him. After a month passed, and no charges were filed, Soltys was assigned to lead the investigation, and Soltys' investigation report confirms he was assigned to lead the investigation on March 20, 2017. (R-2.)

Because of the potential for criminal charges from Tonner's conduct, this matter was referred to HCPO for review. Soltys had DOC Sr. Investigator Michael Cubik inform HCPO of the incident on February 16 or 17, 2017. He asked Cubik to inform HCPO since Cubik was going to be at their office meeting with them on another unrelated matter. DOC provided the information they had to HCPO, which consisted of information and statements of non-targets. Soltys received a declination letter from HCPO via email on June 12, 2017, informing him that they were declining to bring criminal charges arising from the incident.

As part of Soltys' investigation, he conducted multiple interviews and documented the content of those interviews in his investigation report. (R-2.) After HCPO declined to bring criminal charges, Soltys conducted a video-recorded interview of Tonner on June 23, 2017, which was played into the record. (R-9.) During his video-recorded interview, Tonner confirmed that, following his meeting with Alfonzo on

February 15, 2017, he went back to Mahan and met Ellison and Leonard there. (Id.) Tonner had seen Scott at Mahan earlier that day when he reported to work and before he was called down to the central office for a meeting with Alfonso, but Scott was not at Mahan when he arrived back there following his meeting with Alfonso. (Id.)

Tonner denied that he made any comments to Ellison about shooting Scott when they were at Mahan that day. (Id.) He asked Ellison why Scott was not there that afternoon, but he asked because he felt that Scott had started the process that led to his discipline and should be there to explain how the situation had gotten that far. (Id.) He asserted that this was the only mention he made of Scott that afternoon, "end of discussion." (Id.) Tonner felt that Ellison, as his union president, had let him down by allowing him to be disciplined and not helping him get transferred out of Mahan. (Id.)

Tonner also denied talking to Leonard about hurting anyone. (Id.) He said that the only mention about hurting anyone made in his discussions with Leonard were about him hurting himself. (Id.) Tonner said that this was now the second incident where he believed Ellison was making something up involving him and Scott. (Id.) He felt that Ellison was useless as a union representative and was creating this allegation to jam him up just as he did with the former allegation that he referred to Scott as a "monkey." (Id.) Tonner had no interest in shooting anyone, and never said he was going to shoot Scott. (Id.) When he spoke to Leonard about "venting" he was referring to his venting to Ellison about how he was disappointed in Ellison for letting him down as his union representative. (Id.) Tonner felt that Ellison was on Scott's "team" and that he and Scott were working together to try and get him fired with fabricated charges. (Id.) Tonner believed Ellison was fabricating the allegation against him because Ellison does not want him to continue working at DOC.

FACTUAL FINDINGS

Due to the conflicts between Tonner's prior statement (R-9), and the testimony of Ellison regarding what Tonner said to Ellison on February 15, 2017, in Tonner's office at the Mahan facility, a determination of credibility is required. Credibility is the value that

a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Having had the opportunity to observe the appearance and demeanor of the witnesses, **I FIND** Ellison's testimony regarding his verbal exchange with Tonner on February 15, 2017, in Tonner's office at the Mahan facility to be credible. In addition to his role as president of the FOP, Ellison is a sworn law enforcement professional and an experienced criminal investigator. Tonner, in his June 23, 2017, statement to Soltys (R-9), attempted to discredit Ellison's account of the February 15, 2017, incident as being a biased fabrication designed to have Tonner dismissed from DOC.

While Tonner has a prior history of disciplinary actions involving Scott and Ellison, Tonner had no such negative history with Leonard. Having the opportunity to observe Leonard's testimony and her demeanor with the appellant during these proceedings, it is clear that Leonard and Tonner remain friends. Leonard has no known reason to fabricate her testimony in this matter and she was visibly distraught about giving sworn testimony that may be detrimental to someone she clearly considers to be her friend. **I FIND** Leonard's testimony in this matter to be extremely credible and her testimony provides corroboration to Ellison's testimonial account of the events of February 15, 2018.

While Leonard was not a witness to the verbal exchange between Ellison and Tonner, when she spoke to Tonner on February 15, 2018, he said to her that his exchange with Ellison was just venting. Tonner asserted in his statement to Soltys that the "venting" he was referring to was him expressing his frustrations with Ellison, not Scott, because he felt that Ellison had let him down. (R-9.) Tonner further said that, other than asking why Scott was not there to explain the disciplinary action, he did not

make any further mention of Scott that afternoon. (Id.) Leonard noted, however, that when she entered Tonner's office, Tonner was complaining about that "steroid motherfucker" which Leonard believed was a reference to Scott—indicating that Tonner was verbally venting at least some of his anger at that time towards Scott, consistent with Ellison's testimony.

Leonard also testified that after she returned to Tonner's office to speak with him, she told Tonner what Ellison had told her about the verbal threat he made against Scott. In response, Leonard noted that Tonner never denied making any threat, but just dismissed Leonard's concerns that he may be a danger. In his interview with DOC, Tonner said that he and Leonard never discussed him hurting anyone other than himself (id.), however, Leonard testified that she addressed Tonner's threats to Scott in her discussions with Tonner and Leonard's report specifically states that, when Leonard asked Tonner to surrender his weapon, Tonner told her that he "was not going to do anything to that man." (R-4 [emphasis added].) This lends further credence to Ellison's account of events.

Leonard's written report also supported Ellison's testimony that, when Ellison asked Tonner to repeat what he had said in Leonard's presence, Tonner's response was "every time I talk to you [(Ellison)], I get in trouble." (R-4.) In his statement to Soltys, Tonner said he did not recall his response to this question to dispute the accounts of Ellison or Leonard. (R-9.) While Tonner asserted that the current incident was a second time that Ellison was fabricating a statement made by him about Scott, this comment to Ellison, as made in Leonard's presence, suggests that the current incident is the second time that Tonner made an intemperate comment to Ellison that got him into trouble. Whatever questions about Ellison's impartiality raised by Tonner's assertion that this was the second incident where intemperate comments he made about Scott to Ellison indicates a bias on the part of Ellison against him are more than overborne by the supporting and wholly credible testimony of Leonard.

Based upon the testimony and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following **FACTS**:

1. On February 15, 2017, Tonner was a senior investigator with the New Jersey DOC SID.

2. On February 15, 2017, Tonner was called to the DOC central office in Trenton, New Jersey, to meet with Chief Investigator Alfonso. At this meeting:

    a. Tonner was accompanied by Ellison, who attended the meeting as his union representative. In addition to being a senior investigator with SID, Ellison was also the president of the FOP, the union that represented investigators within SID.

    b. Grade was also present at this meeting.

    c. Tonner was served with notice of disciplinary charges, and notified he was going to receive a fifteen-day-suspension and a demotion to his last permanent title of sergeant.

    d. After being served with these charges, Tonner was visibly shaken and clearly upset.

    e. Alfonso asked Ellison to accompany Tonner back to Mahan so Tonner could gather his belongings from his office since Tonner was going to be transferred to another DOC facility.

    f. Because Tonner was visibly upset, Ellison asked Alfonso if Tonner's supervisor, Scott, could not be present at Mahan when they went there to clear out Tonner's belongings.

g. Alfonso agreed to Ellison's request, and contacted Scott to ask him to not be present at Mahan when Tonner went back to collect his belongings. Scott complied and left Mahan before Tonner's arrival.

3. After leaving the meeting, Ellison encountered Leonard at DOC headquarters and asked her to accompany him and Tonner to Mahan.

a. In addition to being a senior investigator with SID, Leonard was also Sergeant-at-Arms for the FOP.

4. Upon arrival at Mahan, Ellison and Tonner went into Tonner's office, and Leonard remained outside the office.

5. Caldwell-McCray was present at Mahan when Tonner, Ellison, and Leonard arrived to clear out Tonner's office, but did not accompany Ellison and Tonner into Tonner's office—instead, she remained in her office at the facility.

6. Upon entering Tonner's office, Tonner stated to Ellison, "why the fuck did you tell them not to have that pussy Gerome here? I was going to shoot that motherfucker." Neither Caldwell-McCray nor Leonard were present in Tonner's office at that time to hear the verbal exchange between Ellison and Tonner.

7. During this exchange, Tonner was armed with his DOC service firearm.

8. Following this verbal exchange, Ellison summoned Leonard to Tonner's office.

9. When Leonard entered Tonner's office, Tonner continued packing his belongings. Tonner appeared red-faced, and his eyes were watering while he was packing.

10. As he continued to pack, Tonner kept repeating that he was upset and mad. Tonner was complaining about requesting a transfer to another SID

office to get away from "that steroid motherfucker" which Leonard believed to be a reference to Scott.

11. In the presence of Leonard, Ellison asked Tonner to repeat what he just said.

12. Tonner refused, responding to Ellison that "every time I talk to you [(Ellison)], I get in trouble."

13. Ellison left the building with Leonard and went to his car, leaving Tonner in his office. Ellison told Leonard that Tonner had just verbally threatened to shoot Scott and asked her to go back inside and get Tonner's gun.

14. Leonard returned inside and spoke to Tonner, explaining to him what Ellison had told her about his threat to shoot Scott. When Leonard asked Tonner for his weapon, Tonner did not agree to turn the weapon over. Tonner told Leonard that he was just venting and that he "was not going to do anything to that man." (R-4.)

15. Ellison notified Alfonso about the incident, and Alfonso contacted Soltys to inform him of what had been reported to him and to ask Soltys to go to Tonner's home and recover Tonner's service weapon. Alfonso also directed Soltys to contact HCPO to inform them of the incident and refer the matter to them for possible criminal charges.

16. Soltys contacted Scott to warn him of the verbal threat made by Tonner.

17. The evening of February 15, 2017, Soltys, accompanied by other investigators with SID and police officers from the Palmer Township Pennsylvania Police Department, went to Tonner's home and Tonner surrendered his service weapon without incident.

18. Soltys asked DOC Sr. Investigator Michael Cubik to inform HCPO of the incident, which Cubik did on February 16 or 17, 2017, to refer the matter to them for possible criminal charges.

19. On June 12, 2017, Soltys received a declination letter from HCPO via email informing him that they were declining to bring criminal charges arising from the incident.

20. Soltys conducted a video-recorded interview of Tonner (R-9) on June 23, 2017, and his report of the administrative investigation (R-3) was completed on July 5, 2017, and forwarded to Alfonso.

These factual findings are supported by a residuum of legal and competent evidence in the record.

LEGAL ANALYSIS AND DISCUSSION

A civil service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provisions of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4A:2-2.3.

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550

(1982). An appeal requires the OAL to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris County Bd. of Social Serv., 197 N.J. Super. 307 (App. Div. 1984).

Application of the Forty-Five-Day Rule to the Charges Against Tonner

The appellant asserts that the charges against him should be dismissed for violation of the "forty-five-day rule." Under N.J.S.A. 40A:14-147, charges for removal or reduction in rank against a police officer, "shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based." The incident at issue happened on February 15, 2017, and, on the evening of the incident, Ellison sent an email to Chief Alfonso advising him of what transpired that afternoon. (R-3.) The appellant argues that Chief Alfonso was aware on February 15, 2017, of the information on which the charges against Tonner were based, but charges (R-1) were not filed against Tonner until July 19, 2017, well past the forty-five days allowed by the statute. This failure to comply with the forty-five-day rule, appellant claims, "require[s] a dismissal of the complaint." N.J.S.A. 40A:14-147.

The forty-five-day rule, by its plain language, is limited in applicability to complaints "charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit" and do not apply to the general causes for major discipline listed under N.J.A.C. 4A:2-2.3(a). McElwee v. Borough of Fieldsboro, 400 N.J.Super. 388, 394-95 (App.Div. 2008). If it were to be applicable at all, the forty-five-day rule would only be applicable to a subset of the charges in this matter alleging violations of the HRB.

The Law Division has noted that "[t]he 45-day period runs from the date upon which the person responsible for the filing of the disciplinary complaint receives sufficient information upon which to base a complaint." Aristizibal v. City of Atlantic City, 380 N.J. Super. 405, 427–28 (Law Div. 2005). Soltys, in his testimony, explained that

DOC could not complete the administrative investigation and conduct an interview of Tonner while the matter remained with HCPO for potential criminal prosecution. Soltys' investigation was not, and could not be, completed until after HCPO referred the matter back to DOC for administrative action on June 12, 2017. (P-2.) After the matter was referred back to DOC, Soltys completed his interview of Tonner (R-9) on June 23, 2017, and his report on the administrative investigation (R-3) was completed on July 5, 2017, and forwarded to Alfonso. The preliminary notice of disciplinary action (R-1) was served on Tonner on July 14, 2017—nine days after Soltys completed his administrative investigation giving DOC adequate information upon which to base an administrative complaint against Tonner. (See P-2.)

Further limiting the application of the forty-five-day rule in this matter is the provision that the rule itself:

> [S]hall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation.
>
> [N.J.S.A. 40A:14-147 (emphasis added).]

This tolling provision is designed to permit "the completion of the criminal prosecution, including grand jury and all appeals, before the governing body is required to initiate and file administrative charges." Aristizibal, 380 N.J.Super. at 425 (quoting Grubb v. Borough of Hightstown, 331 N.J.Super. 398, 405 (Law Div. 2000), aff'd 353 N.J.Super. 333 (App.Div. 2002)). The tolling avoids the inherent futility of proceeding with administrative charges while a criminal investigation is pending because:

> [I]f such a criminal investigation were pending it is hard to envision how disciplinary proceedings could proceed since the subject of such an investigation would most likely decline to testify and invoke Fifth Amendment constitutional rights [citations omitted]—and might even seek a stay of administrative proceedings pending disposition of any such criminal investigation.

[Palumbo v. Township of Old Bridge, 243 N.J.Super. 142, 149-50 (App.Div. 1990).]

Tonner's conduct, as relayed by Ellison in his email to Alfonso, stating he wanted to shoot Scott and expressing this while in possession of a service firearm, raised a credible possibility of criminal prosecution. See N.J.S.A. 2C:12-13 (criminalizing terroristic threat "to commit any crime of violence with the purpose to terrorize another"); N.J.S.A. 2C:39-4(a)(1) (criminalizing possession of a weapon "with a purpose to use it unlawfully against the person or property of another"). The incident was referred, pursuant to DOC policy, to HCPO for investigation and possible criminal prosecution on February 16 or 17, 2017. HCPO did not complete their investigation and declined to bring criminal charges until June 12, 2017, when the matter was referred back to DOC for administrative action (P-2), making June 12, 2017, the day of "the disposition of the criminal investigation" as referenced in N.J.S.A. 40A:14-147.

Even if, at the time the matter was referred back to DOC for administrative action, DOC had adequate information on which to base a complaint without waiting for the completion of Soltys' investigation, the earliest date that the forty-five-day limit "shall begin" was June 13, 2017—"the day after the disposition of the criminal investigation." N.J.S.A. 40A:14-147. The preliminary notice of disciplinary action was served on Tonner thirty-one days later, on July 14, 2017. (R-1.) Accordingly, **I CONCLUDE** that the charges filed against Tonner on July 19, 2017, were within the forty-five-day time limit imposed by N.J.S.A. 40A:14-147 and are not subject to dismissal as untimely under the provisions of that statute.

Charges

The first charge against Tonner is conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). See

also In re Emmons, 63 N.J.Super. 136, 140 (App.Div. 1960). It is sufficient that the conduct complained of and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 150 A.2d 821, 825 (1959)). Such misconduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Department of Ridgewood, 258 N.J.Super. 32, 40 (App.Div. 1992) (quoting Asbury Park v. Dep't of Civil Service, 17 N.J. 419, 429 (1955)).

Tonner's status as a DOC Senior Investigator subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). As a law enforcement officer, Tonner represents "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 566 (App.Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons, and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J.Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect for authority in such settings cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J.Super. 191, 199 (App.Div. 1997).

In the present case, Ellison testified credibly that he heard Tonner state that he wanted to shoot his supervisor while in a DOC facility and armed with a service firearm. Although there were circumstances which may have explained why Tonner was venting his work-related frustrations to a colleague, who was also his union representative, these comments go far beyond that. Threatening to shoot one's supervising officer in the presence of another DOC Investigator while armed with a DOC service weapon displays a significant lack of judgment, thereby violating Tonner's obligations and duties. I **CONCLUDE** that Tonner's behavior on February 15, 2017, did rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6) and the respondent has met its burden of proof to sustain this charge.

Tonner has further been charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against appellant. The charge of other sufficient cause has been dismissed when the "respondent has not given any substance to the allegation" Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <hjttp://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>.

Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Tonner's conduct was such that he violated this standard of good behavior. The testimony that Tonner verbalized a threat to shoot his supervisor in the presence of a fellow DOC investigator (and union representative) is credible. As such, I **CONCLUDE** that the respondent has met its burden of proof on this charge.

Tonner has also been charged with violating provisions of DOC Human Resource Bulletin ("HRB") 84-17, including: §§ C-11 (conduct unbecoming an employee), C-24 (threatening, intimidating, harassing, coercing, or interfering with fellow employees on state property), and E-1 (violation of a rule, regulation, policy, procedure, order, or administrative decision).

HRB 84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.
>
> [R-12]

Pursuant to HRB 84-17, Tonner was required to follow all policies established by DOC and—as it relates to this case—DOC Law Enforcement Personnel Rules and Regulations. (R-6.) Under these regulations, DOC officers shall not:

> a. Engage in threatening or assaultive conduct
>
> b. Direct insulting language, or behave in a disrespectful manner while in the performance of their duty
>
> [R-6 at Article III, § 1.]

By threatening to shoot his direct supervisor and referring to that direct supervisor as "a steroid motherfucker" to another DOC employee, while in a DOC facility and armed with a DOC service weapon, Tonner's conduct on February 15, 2017, clearly violated these provisions. As such, I **CONCLUDE** that Tonner's conduct was in violation of DOC HRB 84-17 §§ C-11, C-24, and E-1 and the respondent has met its burden of proof to sustain these charges.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, the New Jersey Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Bock Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations, and the like on one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. at 523-24.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, Bock, 38 N.J. at 523, that past record may be

considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 205 (App.Div. 1993), certif. denied, 135 N.J. 469 (1994). The respondent has proven by a preponderance of the credible evidence the following charges against Tonner: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, DOC HRB 84-17 §§ C-11, conduct unbecoming an employee, C-24, threatening, intimidating, harassing, coercing, or interfering with fellow employees on state property, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. A sixty-working day suspension and demotion in rank to Correction Sergeant was imposed upon Tonner for his actions. The question to be resolved is whether the discipline imposed in this case is appropriate.

The appellant's prior disciplinary history (R-8) is as follows: an official reprimand for being late for duty on December 7, 1998, an official reprimand for violation of HRB 84-17 A-01 (calling an institution to request an "emergency comp day") on December 29, 2003, and a three-working-day suspension for violation of HRB 84-17 B-05 (failure or excessive delay in carrying out an order) on September 14, 2015. In mitigation, the appellant's employment history also includes the following commendations: December 20, 2002, for responding to a vehicle fire, March 20, 2003, for participation in Operation Liberty Shield at Newark Liberty International Airport, and November 3, 2005, for preventing the attempted suicide of an inmate. (Id.)

While the imposition of a sixty-working-day suspension and demotion in rank is a significant escalation from what was imposed in prior disciplinary actions, appropriate focus must be given to the nature and seriousness of Tonner's current actions. Given the serious nature of these actions—even without a prior disciplinary history—imposition of major discipline would be warranted. (See, e.g., R-12 at 11 (HRB 84-17 noting penalties for § C-24 violation first offense ranges from official written reprimand to removal).) Tonner's status as a law enforcement officer places his conduct under

heightened scrutiny. His primary duty is to enforce and uphold the law. "He carries a service [weapon] on his person and is constantly called upon to exercise tact, restraint and good judgment." In re Disciplinary Procedures of Phillips, 117 N.J. 567, 576-77 (1990) (quoting Moorestown, 89 Super. at 566). Being held to this heightened standard of conduct is one of the obligations Tonner undertook "upon voluntary entry into the public service." In re Emmons, 63 N.J.Super. at 142.

When uttered by an armed law enforcement officer, there is no such thing as an "idle" threat of violence. This is especially true when that verbal threat mentions the use of a firearm, is uttered within a DOC facility, is made in the presence of another sworn law enforcement officer who is duty-bound to take appropriate action upon hearing such a threat, and the statement is made while armed with a service firearm. A threat such as the one expressed by Tonner on February 15, 2017, must be taken seriously—even if it is uttered while "venting." The rapid and proportionate response of DOC to Tonner's utterances—Ellison's immediate report of the matter to senior members of DOC's chain-of-command, Soltys making a duty-to-warn call to Scott, DOC's referral to the Hunterdon County Prosecutor's Office for possible criminal charges, and the dispatching of DOC investigators to travel to Tonner's home in Pennsylvania accompanied by local law enforcement officers on the night of the incident to secure Tonner's service weapon—all underscore the gravity of Tonner's actions. While Tonner, and all law enforcement officers, are held to a high standard, Tonner's conduct on February 15, 2017, failed to live up to that standard to exercise "tact, restraint, and good judgment."

CONCLUSION

After having considered all of the proofs offered in this matter, the impact upon the institution regarding the behavior by the appellant herein, and in light of the seriousness of the offense and in consideration of the appellant's prior disciplinary record, I **CONCLUDE** that Tonner's conduct on February 15, 2017, was so egregious as to warrant the sixty-working-day suspension and demotion to the rank of corrections

sergeant as imposed by the appointing authority, which, in part, is meant to impress upon him, as well as others, the seriousness of his infractions.

ORDER

The respondent has proven by a preponderance of the credible evidence the following charges against Tonner: N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, DOC HRB 84-17 §§ C-11, conduct unbecoming an employee, C-24, threatening, intimidating, harassing, coercing, or interfering with fellow employees on state property, and E-1, violation of a rule, regulation, policy, procedure, order, or administrative decision. Accordingly, I **ORDER** that these charges be and are hereby **SUSTAINED**.

I **ORDER** that the penalty of a sixty-working-day suspension and demotion to the rank of corrections sergeant is hereby **AFFIRMED**. The appellant's appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 15, 2018
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: 11/15/18

Date Mailed to Parties: 11/15/18

/dw

APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

Edward Soltys, DOC Deputy Chief Investigator, SID
Manuel Alfonso, DOC Chief Investigator, SID (retired)
Duane Grade, DOC Chief Investigator, SID
Lisa Gaffney, DOC Human Resource Manager 2
Adrian Ellison, DOC Senior Investigator, SID
Valisa Leonard, DOC Senior Investigator, SID
Renee Caldwell-McCray, DOC Senior Investigator, SID
Jerome Scott, DOC Principal Investigator, SID

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 Preliminary and Final Notices of Disciplinary Action
R-2 DOC SID Administrative Investigation Report by Edward Soltys, July 5, 2017
R-3 Email from Adrian Ellison to Manuel Alfonso, February 15, 2017
R-4 DOC SID Administrative Investigation Report by Valisa Leonard, February 15, 2017

R-5 Weingarten Administrative Rights, June 23, 2017

R-6 Law Enforcement Personnel Rules and Regulations

R-7 Receipt form, Law Enforcement Personnel Rules and Regulations

R-8 Work History, Sgt. Tonner

R-9 Video interview of Sgt. Tonner

R-10 Audio interview of Adrian Ellison

R-11 Audio interview of Rene Caldwell

R-12 DOC Human Resources Bulletin 84-17

STATE OF NEW JERSEY

In the Matter of Yolande Dubuisson
Woodbridge Developmental Center,
Department of Human Services

CSC DKT. NO. 2015-2706 (2013-819 & 2013-820 on Remand)
OAL DKT. NO. CSV 08857-15 (CSV 13878-12 & 13879-12 on Remand)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 23, 2018 BW

The appeals of Yolande Dubuisson, Cottage Training Technician, Woodbridge Developmental Center, Department of Human Services, two removals effective September 14, 2012, on charges, were heard by Administrative Law Judge Leslie Z. Celentano, who rendered her initial decision on October 22, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of November 21, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Yolande Dubuisson.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF NOVEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 08857-15
(CSV 13878-12 & CSV 13879-12
On Remand)
AGENCY DKT. NO. 2015-2706

IN THE MATTER OF YOLANDE DUBUISSON,
DEPARTMENT OF HUMAN SERVICES,
WOODBRIDGE DEVELOPMENTAL CENTER.

Edward A. Berger, Esq., for appellant Yolande Dubuisson

Christopher Weber, Deputy Attorney General, for respondent Department of Human Services, Woodbridge Developmental Center (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: October 9, 2018 Decided: October 22, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Yolande Dubuisson, appeals the decision of respondent Department of Human Services (DHS), Woodbridge Developmental Center (Woodbridge), terminating her for violating DHS and Woodbridge policies against sleeping on duty on July 23, 2011, and March 26, 2012, and removing her effective September 14, 2012. Her appeals of

her two removals were dismissed for failure to appear, but were reinstated following an appeal. See In re Dubuisson, Dep't of Human Servs., No. A-1898-13T2 (App. Div. April 2, 2015), https://njlaw.rutgers.edu/collections/courts/.

By way of background, appellant and her attorney failed to appear at a settlement conference at the Office of Administrative Law (OAL) on December 11, 2012. By notice dated December 13, 2012, they were notified that they had failed to appear and that the matter was being returned to the transmitting agency. The Failure to Appear Notice also instructed that if appellant still wished to have a hearing, she was required to explain in writing to the Civil Service Commission (Commission) why she did not appear, and do so within thirteen days of the notice.

Eight months later, on August 14, 2013, appellant appealed to the Commission, claiming that she had sent letters to the OAL requesting that the matter be rescheduled, but had not received a reply. Appellant's counsel claimed he had mistakenly sent his December 2012 request to reschedule the matter to the OAL, and not to the Commission as required. He provided an unsigned letter and blank certified-mail receipt. Appellant also claimed that they did not appear because neither she nor her attorney received notice of the settlement conference. The Commission denied the appeal, noting that the appeal ultimately filed was dated more than five months after the dismissal of the matter.

The matter was appealed to the Appellate Division, and appellant's counsel presented a signed return receipt for the 2012 letter, which had originally not been provided. The Appellate Division determined to grant his request to "supplement the record," and reversed the Commission's decision, remanding the matter to "reconsider the appellant's request in light of the new evidence." On remand, appellant reiterated that no notice had been received of the hearing and that, in any event, she should not be penalized for the errors of her attorney. The appointing authority, in turn, maintained that although counsel received the Failure to Appear Notice, there was no compliance with the instructions to send the request to the Commission. Moreover, the request was nearly eight months late, and a signed certified-mail receipt not offered until more than two years after the December 2012 letter is claimed to have been sent. The Commission also urged that it had been substantially prejudiced by the delay, especially in that Woodbridge

Developmental Center had closed; files and documents are in storage; and a witness has retired and moved out of state.

Thereafter, the Appellate Division determined to reverse the Commission's decision, and the matter was remanded for hearing as a contested case.

By Preliminary Notice of Disciplinary Action (PNDA) dated October 25, 2011, respondent advised appellant of the charges and specifications as follows:

Charges:

> B.3 Sleeping while on duty.
>
> E.1 Violation of a policy and/or procedures. Second Infraction.

Specifications:

> On July 23, 2011, at approximately 4:00 a.m. during rounds the CTS, Lessie Anderson and Stephen Long, HCTS observed you sleeping. You were sitting in a chair with your head bent down and your back was to the entrance of dorm A. Upon entering the dorm area, they observed that your eyes were closed and you remained unaware of their presence until they called your name to awaken you.

By Final Notice of Disciplinary Action (FNDA) dated September 14, 2012, appellant was removed effective September 24, 2012.

By PNDA dated May 8, 2012, respondent advised appellant of the additional charges and specifications as follows:

Charges:

> B.3 Sleeping while on duty. 3rd Infraction.

E.1 Violation of a rule, regulation, policy, procedure, order. 3rd infraction.

Specifications:

On March 26, 2012, Mrs. Alexander (ASRL) made rounds in C/16. At approximately 3:15 a.m. she entered dorm B and observed what appeared to be Ms. Dubuisson sleeping.

By Final Notice of Disciplinary Action dated September 14, 2012, appellant was removed effective September 14, 2012.

A disciplinary hearing was scheduled for August 30, 2012, at which time the charges were sustained. The decisions were appealed, and the matter was transmitted to the Office of Administrative Law (OAL) on June 17, 2015, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was held over three days, and following receipt of post-hearing submissions and copies of all exhibits, the record closed.

TESTIMONY

Stephen J. Long

Mr. Long testified that he is employed by the DHS at the New Lisbon Developmental Center. He has been employed by the DHS for twenty-three years in various positions, including human services assistant (HSA); cottage training technician (CTT); resident service worker; cottage training supervisor (CTS); and head cottage training supervisor (HCTS), which is his current position. He was the HCTS at Cottage 16 at Woodbridge at the time of the incidents in the within matter. He oversees the entire building and supervises CTSs.

In Cottage 16 there were six CTSs. He worked various shifts, often 3:00 pm to 11:00 p.m. or the midnight shift, which he did every week. His normal hours were 8:00 a.m. to 4:30 p.m. He testified that sometimes he came in later and stayed into the night.

The CTSs were accountable for all staff and patients on their shifts, and each individual resident has staff assigned to them. CTTs worked directly with individuals and helped train HSAs and new employees, and worked one-to-one with individuals to bathe them, help them get dressed, take them to programs, and assist with meals and oral hygiene. CTTs also worked overnight shifts to keep an eye on residents and make sure they were sleeping and not soiled, and help them with the bathroom overnight if needed. They also were required to check on everyone periodically overnight.

The residents were developmentally disabled, and some had obsessive-compulsive or self-injurious behavior. Restraints were not used, so the individuals often needed redirection or physical prompting. Some were autistic and some had dementia; half were verbal and the other half were not. Some residents were incontinent. Some residents would at times try to leave their area without permission if not closely supervised, and others were aggressive towards others and needed to be watched. Staff was there to prevent and address these behaviors.

On July 23, 2011, Mr. Long arrived at approximately 4:15 a.m. to Cottage 16. He testified that he went in the front entrance, put his things down in the office, and then went to the CTS office to see who was on duty. He then did his rounds to check and make sure staff was in place and individuals were all accounted for. His tour took him down to the dorm area and through the hallway.

On the date in question he met with Ms. Anderson, a CTS, who was in her office. Ms. Anderson made his rounds with him, and as they entered the door into the dorm area, they observed appellant at a table with her back facing them and her head down. She was unresponsive and did not notice them walk in or stand next to her. Mr. Long testified that appellant did not respond at all when he asked Ms. Anderson for the sleep log, and when Ms. Anderson retrieved it and showed it to him, he saw that it was all filled in. (R-4.)

He noted his findings in the midnight-shift cottage log (R-5) that rounds had been made and that appellant was observed sleeping with her head down and not moving, and that this had also been observed by the CTS. The notation was made at 4:03 a.m., and

all of the sleep logs were current when he saw appellant sleeping. Ms. Anderson then called appellant's name and received no response. She then called her name again and appellant woke up and reached for the sleep log.

Mr. Long completed a Sleeping on Duty Form on July 23, 2011, at 4:03 a.m. (R-6) and signed the form. This document is used when someone is observed sleeping on duty. Appellant did not hear them come in; did not hear them talking; and did not hear them take the sleep log and discuss it. In fact, she was not aware of their presence until they called her name twice. Appellant could not see the residents from where she was sitting. Appellant was responsible for only one patient, H.H., who had 1:1 care. Patients on 1:1 care have their own paperwork and their own book, and the log is kept with the employee responsible for that patient.

Emrice-Carla Alexander

Ms. Alexander is employed by Amazon as an associate and works in the sort center. She testified that she has been there for eight weeks, after being employed by the Department for twenty-three years, eleven months, and thirteen days. She testified that she was bumped at the end of June 2014, and her last day was July 8, 2014.

She worked at Woodbridge for her entire time with the Department, and was an HSA in 1993. In 1994 or 1995 she became a CTT. In 1999 she became a CTS, and in 2005 an HCTS. She supervised an entire building, including all staff and supervisors under her and all three shifts. In 2010 she became an assistant supervisor for residential living (ASRL), and that was her position in 2012.

The variety of patients at Woodbridge ranged from mildly autistic and high-functioning patients that went to school, to patients in wheelchairs or requiring total care or with physical deformities. As an ASRL her responsibilities included all three shifts, and she also worked from midnight to 8:00 a.m. There were no supervisors working that shift, so she had to go around the buildings and make sure all patients were properly cared for, and that staff was awake and aware and keeping track of patients, and performing their job functions. She was called every hour regarding the status of the buildings and was

responsible for all paperwork. Anything that happened in the buildings was her responsibility, and she was required to report on incidents and had complete oversight. She reported to her supervisor or to Mary Jo Kurtiak, who was the CEO of the Center.

Ms. Alexander made rounds every night and went to each building, speaking to staff, checking on patients, and taking care of anything that needed doing. She testified that CTTs had to do a physical check of all patients every day when they came in, and were required to check the log book and see the status of each patient. They also had to do a proper body check of the patients. A discreet body check is done when a patient is in bed, but the next morning a full body check is done once they are awake and getting washed up and dressed for the day. There is a body-check book which indicates all details, including a "BM" book where bowel movements are documented, and everything is in binders. They also had to check on the patients every fifteen minutes and make sure they were breathing, and make entries in the sleep logs. Some patients had to be turned every two hours in bed, and some had to be elevated due to feeding tubes, and that was done with the aid of a nurse, to prevent chocking when sleeping. Some individuals awoke at different times overnight, and some had seizures or outbursts of behavior and would become combative and could hurt others. Some patients were also somewhat independent and could go to the bathroom by themselves; however, some would try and leave the building.

She recalled an incident involving appellant in March 2012 while making her rounds, which she did typically around 3:00 a.m. The buildings are in a circle, and so she would walk from the building in the center where her office is, up the hill, and then go around to the different cottages shaped like a hexagon. She went in the front door of building 18 and then out the back, and then in the back door of the next and out the front, etc. There were two dorms per cottage, dorm A and dorm B, and four rooms in each dorm, with four beds per room.

On the day in question she entered through the laundry-room door of building 16. Full capacity of each dorm is thirty-two patients; however, the facility was transitioning, so it was not full, and some patients had been transferred elsewhere. The dorms were on the left side of the building, and there was a nurse's station, a CTS office, a dining room,

and a classroom on the right side. In the middle were bathrooms and showers. She went in the laundry-room door, went to the left approximately twenty-five steps and into dorm B through the double doors,[1] then said "good morning" out loud. She testified that the buildings were cinder block and noise echoed, and no public-address system was needed because when she said good morning it echoed through the building. She received no response to her greeting. On that date appellant was to her left, asleep. She stood there for a few seconds because she could not believe her eyes. She testified that she went to the CTS office to get CTS Jackson and asked him to walk with her to dorm B, and asked, "what are we going to do about this," to which Jackson shook his head. CTS Jackson went to appellant and tapped her, and she opened her eyes and said, "what?" CTS Jackson then said, "you were sleeping." Alexander testified that appellant was facing her, as was another staff member, and she could see that her eyes were closed, and her head was leaning against the doorframe. Appellant had her back to the bedroom door, and Alexander went to get CTS Jackson because she wanted a witness to see what she saw. Ms. Alexander prepared a report and copied the CEO, and her supervisor, and the head cottage supervisor Mr. Long, and Ms. Holmes, the unit manager (ASPRS). (R-9.)

Alexander testified that a log is kept in every cottage, recording any and all incidents, even things like someone stubbing their toe or cutting themselves, and when staff has lunch and breaks. Absolutely everything is logged. She also kept a log and wrote entries in black if they were related to staff and in red if related to a resident. Staff was required to keep patient sleep logs; they are supposed to check patients every fifteen minutes and make an entry with initials as to the status of the patient, to be sure that they are checked on often. Alexander testified that she checked the sleep log after Jackson woke appellant, and the books were all filled in, one up to 3:30 a.m. and appellant's up to 5:00 a.m., and this was at 3:10 or 3:15 a.m., when she was making her rounds.

Ms. Alexander was transferred to the New Lisbon Developmental Center when Woodbridge closed, and was an ASRL there too. Ultimately it was too far to travel so she retired.

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[1] Alexander testified in great detail about the cottages, the cottage numbers, the layout, and even where the closets were located. She had tremendous recall of the details.

Steve Jackson

Steve Jackson is employed at Hunterdon Developmental Center (Hunterdon) and is a CTS. He has been with the Department for twenty years and has held multiple positions.

He was at Woodbridge for approximately thirteen years. During that time, he supervised, at various times, Cottages 10, 11, 12, 15 and 16, and in 2012 was supervisor of Cottage 16. He was responsible for making rounds every fifteen or thirty minutes and was responsible for the well-being of the staff and residents. The direct-care staff was responsible for getting residents dressed, helping with their teeth, choosing their clothes, and dealing with all of their needs. Jackson testified that he worked primarily the midnight shift, and at times the 3:00-p.m. shift. Rounds are done to check up on everyone and periodic calls are made to the office to confirm that everything is okay. If a supervisor is out of the building, the CTTs can take charge. They need to make sure that individuals do not leave out a window or door and make sure that everyone is sleeping at night, and need to enter information into a log.

Mr. Jackson testified that in March 2012 he was a supervisor in Cottage 16. He knows appellant, and recalls a disciplinary incident involving appellant that came to his attention. The ASPRS was making rounds and came to him and indicated that two staff members were sleeping. He then walked over with Ms. Alexander and observed appellant and another staff member asleep. Each was sitting at the end of a table asleep, ten feet from him. The lights were on, and appellant's head was leaned over to the side and her eyes were closed. This was the case with the other individual also. He woke up the male staff member by tapping on his shoulder, and then woke appellant by tapping on her shoulder. Ms. Alexander informed him that she wanted a statement prepared that day, and he did so and sent it to her directly.

Jackson testified that both he and the direct-care staff monitor residents' sleep in a sleep log every fifteen to thirty minutes. Notations must be made as to whether a resident is awake or asleep. Jackson testified that he checked the sleep logs at the time, and the sleep log for Cottage 16, dorm B (R-13) had already been filled in.

Jackson testified that he has a great memory of the incident because there is constant training, and this was the only incident like this he experienced.

Theresa Holmes

Theresa Holmes works at the Green Brook Regional Center and is the assistant supervisor of professional residential services (ASPRS). She has worked for the Department for thirty-nine years and has been at Green Brook since September 2015. Prior to that she was at Hunterdon for one month, and prior to that at Woodbridge from 1979 until February 2015. She was a direct-care staff member, then a supervisor, then an OD (ASRL), and then the ASPRS. Her responsibilities included staff safety, client safety, client care, and making sure the staff was doing their jobs and the building was safe. She supervised OD's, head supervisors, and CTTs, and was an ASRL at Woodbridge when she left.

In 2012 she was an SPRS, and her responsibilities included staff discipline, getting statements and reports, and gathering information and investigating. She is familiar with Department policies and procedures, and those of the facility also. Holmes knew appellant and knew of the prior discipline and incidents.[2] Initially, the head CTT supervisor, Stephen Long, brought the matter to her attention, and once it was reported to her she asked Long for the statements he had and reviewed everything. She determined that discipline was warranted. The CTTs were at Woodbridge to serve the residents, and overnight staff need to be awake and taking care of residents. The Sleeping on Duty Policy (R-2) must be referred to when someone is found asleep. The definition of "sleeping on duty" contained within that policy provides that an employee who is considered to be asleep is guilty of neglect of duty and is subject to major discipline, including termination. An individual can have their eyes closed and not be asleep, but if they do not respond one can assume they are asleep, and an individual does not need to be actually asleep to trigger the policy. Sleeping on duty is a very serious offense, and residents have at times died overnight, and so staff needs to be constantly checking on

[2] This was the third such incident.

people overnight. The policy was violated, because appellant was asleep or appeared to be.

The Disciplinary Action Program (R-3) provides at page six that for the first infraction the penalty is a minimum of five days' suspension up to a maximum of removal, and the second infraction requires removal. The same policy provides at page 13 that the penalty for a first offense of violating a rule, regulation, policy, or procedure can range from counseling to removal, and the second offense prescribes a penalty of a minimum of a five-day suspension to a maximum of removal. Holmes obtained statements from the staff involved and initially learned about the incident from Ms. Alexander in an email. Employees were all made aware of the seriousness of these policies. Mr. Long also reported the incident to her and provided a write-up.

Yolande Dubuisson

Ms. Dubuisson testified that she lives in Willingboro, New Jersey, and was employed at Woodbridge from 2003 until 2012. She had the 3:00-p.m.-to-11:00-p.m. shift for the first three months of her employment, and after that worked the 11:00-p.m.-to-7:00-a.m. shift. Her shift was switched because one of her daughters has cerebral palsy and needed care during the day. During the evenings her other daughter stayed and watched her sister, so she needed the 11:00-p.m.-to-7:00-a.m. shift.

Dubuisson testified that she was not asleep on March 26, 2012, and that her head was not against the wall. She had been scheduled for her annual CPR training that day but did not go. She stated that when Alexander came back from doing her rounds she was awake; she knew Alexander was there and said nothing to her. She testified that Alexander looked into the rooms, checked the sleep log, and then left.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service Act and regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:2-1.1 to 4A:2-6.2. A civil service employee who commits a wrongful act related to his or her

duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A:2-2.2, -2.3.

In an appeal such as this from a disciplinary action that resulted in the termination of employment, the appointing authority has the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of the credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Appellant is charged with violation of the Sleeping on Duty Policy. The definition of "sleeping on duty" within the policy provides:

> An employee who is either visibly asleep or who presents as though they may be asleep (as indicated by: eyes being closed for an extended period, relaxed posture, non-recognition that another individual has entered the immediate environment, lack of response when their name is called, heavy respirations or snoring, covered with a blanket or jacket, feet propped on a chair, etc.)[.] When these conditions are confirmed the employee is considered to be asleep, is guilty of neglect of their assigned duties, and is therefore subject to major disciplinary action up to and including termination.

The trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and

contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and the finder of fact is not bound to believe the testimony of any witness, In re Perrone, 5 N.J. 514, 521–22 (1950).

I found Stephen J. Long, Emrice-Carla Alexander, Steve Jackson, and Theresa Holmes to be extremely credible witnesses, offering truthful testimony. Each testified clearly and concisely as to how each was involved in this matter and the steps taken to investigate this matter, and no competent evidence was presented to dispute any of their testimony. Accordingly, I **FIND** and adopt the entirety of the testimony of Stephen J. Long, Emrice-Carla Alexander, Steve Jackson, and Theresa Holmes as **FACT**.

In the within matter, respondent asserts, and I agree, that appellant violated the Sleeping on Duty Policy. The testimony of respondent's witnesses was extremely clear, credible, detailed, and consistent and their testimony was entitled to more weight than the denials of appellant regarding her conduct on July 23, 2011, and March 26, 2012. The observations of respondent's witnesses amply confirm that appellant was found sleeping on duty not once, but twice. Their strong testimony was further corroborated by documentary evidence. Sleeping while on duty is an extremely serious offense because of the safety threat to vulnerable patients, as well as to staff. Respondent's witnesses testified at length as to the need to be vigilant with the care of patients with significant health concerns. The administrative policy requires removal after the second infraction, and these two incidents constitute the second and third infractions of sleeping while on duty.

Based upon all of the foregoing, I **CONCLUDE** that respondent has amply met its burden of proof by a preponderance of the credible evidence as to the charges in this matter and that the penalty imposed was appropriate, indeed it was required, under the circumstances.

ORDER

It is therefore **ORDERED** that all the charges are sustained and the appellant's removal from her employment is **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 22, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: October 23, 2018

Date Mailed to Parties: October 23 2018

dr

APPENDIX

Witnesses

For Appellant:

Yolande Dubuisson

For Respondent:

Stephen J. Long

Emrice-Carla Alexander

Steve Jackson

Theresa Holmes

Exhibits

Joint:

J-1 Drawing by Ms. Alexander

For Appellant:

P-1 Sleeping on Duty Form (marked for identification)

P-2 Statement of Mr. Jackson (marked for identification)

P-3 Drawing by Mr. Jackson (marked for identification)

For Respondent:

R-1 A. PNDA dated 10/25/11

B. FNDA dated 9/14/12

C. PNDA dated 5/8/12

D. FNDA dated 9/14/12

R-2 Sleeping on Duty Policy

R-3 Disciplinary Action Program AO:408

R-4 Weekly Sleep Log, HH 7/23/11

R-5 Cottage Log 7/23/11

R-6 Sleeping on Duty Form 7/23/11

R-7 Cottage Log 3/26/12 (marked for identification)

R-8 Sleeping on Duty Form 3/26/12

R-9 Alexander to Holmes email dated 3/26/12

R-10 Memo by Steven Jackson (marked for identification)

R-11 ASRL Rounds dated 3/26/12

R-12 Disciplinary History

R-13 Sleep Logs

11-21-18

A-4

STATE OF NEW JERSEY

In the Matter of Doreen Meheski
Mercer County, Department of the Clerk

CSC DKT. NO. 2016-2936
OAL DKT. NO. CSV 4009-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 23, 2018 BW

The appeal of Doreen Meheski, Keyboarding Clerk 2, Mercer County, Department of the Clerk, removal effective February 2, 2016, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on October 25, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on November 21, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission affirms the granting of the motion for summary decision and affirms the removal of Doreen Meheski.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF NOVEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 4009-16
AGENCY DKT. NO. 2016 2936

IN THE MATTER OF DOREEN D. MEHESKI, COUNTY OF MERCER. DEPARTMENT OF THE CLERK.

Jeffrey J. Dunn, Esq., for appellant Doreen D. Meheski (Weir & Associates, LLC, attorneys)

Stephanie Ruggieri D'Amico, Assistant County Counsel, for respondent County of Mercer (Paul R. Adezio, County Counsel, attorney)

Record Closed: October 2, 2018 Decided: October 25, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

Doreen Meheski was employed with the Mercer County Clerk's Office as a senior clerk typist. On October 7, 2015, her employer served her with a Preliminary Notice of Disciplinary Action (PNDA), charging that she had been chronically or excessively absent or late, in violation of N.J.A.C. 4A:2-2.3(a)(4); had engaged in conduct that was unbecoming a public employee, N.J.A.C. 4A:2.2.3(a)(6) and "other sufficient cause", specifically, "chronic or excessive work without pay (Step 7)", N.J.A.C. 4A:2-2.3(a)(12). Following a departmental hearing, a Final Notice of Disciplinary Action was issued on February 2, 2016, removing Ms. Meheski from her position. She appealed this determination to the Civil Service Commission. On March 14, 2016, the Commission

transferred the contested case to the Office of Administrative Law. On December 16, 2016, the appointing authority filed a motion for summary decision, as authorized by N.J.A.C. 1:1-12.5. On January 9, 2017, counsel representing Ms. Meheski filed a reply to the motion. On September 4, 2018, the file was transferred to this judge, retired on recall, due to the voluminous calendar of the previously assigned judge.

In its motion seeking summary decision, the appointing authority, supporting its contentions with certifications from its Deputy Clerk, Walker Worthy, and from Maureen Sparano, employed in the Personnel Department as a clerk transcriber and, at the time of her certification, as a principal personnel technician, offers that the appellant worked in a position whose job title was included in the bargaining unit represented by AFSCME 2287. Her work schedule, governed by Articles 4.1 and 4.3 of the Agreement, consisted of a work day of seven hours per day with one-hour paid lunch, Monday through Friday. Paid time off was covered by the Agreement. Article 9.1 permitted bereavement days, with employees receiving five days for the death of specified immediate family members. Article 9.4(b) provided employees were to receive fifteen sick days per year. Article 9.4(k) provided that sick days would not accrue while an employee was on leave without pay, except for military leave,). Article 9.6 provided that full-time employees receive three personal days per year. The amount of vacation time an employee was entitled to depended upon the employee's number of years of employment, Article 22. As of the time of her termination, the appellant had been employed for twenty-four years and received twenty-five vacation days at the beginning of 2015. Under Article 22.11 vacation credits would not accrue while an employee was on leave without pay, except for military leave.

As of the beginning of calendar year 2015, Ms. Maheski was entitled to 105 hours of sick time, 210 hours of vacation time and 21 hours of personal time. According to the appointing authority, during the month of January 2015, she utilized seven hours of vacation time on January 2, 5, 6, 7, 9, 13, 14, 16, 20, 21, 29 and 30. In February, she used 7 hours of vacation time on February 10, 13 and 26. In March, she used 7 hours on March 4,1.5 hours on March 17, .50 on March 19, 7 hours on March 24 and 25, .50 on March 26 and 7 hours on March 31. In April, she used to .50 hours on

April 1 and 3.5 hours on April 9. In August, she used 3.5 hours on August 7 and 1.75 hours on August 27. Then on September 24, she used 2 hours of vacation time.

During 2015, Ms. Maheski used 7 hours of sick time on January 12, 15, 26 and 28. In February she used 7 hours on February 2, 3.5 hours on February 4, 7 hours on February 9, and 7 hours each on February 11, 12, 17, 18, 19, and 20. She also used 3.5 hours on February 25 and 7 hours on February 27. She used 7 hours of personal time on January 23 and August 25, 2015.

Ms. Maheski was docked hours on the following days in 2015: 7 hours on March 3, March 5 and March 6; 1.5 hours on March 20, 6.5 hours on March 26, 7 hours on March 2, 7 hours on April 8, and 7 hours on September 21.

In summary, the appointing authority asserts that as of April 20, 2015, the appellant had utilized 105 hours of sick time, 141.5 hours of vacation time and 7 hours of personal time. She was suspended without pay from April 20 through July 24, 2015. During that period of suspension, paid time off did not accrue.[1] She was prorated 7 hours of personal time, 61.25 hours of vacation time and 30.63 hours of sick time. Thus, when she returned to work on July 28, she had no hours of sick time remaining, 7.25 hours of vacation time remaining and 7 hours of personal time remaining.

According to Maureen Sparano's certification, Ms. Maheski called out of work on September 21, 2015. She had no time off available for her to utilize as of that date. When she returned to work the following day, she advised the deputy clerk that two family members, an aunt and cousin, had passed away the preceding Friday and that on Monday she had been tired. She also advised the deputy clerk that there was a funeral scheduled for that Wednesday and that she would be attending, utilizing, according to Mr. Worthy's certification, her remaining two hours of vacation time. The

[1] As explained at oral argument, while an employee had an allotment of fifteen days sick time for a year which could be utilized at any time during the year, sick time was actually accumulated on a monthly basis, at one and one-quarter day each month. Thus, if an employee was out of work for a period when sick leave did not accrue, the total sick time available to the employee for the calendar year would be reduced by a prorated amount.

deputy clerk discussed the absence of September 21, with the clerk and disciplinary charges were initiated. When the charges were sustained following a departmental hearing, the penalty was determined based upon reference to the Mercer County Table of Offenses and Penalties. Reference to Ms. Maheski's prior disciplinary record, combined with the findings of violations of the applicable Administrative Code provisions which formed the basis for the PNDA, resulted in a determination that she should be removed from her position, as the infractions charged constituted a Step 7 infraction, for which the penalty authorized under the Table of Offenses and Penalties was removal.

. In moving for summary decision, the appointing authority asserts that none of the material facts are in genuine dispute. Therefore, under the principles laid out in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995), the appointing authority is entitled to summary decision in its favor, in that the appellant violated the provisions of the Administrative Code by her excessive and chronic absenteeism, which constitutes conduct which is unbecoming a public employee, as it affects the morale and operations of the County Clerk's Office.

In response to the motion, the appellant initially produced only a letter reply, unsupported by any affidavits or other evidentiary materials. However, counsel for the appellant points to the documentation offered by the respondent in support of its motion, asserting that while his client does not dispute the days from work that would missed, as they are outlined in the appointing authority's brief, nevertheless, reference to the chart on pages 3 and 4 of that brief shows that she only used 14 sick days in 2015, not 15. On September 17, 2018, Ms. Meheski provided an Affidavit. In it she claims that prior to 2015, she had no disciplinary record, but in 2015 she "refused to take part in an office event, a wedding, due to sincerely-held religious beliefs." She offers that she believes that her refusal led to "the supervisors at the County Clerk's Office seeking ways to remove me from the office." She was forced to miss work due to her own personal health problems and those of her mother, for whom she "was the primary caretaker." She used leave approved by New Jersey law, as well as sick and vacation time. She claims that she was "wrongfully told that I had exhausted my sick time for 2015, and was put in docked status for missed time, and a series of disciplinary actions were taken

against me, including multiple suspensions." She did not appeal these "due to fear of furthering animosity and my belief in civil obedience." She acknowledges having called out on September 21, 2015, due to the death of two relatives. Due to her diagnosed depression, these caused "me to suffer debilitating bereavement." She offers that prior to her termination, Tammy Barringer, a timekeeper in the County Clerk's office, told her "that I had some additional form of administrative leave, such as FMLA, available to me that I could have taken during my absences." She states that Barringer told her that this had not been brought to Meheski's attention because, "they wouldn't let me tell you." Another employee, Yochin Duffell, "previously told me that "they are trying to get you fired." When she received her notice of termination, she requested that her union representative represent her, but he refused to do so.

In reply to the affidavit, counsel for the County offers documentary evidence that Ms. Meheski knew about FMLA, as in 2010, she received a notice explaining that her request for a medical leave of absence that met the requirements under the FMLA, had been approved, while in 2013 and 2014, she applied on several occasions for medical leave which was approved, although the forms presented as evidence note that while these requests for medical leave and then for an extension of previously approved medical leave were granted, these requests did "not meet the requirements under the FMLA . . . ." Counsel notes that Meheski's affidavit does not dispute that on September 21, 2015 she called out without having any time available for her to use.

As the appointing authority correctly argues, Ms. Meheski has not denied that she called out of work on September 21, 2015, because, as she offers, of the death of two relatives. She claims that these deaths caused debilitating bereavement. She also notes that she had been diagnosed with depression. She offers no evidence to support the latter contention, but even if she was so debilitated by these losses, that does not change the fact that when she called out she did not have any available sick time to utilize to cover her absence. She makes assertions that employees told her that she "had additional time available to her" of some undefined type that "they" apparently purposely, "wouldn't let [Ms. Barringer] tell" her about, and that she was told by an employee that "they" were trying to get rid of her. She also refers to some alleged

animus to her, relating to her religious beliefs, that she "believe[s]" caused "the supervisors"[2] in the office to seek ways to remove her. Yet she does not appear to deny that she was absent as frequently as the appointing authority claims, or the records offered document. And she acknowledges that she received a series of disciplinary actions that she did not appeal, offering as a reason for not challenging them her "fear of further animosity" and her "belief in civil obedience." Thus, it appears that while the appellant does not deny the essential facts upon which the appointing authority seeks summary decision, including the multiple days when she was absent due to, it must be assumed, sickness, including September 21, 2015, as well as the multiple prior steps of discipline to which she was subjected, she seems to seek to raise the possibility that her assertion of religious beliefs was the cause of what she seemingly sees as a plot to remove her. The sole cited reference to anything that she contends might have prompted this animus is her refusal in 2015 to take part in what she describes as an office event, identified as a wedding, in which she apparently "refused to take part" "due to sincerely-held religious beliefs." Her affidavit does not indicate exactly what she means by not taking part and not taking "part in the ceremony", although it may be that she means to attend the event. She does not indicate if this was a wedding involving office personnel, or a wedding that was taking place in the Clerk's office between non-office personnel. She does not explain how she manifested this refusal, whether she ever told anyone why she would not "take part." Indeed, she makes no reference to ever having revealed her "sincerely-held religious beliefs" to anyone in the office, whether to supervisors or to staff members.

The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted

[2] It appears that Meheski's references to "they" telling Barringer not to tell her of time available to her and the "they" referred to by Duffell are references to "supervisors." Nowhere does Meheski identify which supervisor(s) were the one or ones seeking her ouster or the withholding of the information from her. Also, nowhere does she identify whether Duffell was personally told of the intent to get her fired, or whether Duffell only was reporting hearsay information.

where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986) (Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106 S.Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law.

However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

Ms. Meheski's comments concerning some alleged animus arising from a 2015 wedding and her "refusal to take part" are properly characterized, from an evidentiary standpoint, as a mere "scintilla" of "gauzy" assertions that are both "insubstantial" in character and, in the absence of any detail and supporting evidence, "immaterial." As noted, she fails to provide any details about the circumstances of the wedding and of her "refusal." She provides hearsay about "they" wanting to get her out of the office and of withholding, at the behest of "they," of some unspecified information about additional leave time. And she does not explain, with any particularity, how the alleged animus might provide any defense to the undisputed facts of her numerous absences and her use of all available sick time prior to her calling out sick on September 21, 2015. As for her comment about the debilitating impact of the two deaths, while it may well be that she was devastated by these unfortunate events, it is still the fact that she called out sick and had no sick time available to utilize. As such, I **FIND** that the material facts underlying the appointing authority's charges and supporting its motion are undisputed.

I **FIND** that on September 25, 2015, Ms. Meheski called in sick. As of that date, she did not have any available sick time to utilize. She had exhausted her allotted number of sick days for calendar year 2015. Her annual allotment of fifteen sick days was reduced due to her having been out of work on suspension without pay earlier that year, which properly resulted in the reduction of her allotted sick days as per the contract between the bargaining unit and the County. I **FIND** that her use of sick time that was unavailable constituted an abuse of sick time and continued what was a pattern of chronic and excessive absence as established by prior disciplinary actions. I **FIND** that, for the reasons explained above, Ms. Meheski's allusions to some sort of religious animus and of an attempt to terminate her employment apparently arising from such animus constitute the sort of "insubstantial" and "gauzy" assertions of fact that the Supreme Court identified as insufficient to establish the existence of relevant, material and genuine factual disputes that can defeat summary decision in the face of

undisputed facts that support the motion. In addition, to the extent these allusions may be viewed as seeking to raise legal defenses to an otherwise established factual basis for a finding of violations of the Administrative Code and for removal, the same analysis applies. As such, I **CONCLUDE** that the undisputed facts establish that Ms. Meheski was chronically or excessively absent or late, in violation of N.J.A.C. 4A:2-2.3(a)(4) and engaged in conduct that was unbecoming a public employee, N.J.A.C. 4A:2.2.3(a)(6) and constituted "other sufficient cause", specifically, "chronic or excessive work without pay(Step 7)", N.J.A.C. 4A:2-2.3(a)(12).

It is fundamental to the relationship between employer and employee that the employee will appear for work when scheduled. A contractual agreement that establishes the right of an employer to a specific number of days of sick time that may be taken during each calendar year establishes a framework for determining if the employee honors the limits or not. Here, the employee on this occasion, as before, failed to appear for work when she did not have any available sick time remaining. This establishes that the employee was guilty of excessive absenteeism.

> New Jersey courts have applied the standard of "conduct unbecoming" in numerous cases involving the discipline of police officers. For instance, in In re Emmons, 63 N.J. Super. 136 (1960), the Appellate Division confronted the issue whether an off-duty police officer's refusal to cooperate and to submit to a sobriety test following an automobile accident constituted "conduct unbecoming an officer." Id. at 140. The court observed that "[t]he phrase is an elastic one," that "has been defined as 'any conduct which adversely affects the morale or efficiency of the bureau . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" Ibid. (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)).
>
> [Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998)].

Certainly, when an employee fails to appear for work as scheduled that employee has acted in a manner that, by definition, affects the efficiency of the employing agency. And where the conduct is chronic, not only is this tendency to impair efficiency exacerbated, but the conduct can also negatively affect the public perception of the

agency. Thus, Ms. Meheski's failure to appear and her excessive absenteeism does constitute conduct unbecoming a public employee.

As noted, Ms. Meheski does not dispute her prior disciplinary record. Her unsanctioned absence on September 25, 2015, was the latest of a string of such absences. The Table of Offenses utilized by the County allowed for removal for a seventh offense. I **CONCLUDE** that removal was the appropriate penalty.

ORDER

The County's motion for summary decision is **GRANTED**. Ms. Meheski's appeal of the appointing authority to remove her from her position is **DENIED.** On this de novo consideration, **IT IS HEREBY ORDERED** that she be **REMOVED.**

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 25, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 10-25-18

Date Mailed to Parties: 10-25-18

mph

LIST OF EXHIBITS:

For Appellant:

A-1 Certification of Doreen Meheski

For Movant/Respondent:

R-1 Certification of Maureen Sparano, with attachments A through F

R-2 Certification of Walker Worthy, with attachments A through D

R-3(a)(b)(c) and (d) Personal Notices sent to Doreen Meheski, dated July 7, 2010, May 6, 2013, January 8, 2014 and March 18, 2014

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A-5

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jaime Velez,
Irvington Township

CSC Docket No. 2018-2778
OAL Docket No. CSR 05035-18

ISSUED: DECEMBER 7, 2018 (HS)

The appeal of Jaime Velez, a Police Sergeant with Irvington Township (Irvington), of his removal effective March 20, 2018, on charges, was heard by Administrative Law Judge Julio C. Morejon (ALJ), who rendered his initial decision on October 5, 2018. Exceptions were filed on behalf of the appellant and exceptions and a reply to exceptions was filed on behalf of Irvington.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 21, 2018, did not adopt the ALJ's recommendation to modify the removal to a three working day suspension. Rather, the Commission modified the penalty to a 30 working day suspension.

DISCUSSION

Irvington removed the appellant on charges of violating the following departmental regulations: (1) Standard Operating Procedure (SOP) 2016-16.IV.B.3a (Duties and Responsibilities of Supervisory Personnel); (2) SOP 2016-16.IV.B.3c (Duties and Responsibilities of Supervisory Personnel); (3) SOP 2017-09.IV.G.3.1.31 (Performance Standards: Accountability of Supervisors); (4) SOP 2017-09.IV.G.3.1.29 (Performance Standards: Official Inefficiency & Incompetency); (5) SOP 2017-09.IV.H.3.1.32 (Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors); and (6) General Order 2:00.IV.A (Responsibility for Preliminary and Follow-Up Investigations). Specifically, it alleged that the appellant failed to monitor all radio transmissions and personally respond to a

robbery to provide supervision and direction. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

Based on the testimonial and documentary evidence presented, the ALJ set forth in his initial decision that on October 12, 2017, the following officers were working the 8:45 p.m. to 7:00 a.m. shift (midnight shift) for the Irvington Police Department: Mark Green, Police Lieutenant; Jose Zepeda, Police Officer; Darryl Ewell, Police Officer; and the appellant. Ajah Dobson, Police Officer, was working as the radio dispatcher for calls to the police station, and the supervisors for the shift were Green, who was the desk supervisor, and the appellant. Near the end of the shift, the appellant arrested a man for heroin possession. Upon arrival at headquarters, the appellant brought the arrestee to Green. Thereafter, the appellant walked the prisoner to the report room where arrestees are processed. During this time, Zepeda and Ewell were in the report room. The appellant processed the prisoner between 6:04 a.m. and 6:13 a.m. At 6:02 a.m., Dobson received a 911 call from a robbery scene, a gas station/convenience market, but she had trouble understanding the caller and entered the call as a "fight." At 6:04 a.m., Dobson, knowing that the appellant had made an arrest earlier in the shift, called the appellant over the radio and asked if he still needed two officers. The appellant responded that she could "have Ewell back," meaning that Ewell was available to answer calls for service. At 6:07 a.m., Dobson received a second 911 call from the robbery scene. This time, Dobson was able to make out that the caller stated he had been "robbed." Not being able to reach Ewell, Dobson called the appellant in the report room by phone to ask if Ewell was with him. She did not mention anything about a robbery. Ewell answered Dobson's call, and Dobson dispatched him to the scene of the robbery report. At 6:13 a.m., Ewell arrived at the robbery scene. Ewell responded alone and did not receive assistance from any officer of the Irvington Police Department during the duration of his response. Ewell was aware that the rules required him to report the robbery to his supervisors, *i.e.*, the appellant and/or Green. Ewell never confirmed over the radio that a robbery had taken place. At 6:21 a.m., the appellant completed fingerprinting and photographing the prisoner. The appellant never heard Dobson say the word "robbery." Zepeda was the only officer who heard Dobson say the word "robbery" over the radio. At the time, Zepeda was assisting the appellant in processing a prisoner, but he did not recall where he was when he heard the word "robbery." Zepeda was wearing a shoulder microphone that sat about six inches from his ear when he heard the dispatch call for a "robbery." Green did not hear the initial dispatch from Dobson in which she used the word "robbery," despite seeing the call on his computer. It was undisputed by the witnesses, including the appellant, that supervisors are required to respond to a robbery call under Irvington Police Department policy. The appellant and Green acknowledged that the robbery call would take precedent over the processing of the prisoner.

The ALJ stated that during the morning crime meeting following the midnight shift, Kenneth Price, Police Captain, read the incident report regarding the robbery call and viewed the store surveillance video. Noticing only Ewell at the scene, Price questioned why the appellant was not at the scene and summoned him. This was the first time the appellant learned that there was a robbery during the midnight shift. The appellant told Price that he did not respond to the crime scene as he was processing a prisoner. Price did not ask any further questions of the appellant because he determined the appellant violated departmental policy in not being at the scene and assigned Clinton Franks, Police Lieutenant, to investigate the matter. Franks reported back to Price on October 13, 2017. Franks' report found potential violations for the officers involved, including the appellant for failing to monitor his radio and respond to a robbery scene. Franks listened to the dispatch and created the chart of the various dispatch calls for the incident. Based on that report, Price sent an administrative report to Stephen Yannotti, Deputy Police Chief, on October 27, 2017. Price agreed with Franks' findings. Specifically, the radio dispatch at 6:10:52 a.m. dispatched a robbery, and the appellant did not respond. Price forwarded the findings to Yannotti, as it was typical procedure to first review a matter internally within the Patrol Division to determine if it warranted further investigation by Internal Affairs. Maurice Taylor, Police Officer, was the Internal Affairs investigator in the case and drafted a report dated December 12, 2017. Taylor reported that the appellant failed to monitor his radio, failed to respond to the robbery, failed to be aware of the response and actions of his subordinate Ewell, and violated General Order 2:00 IV.A in failing to ensure that an adequate and complete preliminary investigation was completed at the crime scene. Taylor's report was approved on December 15, 2017, and a Preliminary Notice of Disciplinary Action (PNDA) was issued on December 25, 2017 and mailed to the appellant on December 26, 2017. The ALJ found that in removing the appellant, Irvington considered the hearing officer's recommendation, which included the appellant's disciplinary history and plea agreement in a previous 90-day suspension in 2016. In that case, the hearing officer stated that Irvington would "move for" removal in the event the appellant was found guilty of untruthfulness or incompetency in the future. The ALJ noted that the appellant did not sign a settlement agreement in the 2016 discipline case and that Irvington relied upon the recording of the hearing in that case as a "last chance" agreement in removing the appellant in this case. The ALJ stated that it was undisputed that the appellant was removed because he did not hear Dobson say the word "robbery" in a single transmission over the radio while he was fingerprinting and photographing an arrestee in police headquarters.

The ALJ determined that the appellant admitted that he did not hear Dobson's radio transmission of a robbery call, failed to monitor his radio as required by SOP 2016-16.IV.B.3a (Duties and Responsibilities of Supervisory Personnel) and that the appellant's conduct was inefficient and incompetent under SOP 2017-09.IV.G.3.1.29 (Performance Standards: Official Inefficiency & Incompetency). In

failing to respond to the robbery call, the appellant failed to patrol all activities of Dobson and Ewell via the radio and via the mobile data computer as required by SOP 2016-16.IV.B.3c (Duties and Responsibilities of Supervisory Personnel). The ALJ found unpersuasive the appellant's defense that not hearing the radio does not equate to failure to monitor. The appellant was not attentive to the reason Dobson was inquiring if Ewell was available, and thus, he not only failed to monitor his radio but also failed to monitor the situation as required of supervisory officers. The ALJ further found that Ewell's mistakes in handling the robbery would have been corrected had the appellant responded to the robbery as required by Irvington's SOPs, and thus, the appellant was accountable for Ewell's conduct and failed to adhere to SOP 2017-09.IV.G.3.1.31 (Performance Standards: Accountability of Supervisors). However, the ALJ found that the charges that the appellant violated SOP 2017-09.IV.H.3.1.32 (Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors) and General Order 2:00.IV.A (Responsibility for Preliminary and Follow-Up Investigations), respectively, were not upheld. With respect to the penalty, the ALJ found that neither the document incorporating the 2016 90-day suspension nor the recording of the 90-day suspension hearing make any mention of a last chance agreement or that the appellant would be automatically removed for any future sustained disciplinary charges. The ALJ noted that Ewell and Dobson each received a one working day suspension for violating the departmental regulations in failing to notify the supervisory officers of a robbery and that Green received a three working day suspension for conduct similar to that of the appellant. Thus, the ALJ determined that the appellant, like Green, should receive a three working day suspension.

In addition, the ALJ rejected the appellant's argument that Irvington did not comply with the 45-day time period for filing disciplinary charges found in *N.J.S.A.* 40A:14-147 (45-day rule). The appellant had argued that the 45-day time period began when Internal Affairs received the preliminary investigation report rather than when Internal Affairs conducted its own investigation. The 45-day rule provides:

> A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based . . . A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

The ALJ noted that it was undisputed that in Irvington, Internal Affairs makes charging decisions and issues PNDAs. The ALJ found that Internal Affairs had sufficient information upon which to base a complaint at the conclusion of its investigation on December 8, 2017 and not when it received Franks' report on

October 27, 2017. The assigned Internal Affairs investigator conducted witness interviews to uncover what happened, to confirm whether Franks' preliminary report was correct and to determine whether there was information that may exonerate any of the officers. Thus, the ALJ determined that Irvington complied with the 45-day rule when Internal Affairs signed off on the PNDA on December 25, 2017.

In his exceptions, the appellant contends that a suspension for not being able to hear the single word "robbery" is "patently unjust."

In its exceptions and reply to exceptions, Irvington argues that removal is the required penalty in this case. Specifically, it states that in 2016, the appellant pled guilty to a matter in which he was facing removal and accepted a 90-day suspension along with an understanding that if there was any further discipline involving either truthfulness or incompetency/inefficiency, Irvington would move for removal. Irvington proffers that the most obvious interpretation of the plea agreement is that the appellant would be removed if there is another sustained charge of inefficiency, incompetency or making a false statement. Irvington emphasizes that since it could always *move* for removal, any contrary interpretation would render the terms of the plea agreement meaningless. It contends that as incompetency/inefficiency on the appellant's part has been proven in this case, removal is the appropriate penalty under the plea agreement giving the appellant a last chance. Additionally, Irvington contends that based on the appellant's disciplinary history, disregarded by the ALJ by his inappropriate reduction of the penalty to the same one imposed on Green, removal is the logical next step under the concept of progressive discipline even without the plea agreement.

The Commission agrees with the ALJ's determination that Irvington complied with the 45-day rule and the ALJ's determination of the charges. The Commission also agrees with the ALJ's determination that there was no last chance agreement, in that there is no such written document in the record. Even assuming there were, it must be noted that the Commission is not strictly bound by a last chance agreement but rather uses it as a factor to be considered when determining the appropriate penalty in an appeal. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is

settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In this case, the Commission finds that the appellant's infraction was not so egregious as to warrant his removal, especially in light of the discipline imposed on the other involved individuals. Still, the ALJ incorrectly ignored the appellant's own prior record, which includes a 90 working day suspension, and incorrectly overreduced the penalty based on a comparison to the discipline imposed on the other involved individuals. Considering all factors, including the appellant's prior record, his actual infraction in this case, and the discipline imposed on the other involved individuals, the Commission finds a 30 working day suspension to be the appropriate penalty.

Since the penalty has been modified, the appellant is entitled to be reinstated with back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10, following the 30 working day suspension. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission upheld most of the charges and only modified the penalty. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by Irvington. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court stated in *Phillips*, *supra*, if it has not already done so, upon receipt of this decision, Irvington shall immediately reinstate the appellant to his position.

ORDER

The Commission finds that Irvington's action in removing Jaime Velez was not justified. Therefore, the Commission modifies the penalty to a 30 working day suspension. The Commission further orders that the appellant be granted back

pay, benefits and seniority for the period following his 30 working day suspension to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to Irvington within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of the issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties, and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF NOVEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. CSR 05035-18

2018-2778

IN THE MATTER OF JAIME VELEZ,

v.

IRVINGTON TOWNSHIP,

APPOINTING AUTHORITY.

Peter B. Paris, Esq., for appellant Jamie Velez (Law Office of David Beckett, attorneys)

Joseph M. Hannon, Esq., for respondent Irvington Township [1] (Genova Burns, LLC, attorneys)

Record closed: September 26, 2018 Decided: October 5, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Appellant, Jamie Velez (Velez), was employed as a Police Officer, with respondent, Township of Irvington (Irvington), having attained the rank of Sargent. Velez appeals his termination on March 20, 2018, for allegedly failing to respond to a robbery call as the supervisory officer at the scene on October 12, 2017.

[1] The appeal filed with the Office of Administrative (OAL) refers to respondent as "Irvington Township, Appointing Authority." The respondent's correct name is "Township of Irvington."

PROCEDURAL HISTORY

On December 26, 2017, Irvington issued a Preliminary Notice of Disciplinary Action (PNDA), which alleged that Velez violated the following regulations:

1) SOP 2016-IV.B.3a, Duties and Responsibilities of Supervisory Personnel;
2) SOP 2016-IV.B.3c, Duties and Responsibilities of Supervisory Personnel;
3) SOP 2017-09 IV.G.3.1.31 Performance Standards: Accountability of Supervisors;
4) SOP 2017-09.IV.G.3.1.29, Performance Standards: Official Inefficiency & Incompetency;
5) SOP 2017-09.IV.H.3.1.32, Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors, and
6) General Order 2:00 IV.A., Responsibility for Preliminary and Follow-Up Investigations (charges).

Velez plead not guilty to the charges and a hearing was scheduled for March 20, 2018, at the office of the Irvington's Director of Public Safety. At attendance for the hearing were the following individuals: Hearing Officer Joseph Santiago (Santiago), Velez, his legal counsel Mr. Paris, legal counsel for Irvington, and Detective Wesley Mondelus (Mondelus). Velez waived his right to a hearing and Santiago then made a recommendation to Director of Public Safety, Tracey Bowers (Bowers), to substantiate all of the charges against Velez. Bowers accepted Santiago's recommendations substantiating all of the charges against Velez and signed off on a Final Notice of Disciplinary Action (FNDA), dated March 20, 2018, substantiating the charges and terminating Velez effective the same date (R-1).

Thereafter, on March 27, 2018, Velez filed an appeal with the Office of Administrative Law pursuant to N.J.S.A. 40A:14-202(d), contesting the substantiated charges and termination in the FNDA. On April 5, 2018, Velez filed with the New Jersey Civil Service Commission, (Commission), a letter amending his appeal to include an alleged violation against Irvington of N.J.S.A. 11A:2-24, Protection Against Reprisals

(reprisals allegation). Velez alleged that agents of Irvington conspired to terminate Velez "in retaliation for [his] disclosure of information on the violation of any law or rule, government mismanagement or abuse of authority."

The Commission responded on June 13, 2018, that the appeal was amended to include Velez's reprisals violation charge against Irvington, and that Velez was instructed to present his proofs of the same in the underlying matter. [2]

A prehearing telephone conference was held April 13, 2018, where counsel for Velez, Mr. Paris, and Dwayne Warren, Township Attorney (Mr. Warren) appeared. The parties agreed to exchange discovery as expeditiously as possible, considering the 180-day rule under N.J.S.A. 40A:14-201(a). A telephone status conference was scheduled for April 20, 2018, to allow the Commission to process Velez's amendment to his appeal concerning the allegations of reprisals violations by Irvington.

On April 20, 2018, a telephone status conference was held with Mr. Paris and Mr. Warren, wherein Irvington agreed to provide discovery by May 30, 2018. A Prehearing Order was issued on April 30, 2018, ordering that discovery be completed by May 30, 2018, scheduling a telephone status conference for May 14, 2018, and setting hearing dates for June 14 and 20, 2018.

On May 14, 2018, a telephone status conference was held and counsel for Veles informed the undersigned that discovery had not been completed and Irvington had not provided responses to interrogatories propounded by Velez. Counsel for Irvington agreed to provide all document discovery by May 31, 2018, and notwithstanding this date, agreed to provide Velez with a preliminary response to the Interrogatories and document discovery request by May 21, 2018. On May 18, 2018, an Amended Prehearing Order was issued to include the discovery compliance dates for Irvington, and the scheduling of a telephone status conference for June 5, 2018.

[2] During the hearing held on July 27, 2018, Velez informed the undersigned that he would not be proceeding with his claim against Irvington for reprisals violation and moved to dismiss the same. No opposition was made by Irvington, and the reprisals violation was dismissed.

On June 1, 2018, counsel for Velez wrote to the undersigned informing me that Irvington had not provided discovery as set forth in the Amended Prehearing Order of May 18, 2018, and that Irvington was no longer represented by Mr. Warren, and was now represented by Joseph Hannon (Mr. Hannon) from the law firm of Genova Burns.

On June 5, 2018, a telephone status conference was held, and Mr. Paris and Mr. Hannon appeared, wherein the following resulted: the hearing dates of June 14 and 20, 2018, 'were adjourned to July 25 and 27, 2018, to allow Irvington to provide discovery by June 30. Velez objected to a waiver or extension of the 180-day rule, however, he agreed to the new hearing dates as he could not proceed with the hearing dates of June 14 and June 20, as discovery had not been provided by Irvington, and Velez could not prepare for the June hearing dates. On June 5, 2018, a Second Amended Prehearing Order was issued incorporating the hearing and discovery completion dates.

On July 2, 2018, a telephone status conference was held and the parties informed the undersigned that discovery was completed, and the parties were prepared to proceed with the hearing scheduled for July 25 and 27, 2018. [3]

On July 30, 2018, the parties concluded submission of proofs in their respective cases, and it was agreed that mutual written summations would be submitted by August 17, 2018.

On August 15, 2018, counsel for Irvington wrote to the undersigned that the parties had not received the hearing transcripts and therefore, could not provide the written summations by August 17, 2018. A telephone status conference was held on August 15, 2018, and the parties were given an additional week to August 24, 2018, to submit their written summations.

On August 24, 2018, written summations were submitted by Velez and Irvington. On August 28, 2018, by letter from the undersigned, Velez and Irvington were informed

[3] During the hearing conducted July 27, 2018, the parties agreed to an additional hearing date of July 30, 2018.

that the 180-day provision under N.J.S.A. 40A:14-201b(4) [4], was tolled 35-days between June 20, 2018, the original hearing date, and July 25, 2018, the adjourned hearing date. Consistent with my ruling on August 28, 2018, the record closed on August 24, 2018, and the 180 calendar days was calculated to expire on October 28, 2018.

Thereafter, on September 26, 2018, a telephone converse was had with counsel, wherein I ruled to re-open the record, and to allow respondent to amend their written summation to address the appellant's argument that the complaint should be dismissed under the 45-day rule (N.J.S.A. 40A:14-147). [5]

Consistent with my ruling on September 26, 2018, the 180 calendar days shall be calculated as follows:

- Appeal filed with OAL on March 27, 2018;
- Original 180 calendar days was September 23, 2018;
- Hearing adjournment June 2018- thirty-five calendar days accrued June 20 - July 25;
- Adjournment amended summation-eleven calendar days accrued to October 9, 2018;
- Revised 180th calendar day under N.J.S.A. 40A:14-201(a)- November 8, 2018.

ISSUES

The issues to be determined in this matter are the following:

The issue in this case is whether the Department's determination that sustained charges in the Final Notice of Disciplinary Action dated March 20, 2018, was proper, and if properly sustained, whether the charges warrant termination?

[4] If the officer and the agency or the firefighter and the department agree to any postponement or delay of a hearing before the 181st calendar day, the calendar days that accrue during that postponement or delay shall not be used in calculating the date upon which that officer or firefighter is entitled, pursuant to subsection a. of this section, to receive his base salary pending a final determination on his appeal . . . . (emphasis added) N.J.S.A. 40A:14-201b(4).

[5] Appellant included an argument in his written summation that was not raised in the hearing asserting that this case must be dismissed under N.J.S.A. 40A:14-147, also known as the "45-day rule". Respondent did not address this issue in its summation, as summations were submitted simultaneously.

FACTUAL DISCUSSION AND FINDINGS

Summary of Testimony

At the hearing, Irvington presented testimony from Officer Darryl Ewell, Officer Ajah Dobson, Officer Jose Zepeda, Lt. Mark Green, Capt. Kenneth Price, Det. Maurice Taylor, Lt. Clinton Franks, and Public Safety Director Tracy Bowers. Sgt. Velez called Carl Hamer, Det. William Gatling to testify, as well testifying himself on his behalf. Below is a brief description of the testimony provided.

Officer Darryl Ewell

Officer Darryl Ewell (Ewell) testified on direct that on October 12, 2017, he responded to a call at 558 Chancellor Avenue, which is a gas station/convenient market. Ewell stated that the call had originally been broadcast as a "robbery" and that, after he arrived at the scene he notified the dispatcher Officer Ajah Dobson that the "assault" call was actually a robbery. Ewell stated that he never heard the word "robbery" uttered by Officer Dobson over the radio. Ewell testified that he was aware that the rules required him to report a robbery to his supervisors working his shift. Ewell admitted that he never notified his supervisors, Lt. Mark Green or Sgt. Velez, that he had arrived at robbery call. Ewell agreed that he and Officer Dobson failed to follow the rules when they failed to notify their supervisors of the robbery. Officer Ewell accepted a one-day suspension for failing to notify his supervisors of the robbery call.

Officer Ajah Dobson

Officer Ajah Dobson (Dobson) testified that she was the radio dispatcher on October 12, 2017. Dobson testified that she initially received a call regarding a "fight" at 558 Chancellor Avenue, as the victim called stating that someone hit him. Dobson testified that she initially called for Ewell, but since he did not respond, she called Sgt. Velez on the radio and later by telephone, asking for Ewell and to inquire if Ewell was available. Sgt. Velez responded that Ewell was not with him and was available.

Dobson testified that when she spoke with Sgt. Velez, she did not mention a robbery call, as the call had come in as an assault. It was when the victim called again that he stated he had been "hit", that Dobson broadcast over the radio that the call to 558 Chancellor Avenue was now an "assault". Dobson stated that she knew Sgt. Velez was in headquarters processing an arrest when she called him and when she dispatched Ewell to the robbery call.

Dobson testified that when she broadcast the call as a robbery and Ewell responded to the scene, she did not contact Sgt. Velez as she knew he was on an arrest. Dobson stated that she accepted a one-day suspension for failing to notify her supervisors of the robbery.

Officer Jose Zepeda

Officer Jose Zepeda (Zepeda), testified that he was assisting Sgt. Velez in processing a prisoner when he heard Dobson say the word "robbery" over the radio. Zepeda could not recall where he was when he heard the word "robbery." Zepeda stated that was wearing a shoulder microphone which sits about six inches from his ear, instead of wearing the radio on his hip. Zepeda testified that sometimes he has difficulty hearing the radio and by wearing the shoulder microphone makes it easier for him to hear his radio call. Zepeda stated that he did not mention the radio call of a robbery to Sgt. Velez or Lt. Green. Zepeda stated that Velez is a "good officer" and "a good boss."

Lt. Mark Green

Lt. Mark Green (Green) was the desk lieutenant on October 12, 2017. Green testified that his duties "keeping charge of the police department...and just being aware of what's going on in the field." Green stated that he did not hear the initial dispatch from Dobson when she used the word "robbery." Green testified that he saw the call on his computer as a "fight call." Green testified that he did not have a shoulder radio but rather his radio was "to the side." Green testified that had he heard the robbery call, he and Sgt. Velez would have figured out what to do with Velez's prisoner and Sgt. Velez would have responded to the robbery call "to assess the situation."

Green acknowledged that a superior officer is required to respond to a robbery call as per the Irvington Police Department's Rules and Regulations. Green also stated that although an officer may be distracted, it does not excuse an officer to hear a dispatch call. Green accepted a three-day suspension for his role in this event in failing to respond to the robbery call. Green testified that he considers Velez to be a diligent officer and supervisor.

Capt. Kenneth Price

Captain Kenneth Price (Price) testified as to the origins of the investigation of this matter. Price stated that he generally works the 8:00AM-4:00PM shift, and did so on October 12, 2017. Price testified that at a morning crime meeting held at the beginning of the morning shift on October 12; 2017, he viewed the video of the 558 Chancellor Avenue incident, which revealed a robbery. Ewell testified that noticing only Ewell at the scene, he questioned, "Where's my Sergeant?" to which another officer in the meeting responded that Sgt. Velez was processing an arrest and was in the building.

Price testified that he then summoned Sgt. Velez to the crime meeting, and asked Sgt. Velez if he responded to the robbery to which Sgt. Velez answered "no". Price then testified that he asked Sgt. Velez why he did not respond and that Sgt. Velez answered he was processing an arrest. Price testified that after Sgt. Velez's response, Price determined that his conduct was in violation of Irvington's departmental policies, which required further investigation. Price assigned Lt. Franks to complete an investigation into the matter as to whether there was any violation with the handling of the 558 Chancellor Ave. robbery call.[6]

Cpt. Price had no involvement after he forwarded the findings to Deputy Chief Yannotti; however, Cpt. Price acknowledged that it is typical procedure to first review a

[6] Price testified that the investigation performed by Lt. Franks was not the internal affairs investigation, but rather a review of whether any violation occurred, specifically why a superior officer did not respond to the call. Price stated that the investigation by Lt. Franks was a typical preliminary investigation done within the Patrol Division to see if the matter warrants further review.

matter internally within the Patrol Division to determine if it warrants further investigation by Internal Affairs. (T1 180:9-25; 181:1-2). The matter is not sent right to internal affairs because there is a need to review if a possible violation even occurred. (T1 196:6-14).

Lt. Clinton Franks

Lt. Clinton Franks (Franks) conducted his investigation and issued a report to Price on October 13, 2017. On direct examination, Franks' testified that the report found potential violations for the officers involved (Dobson, Elwell and Green), including Sgt. Velez for "failing to monitor his radio and respond to robbery scene." Franks stated that he listened to the dispatch audio and created the chart of the various dispatch calls. Franks' stated that based on his report, Price sent an administrative report to Deputy Chief Stephen Yannotti on October 27, 2017.

On cross examination, Franks testified to the following:

- that "a supervisor should have responded, however, there are extenuating circumstances when it comes to Sergeant Velez. He was on an arrest and he was in the back processing a prisoner. It was his arrest. So, it was only dispatched once from the tape so there's a likelihood that he may have missed it."
- there are times when he [Franks] has not been able to hear radio transmissions. He also testified that it is common for officers to miss transmissions.
- "Dobson spoke to him [Sgt. Velez] on the phone because she was looking for Ewell at one point...and she never said, 'there's a robbery.'"
- that a supervisor "is supposed to be dispatched" to a robbery incident.
- that it was difficult to hear the dispatch from Dobson, and that when he reviewed the dispatch tapes, he was in an office with the ability to rewind the tape and increase the volume.

- that if Ewell had broadcast a description of the robbery suspect over the radio, that description would have been repeated by Dobson and the "repetition of the description...would trigger something in my mind that something is going on that maybe I'd want to ask further if I'm not aware of what's going on."
- that there was no evidence that Velez had his radio off or that he was not trying to listen to the radio.
- that Velez simply did not hear the transmission where Dobson stated the call was now a "robbery."
- he uncovered no evidence that Velez did not monitor his radio; he simply did not hear the transmission.
- Franks considers Velez to be a good and diligent officer.

Det. Maurice Taylor

Detective Maurice Taylor (Taylor), testified that he was assigned to investigate the events of the October 12, 2017 incident by Sgt. Gerard Malek, the Internal Affairs Supervisor for the Irvington Police Department. Taylor testified that he proceeded through his investigation from October 27 through December 15, 2017 by doing the following: (1) reviewing the administrative reports on the matter; (2) summarizing the administrative reports; (3) interviewing Franks, Dobson, Ewell, Green and Sgt. Velez. Taylor stated that he proceeded to complete his report and that his investigation found that Sgt. Velez violated the following: SOP 2016-16.IV.B.3.a, SOP 2016-16.IV.B.3.a, SOP 2017-09 IV.G.3.1.31, SOP 2017-09 IV.E.3.1.29, SOP 2016-16, SOP 2017-09.IV.H.3.1.32, General Order 2:00 IV.A. Taylor testified that his report was then reviewed by his superiors and legal department, and that on December 26, 2017, the charges were served upon Sgt. Velez.

Public Safety Director Tracy Bowers

Director Tracey Bowers (Bowers) testified that as Director of the Irvington Township Public Service, he oversees the day-to-day activities of the Irvington Police Department, and as part of his duties he determines the penalty received by officers brought up on disciplinary charges. Bowers stated that does not get involved with internal affairs investigations as they are exclusively handled by Irvington's Internal Affairs division.

Bowers testified his designee, Joseph Santiago (Santiago), serves as hearing officer on all police disciplinary charges that have been first investigated by the Internal Affairs division. Bowers testified that in October 2016, Santiago presided over a prior discipline of Velez, in which a plea agreement was reached resulting in Velez agreeing to a ninety-day suspension, when faced with termination, regarding a charge that Velez made false official statement and inefficiency and incompetency. Bowers stated that Velez' prior plea agreement was made on the record, with representation of counsel, and the terms of the plea were memorialized as an attachment to the Final Notice of Disciplinary Action, and provided for, "suspension without pay for 90 (ninety) days (9 Payrolls), effective October 20, 2016. Bowers testified that the October 2016 plea agreement called for Velez to be terminated if he were found to be guilty of any violations for sustained charges in the future. The tape of the plea agreement was played during Bowers' testimony.

In the present matter, Bowers' testified that he took into account Velez's October 2016 plea agreement as well as Velez's prior disciplinary record in determining that termination was the appropriate penalty in this matter. Bowers' stated that the Disciplinary Memorandum from Santiago, outlined Velez's history which included his disciplinary history of one performance notice, two counseling notices, four reprimands, four suspensions ranging from two days to ninety days, with the ninety days being the recent plea on October 20, 2016. Bowers' stated that Velez disciplinary history, and the underlying charges for inefficiency and incompetency, resulted in his decision that Velez be terminated in this matter, effective March 20, 2018.

Carl Hamer and Det. William Gatling

Carl Hammer (Hammer) and Det. William Gatling (Gatling), both testified as part of Velez's claim of Actions Against Reprisal against Irvington under N.J.S.A. 11A:2.24. Since Velez moved to dismiss the reprisal claim, their testimony is not germane to the underlying charges and will not be discussed.

Sgt. Jamie Velez

Velez testified that he grew up in Irvington, and after graduating high school, he enlisted in the Army for three years. Velez stated that upon his discharge from the Army he applied to be a police officer, was selected and graduated from the police academy on June 4, 2004. Velez stated that he has been a police officer for fourteen years and he has been a Sargent since May 2013.

Velez testified that during his time as patrolman and Sargent, he has had numerous assignments in the Irvington Police Department including the Narcotics Task Force, training officer for new officers, the Essex County Carjacking Task Force and Homicide Task Force. Velez stated that he has been honored with numerous awards and commendations during his fourteen years as an officer.

As to the underlying charges, Velez testified as follows:

- On October 12, 2017, he was nearing the end of his 7:45p.m. to 7:00 a.m. shift, when he observed a suspicious individual in a high crime area around 5:00 a.m.
- He arrested the man for possession of heroin, and after having the individual's vehicle towed, Zepeda responded to transport the him to headquarters (with Velez following in his patrol vehicle). This occurred around 5:30 a.m.

- Upon arrival at headquarters, he brought the arrestee to the desk supervisor, Green, per Irvington policy, and then walked the arrestee to the report room where the arrestee was processed.
- Zepeda and Ewell were in the report room when Velez brought the arrestee for processing.
- As a practice, Velez submits "time stamps" on the computer while processing an arrestee, as "the department is really strict on completing reports within 60 minutes and if the jobs aren't completed within 60 minutes, they want to know why the job took so long. Me knowing that a drug arrest is not going to be able to get completed within 60 minutes, I've always entered pretty much step by step everything that I do on the job."
- He recalls Dobson calling him once on the radio and once by phone while he was processing the arrestee.
- Velez checked the suspect for warrants, photographed him and fingerprinted him.
- Dobson called Velez over the radio and asked if he still needed two officers, and Velez responded that she can "have Ewell back," meaning that Ewell is available to answer calls for service.
- Velez never heard Dobson say the word "robbery."
- The first time Velez learned that there was a robbery was when Price called him into the daily crime meeting.

FINDINGS OF FACT

I FIND the testimony of all of the witnesses to be credible. It is not disputed that Velez, as supervisory officer, was not present at the robbery scene October 12, 2017, contrary to Irvington's Standard Operating Procedures. What does appear to be in dispute is whether Velez's conduct merits the discipline commensurate to the charges filed against him. Accordingly, based upon the testimonial and documentary evidence, and having had the

opportunity to observe the appearance and demeanor of the witnesses, I **FIND** as **FACT** the following:

On October 12, 2017, the following police officers were working the 8:45 p.m. to 7:00 a.m. shift (midnight shift) for the Irvington Police Department: Green, Velez, Zepeda and Ewell. (T1 37:1-10). Dobson was working as the radio dispatcher for calls to the police station (T1 86:5-7). The supervisors for this shift was Green and Velez, Lieutenant and Sargent respectively.

Dobson initially received a call from a man stating that he had been "hit" in a fight that occurred at 558 Chancellor Avenue. (T1 86:8-13; 141:10-18; R8; R24). Knowing that Velez had made an arrest earlier in the shift, Dobson called Velez asking for Ewell and inquiring if he was available to respond to the assault call. (R23; Tr1 at 111). Velez responded that Ewell was available affirmatively. (Ibid.) The victim called the Police department again inquiring when the police would arrive and now stated that someone had "robbed" him. (R24). After the second call was received, now stating that a robbery had occurred, Dobson called Ewell on five separate occasions, but Ewell did not respond. (R8; R24). Finally, at 6:10:48 Ewell responded and Dobson dispatched Ewell to "respond to 558 Chancellor Ave. on a robbery report." (Ibid.) These dispatches span over a period of approximately eight minutes. (Ibid).

Ewell acknowledged that he received a dispatch that was initially an assault at 558 Chancellor Avenue, which is a gas station/convenient market. (T1 37:13-19; 37:20-25; 38:1-3). Ewell believed the original call was for an "assault" and "later learned" from the victim that a robbery had occurred. (Tr1 at 37). After he arrived and assessed the situation, Ewell notified dispatch that the "assault" call was a "robbery". (Tr1 at 39; R-9). However, there is no recording of Ewell ever using the word "robbery" over the radio. (See Exhibits R-8 and R-26). Ewell responded alone and did not receive assistance from any officer of the Irvington Police Department during the duration of his response. (T1 38:7-12). Ewell was aware that the rules required him to report the robbery to his supervisors, Velez and/or Green. (Tr1 at 64; R-26; Tr1 at 52-53).

Zepeda is the only officer who heard Dobson say the word "robbery" over the radio. (Tr1 at 74.) At the time, Zepeda was assisting Velez in processing a prisoner, but he did not recall where he was when he heard the word "robbery." (Tr1 at 74). Zepeda was wearing a shoulder microphone which sits about six inches from his ear when he heard the dispatch call for a "robbery". (Tr1 at 76). Green did not hear the initial dispatch from Dobson in which she used the word "robbery", despite seeing the call on his computer (Tr1 at 141; 143-144; 145).

During the "morning crime meeting" following the midnight shift, Price read the incident report regarding the robbery call at 558 Chancellor Avenue, and the store surveillance video. Noticing only Ewell at the scene, Price questioned, why Velez was not at the scene and summoned him. (T1 172:14-19; 174:16-21). Velez told Price that he did not respond to the crime scene, as he was processing a prisoner (T1 174:23, 24). Price did not ask any further questions of Velez, because he determined Velez violated departmental policy in not being at the scene and assigned Franks to investigate the matter (T1 175:7-16; 176-177).

Franks reported back to Price on October 13, 2017. (Tr1 at 177; R-12). Franks' report found potential violations for the officers involved, including Velez for failing to monitor his radio and respond to robbery scene. (T2 28:7-18; R-12). Franks listened to the dispatch and created the chart of the various dispatch calls for the incident (R8). Based on that report, Price sent an administrative report to Deputy Chief Stephen Yannotti (Yannotti) on October 27, 2017. (R13). Price agreed with Franks' findings. (R13; T1 178:4-22). Specifically, the radio dispatch at 6:10:52 dispatched a robbery and Velez did not respond. (T1 180:1-8). Price forwarded the findings to Yannotti, as it is typical procedure to first review a matter internally within the Patrol Division to determine if it warrants further investigation by Internal Affairs. (T1 180:9-25; 181:1-2).

Taylor was the Internal Affairs investigator in this case and drafted a report dated December 12, 2017 (Tr1-228; R-2). Taylor reported that Velez failed to monitor his radio, failed to respond to the robbery and failed to be aware of the response and actions of his subordinate, Ewell, and that Velez violated General Order 2:00 IV.A, in failing to ensure that an adequate and complete preliminary investigation was completed at the crime

scene. (T1 237:18-25; 238:1-20; R-3). Taylor's report was approved on December 15, 2017, and a Preliminary Notice of Disciplinary Action was issued on December 25, 2017, and mailed to Velez on December 26, 2017 (R-3).

Bowers "did not hear the case" at the departmental level, although he signed the FNDA and issued a "disciplinary memo." (Tr2 at 79; R-1; R-19). Bowers did not serve as the hearing officer, but rather his designee, Santiago. (T2 79:11-25; 80:1-14). A departmental disciplinary hearing was held before Santiago on March 20, 2018, which resulted in sustaining the charges and recommending termination. (R19). On the same date, Velez was terminated. (R20). In determining if termination was appropriate, Bowers considered Santiago's recommendation which included Velez's disciplinary history and plea agreement in a previous suspension in October 2016, that any further disciplines would result in termination. (R19; T2 84:13-21). Bowers' agreed to Velez's termination in the within matter because he relied upon a prior case in which Santiago that Irvington would "move for termination" in the event. Velez was found guilty of untruthfulness or incompetency in the future. (Tr2 at 95-96; R-18; R-28).[7] Velez did not sign a settlement agreement in the October 2016 discipline case, which Irvington relied upon as a "last chance" agreement in terminating Velez herein (Tr3 at 65-67).

Although Bowers does not conduct the disciplinary hearings, he is the "ultimate authority" when it comes to disciplinary penalties. (Tr2 at 76-77). He has "sole authority" to discipline Irvington Police Officers. (Tr2 at 111). On the same date as the termination in this matter, the Township issued a 4-day suspension to Velez in a separate matter (P-43; Tr2 at 115-116).

In this case, it is undisputed that Velez, was terminated from his employment because, he did not hear Dobson say the word "robbery" in a single transmission over the radio while Velez was fingerprinting and photographing an arrestee in police

[7] During the colloquy in that prior case, Santiago states that "any further violations of Department regulations with respect to truthfulness, inefficiency, or incompetency will result in his termination." However, he was corrected by counsel for Velez, who stated, "Actually, if there is a sustained charge...for any similar truthfulness or inefficiency violation, the Township will move for termination." (Tr2 at 102; R-28). The hearing officer consented to the amended language by stating, "will move for termination, yes." (Tr2 at 102).

headquarters. On October 12, 2017, Velez was working a 7:45p.m. to 7:00 a.m. shift. Near the end of his shift, Velez arrested a man for possession of heroin. Upon arrival at headquarters, Velez brought the arrestee to the desk supervisor, Green (Tr3 at 18). Thereafter, Velez walked the prisoner to the report room where arrestees are processed. (Tr3 at 19). During this time, Zepeda and Ewell were in the report room. (Tr3 at 19). While processing the prisoner, Velez recalls Dobson calling him once on the radio and once by phone (Tr3 at 20).

Velez processed the prisoner between 6:04 to 6:13 a.m. (P-3). At 6:02 a.m., Dobson received the first 911 call from the robbery scene, but she had trouble understanding the caller and entered the call as a "fight." (R-8; R-24). At 6:04 a.m., Dobson called Velez over the radio and asked if he still needed two officers. Velez responded that she can "have Ewell back," meaning that Ewell is available to answer calls for service (R-23; Tr1 at 87-89). At 6:07 a.m., Dobson received the second 911 call from the robbery scene. This time, Dobson was able to make out that the caller stated he had been "robbed".

Not being able to reach Ewell, Dobson called Velez in the report room by phone to ask if Ewell was with him. She did not mention anything about a robbery (R-8; R-24). Ewell answered Dobson's call, and Dobson dispatched him to the scene of the robbery report. (Ibid). At 6:13 a.m., Ewell arrived at the robbery scene (P-2) Ewell never confirmed over the radio that a robbery had taken place (Ibid.) At 6:21 a.m.; Velez completed fingerprinting and photographing the prisoner (P-3). Velez never heard Dobson say the word "robbery." (Tr3 at 24). The first time Velez learned that there was a robbery during his shift on October 12, 2017, was when Price called him into the daily crime meeting. (Tr3 at 24).

It was undisputed by the witnesses that supervisors are required to respond to a robbery call (T1 40:7-11; T2 27:10-23). Velez acknowledged and agreed that a supervisor must respond to a robbery call and that it is the policy of the Irvington Police Department. (T3 37:1-24). Further, Velez understood this to be the policy of the Irvington Police Department. (T3 37:9-16). Velez and Green both acknowledged that the robbery

call would take precedent over the processing of the prisoner (T1 146:1-13; T3 38:14-16; 39:20-25; 40:1,2; 53:5-16).

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standards

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including conduct unbecoming a public employee, neglect of duty and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "'fair preponderance of the believable evidence.'" Polk, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, supra, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The greater weight of credible evidence in the case—the preponderance—depends not only on the number of witnesses, but "the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a

credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950).

Velez is charged with having violated the following six departmental regulations in failing to respond to the robbery on October 12, 2017 and failing to appropriately supervise:

1) SOP 2016-IV.B.3a, Duties and Responsibilities of Supervisory Personnel;

2) SOP 2016-IV.B.3c, Duties and Responsibilities of Supervisory Personnel;

3) SOP 2017-09 IV.G.3.1.31 Performance Standards: Accountability of Supervisors;

4) SOP 2017-09.IV.G.3.1.29, Performance Standards: Official Inefficiency & Incompetency;

5) SOP 2017-09.IV.H.3.1.32, Performance Standards: Inefficiency or Incompetency of Supervisors and Superiors, and[8]

6) General Order 2:00 IV.A. Responsibility for Preliminary and Follow-Up Investigations (charges).

It is undisputed by Velez that the Irvington Police Department requires supervisors to respond to a robbery call. SOP 2016-16 IV.B.3.a provides that sergeants "shall...monitor all radio transmissions and personally respond to the following assignments to provide supervision and direction and control...other significant calls involving violent crimes." In addition, SOP 2016-16 IV.B.3.c provides that sergeants shall "monitor all patrol activities via the radio and via the mobile data computer."

It is undisputed that Velez did not hear Dobson say the word "robbery" in a single transmission over the radio while he was fingerprinting and photographing an arrestee in

[8] Charge #5 references SOP 2017-09. is not in the record, and therefore, **I CONCLUDE** that Irvington has not carried its burden of proving a violation of this rule by a preponderance of the credible evidence, and the same is dismissed herein.

police headquarters. Velez was listening to the radio while processing the prisoner, as he responded to Dobson minutes earlier calling for Ewell, as well as answering his phone when she called him. However, Dobson never mentioned a robbery call when she spoke with Velez because she was waiting for confirmation from Ewell that it was actually a robbery call. Ewell failed to call in and confirm that a robbery had taken place. When Dobson did state over the radio that the call was now a "robbery", Velez, Green and Ewell did not hear the transmission.

Price and Franks both testified that officers must monitor all radio dispatches at all times. **I CONCLUDE** that the evidence in this case reveals that a robbery was dispatched on October 12, 2017 and Velez did not hear his radio effectively so as to hear the dispatcher; Velez did not respond to the robbery and did not monitor the radio and MDC and the activities of Ewell responding to the robbery. The question then becomes did Velez's conduct rise to the level of a violation of Irvington's regulations by not "monitoring" his radio and that of Ewell?

I CONCLUDE that Velez by his own admission that he did not "hear" Dobson's radio transmission of a robbery call, failed to monitor his radio as required by SOP 2016-16 IV.B.3.a, and I **CONCLUDE** that Irvington has demonstrated by a preponderance of the credible evidence that Velez's conduct is deemed inefficient and incompetent under SOP 2017-09.IV.G.3.1.29. In failing to respond to the robbery call, **I CONCLUDE** further that Velez failed to patrol all activities of Dobson and Ewell, via the radio and via the mobile data computer as required under SOP 2016-16 IV.B.3.c. **I CONCLUDE** that Velez's defense that not hearing the radio does not equate to failure to monitor is not persuasive. **I CONCLUDE** that the record reveals that Velez was not attentive to why Dobson was inquiring if Ewell was available, and thus he not only failed to monitor his radio, but also failed to monitor the situation, as required of supervisory officers.

SOP 2017-09 IV.G.3.1.31, concerns the accountability of supervisors for subordinate officer's conduct. Ewell's mistakes in handling the robbery would have been corrected if Velez responded to the robbery as required by Irvington's SOPs. Velez acknowledged that he is required to respond to a robbery or at the very least, ensure that a superior officer is responding to the robbery, which did not occur. For these reasons, I

CONCLUDE that Irvington has demonstrated by a preponderance of the credible evidence that Velez failed to adhere to SOP 2017-09 IV.G.3.1.31. and is accountable for Ewell's conduct at the scene in failing to ensure an adequate and complete investigation.

SOP 2017-09.IV.H.3.1.32, concerns Irvington's charge that Velez was inefficient or incompetent in failing to take corrective action against Dobson and Ewell after they did not meet departmental standards. This charge presumes that Velez was aware of Ewell and Dobson's conduct in real time, which the record reflects he was not, and therefore, I **CONCLUDE** that the evidence presented by Irvington did not demonstrate by a preponderance of the credible evidence that Velez was unwilling to take corrective action or somehow refused to do so. Rather, **I CONCLUDE** the evidence reveals that Velez was unaware that corrective action was necessary until after corrective action was already initiated by Price in ordering Franks' to conduct a preliminary investigation. For these reasons, **I CONCLUDE** that Irvington failed to demonstrate that Velez did not adhere to SOP 2017-09.IV.H.3.1.32.

The charge under General Order 2:00 IV.A. concerning responsibility for preliminary and follow-up investigations applies only to patrolmen and not supervisors. Section C (1) of this rule states that "...the preliminary investigation shall be conducted by the uniformed patrol officer assigned to the call for police service." Section C (2) states, "...The patrol officer assigned shall be responsible for initiating action to inform other appropriate bureau units of a serious crime or one requiring immediate on-the-scene follow up investigation." Therefore, I **CONCLUDE** that Irvington has failed to prove by a preponderance of the credible evidence that Velez is obligated under General Order 2:00 IV.A for the actions of the patrolman.

I CONCLUDE that Irvington has proven by a preponderance of the credible evidence that Velez violated departmental charges SOP 2016-16 IV.B.3.a, SOP 2017-09.IV.G.3.1.29, SOP 2016-16 IV.B.3.c, and SOP 2017-09 IV.G.3.1.31.

I CONCLUDE that Irvington has not proven by a preponderance of the credible evidence that Velez violated departmental charges SOP 2017-09.IV.H.3.1.32 and General Order 2:00 IV.A.

Now to address Velez's argument that Irvington did not comply with N.J.S.A. 40A:14-147, also known as the "45-day rule." Velez alleges that the 45-day period began when the Internal Affairs Department received this preliminary investigation report rather than when Internal Affairs conducted its own investigation.

The 45-day rule provides:

> A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based...a failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.
>
> N.J.S.A. 40A:14-147

"The 45–day period runs from the date upon which the person responsible for the filing of the disciplinary complaint receives sufficient information upon which to base a complaint." Aristizibal v. City of Atl. City, 380 N.J. Super. 405, 427, (Law. Div. 2005). The court in Aristizibal also makes clear that "The statute contemplates that an investigation may be necessary before a decision can be made as to whether a basis exists to initiate disciplinary charges." Aristizibal, 380 N.J. Super. at 427. The "45-day rule" is "undoubtedly not designed to force an appointing authority, at the risk of being estopped, to prospectively bring ultimately valid, but unripe, disciplinary charges within 45 days of an incident without properly investigating the matter to ensure that sufficient information to bring such charges is obtained." Id. at 426 (citing In the Matter of Joseph McCormick, OAL Docket No. CSV 6319-00, 2001 WL 34609057, 3 (Dec. 4, 2001).

It is undisputed that in Irvington, the Internal Affairs Department makes charging decisions and issues Preliminary Notices of Disciplinary Action (PNDA), not the Public Safety Director. **I CONCLUDE** that Irvington has proven by a preponderance of the credible evidence that the Internal Affairs Department is responsible for making charging decisions, and that it had sufficient information upon which to base a complaint at the

conclusion of its investigation on December 8, 2017, the date its investigation was completed, and not when it received Franks' report on October 27, 2017. Therefore, I **CONCLUDE** that Irvington complied with the requirements of N.J.S.A. 40A:14-147, when its Internal Affairs Department signed off on the PNDA on December 25, 2017.

I **CONCLUDE** that Velez's argument is contrary to the decision made in Aristizibal, 380 N.J. Super. at 427, inasmuch as the Internal Affairs investigator assigned to this matter conducted interviews of the witnesses in order to uncover exactly what happened and to confirm whether Franks' preliminary report was correct, and also to determine whether there was information which may exonerate any of the officers.

Appropriateness of Penalty

In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. 523-24.

As the Supreme Court explained in In re Herrmann, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment

> that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, 192 N.J. at 30-33 (citations omitted).]

It is undisputed that Velez has a lengthy disciplinary history, which includes: (1) July 7, 2005 – written reprimand; (2) June 28, 2006 – 90 day suspension for leaving town during a break and an altercation with a girlfriend; (3) December 20, 2007 – written reprimand – driving privileges suspended; (4) June 15, 2010 – 2 days for failing to secure evidence; (5) March 24, 2011 – written reprimand – vehicular pursuit out of town boundaries; (6) January 8, 2013 – performance notice – overtime entry; (7) March 6, 2014 – written reprimand – AWOL; (8) February 7, 2014 – 10 day suspension – improper arrest ; (9) January 19, 2015 – 4 day suspension; (10) October 1, 2015 – counseling; and (11) June 23, 2016 – 90 day suspension and plea agreement for future violations.

Irvington has argued that Velez agreed to a "last chance agreement", which would result in his termination in the event of a future charge, when he agreed to plead guilty in the prior disciplinary action to ninety-day suspension. Irvington admitted that the ninety-day suspension plea agreement was essentially the sole justification for termination in the within matter. As a result, I examined the audiotape of the ninety-day suspension during the within hearing. Based upon the foregoing, **I CONCLUDE** that that there is no mention of a last chance agreement in the ninety-day suspension hearing, and that the record was clear as to the same. **I CONCLUDE** that when Velez accepted the ninety-day suspension, Irvington would move for termination in the future if Velez was found guilty of another infraction, at no time did Velez waive any rights to a fair adjudication on the merits of any future disciplinary matter, including the within case.

I CONCLUDE that Irvington's decision to terminate Velez based upon a last chance agreement does not comport with the document incorporating the ninety-day suspension or it is not supported by the audiotaped rendition of that agreement, which was played twice in Court. **I CONCLUDE** that both the document and the recording make no mention of a last chance agreement, or that Velez would be automatically terminated for any future sustained disciplinary charges.

Notwithstanding the existence or non-existance of a last chance agreement, Irvington argues that termination is appropriate in this matter under the concept of "progressive discipline". It is undisputed that Velez has a lengthy disciplinary history as documented by Irvington. However, Velez has also been honored with numerous awards and commendations. In addition, there was no evidence presented by Irvington by testimony or documentation, that Velez was not a competent officer. The testimony of all the witnesses attested to the same.

I CONCLUDE that the concept of progressive discipline is not applicable herein, as I cannot ignore the mitigating factors in rendering my conclusion that Irvington has proven by a preponderance of the evidence that Velez violated departmental charges SOP 2016-16 IV.B.3.a, SOP 2017-09.IV.G.3.1.29, SOP 2016-16 IV.B.3.c, and SOP 2017-09 IV.G.3.1.31. **I CONCLUDE** that these mitigating factors was that Irvington failed to prove that Velez intentionally failed to respond to the dispathcer's call of a robbery, and the testimony of Franks that there were "extenuating circustances" that prevented Velez from hearing the transmission, and Taylor's testimony that missing a transmission doe not equate to failing to monitor.

I CONCLUDE that Irvington did not prove (or even allege) that Velez deliberately failed to monitor the radio, and that the only proofs submitted by Irvington was that Velez could not hear the dispatcher say the word "robbery" when she dispatched Ewell.[9] The record reveals that Green and Ewell did not hear it either, and they were given minor

[9] I had some difficulty hearing Dobson's radio call of a "robbery", when listening to the audio recording during the hearing, which supports my Velez's testimony and my conclusion.

discipline. The only witness who heard the word was Zepeda who was wearing a shoulder mic that rests inches from his ear. Velez did not have a shoulder mic.

I CONCLUDE that the penalty in this case was not proportionate to the punishment imposed for similar offenses. As the New Jersey Supreme Court has emphasized, "there must be fairness and generally proportionate discipline imposed for similar offenses by public employers..." In re Stallworth, 208 N.J. 182, 192 (2011). In the matter of In re Stallworth, a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Civil Service Commission (Commission) modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

In this case, Ewell and Dobson received one-day suspensions for directly violating the departmental regulations in failing to contact the supervisory officers of a robbery. **I CONCLUDE** that terminating Velez is clearly disproportionate when compared to similar conduct by Green who, like Velez, was guilty of nothing other than not being able to hear a word uttered during a radio transmission. Similarly, **I CONCLUDE** that Irvington's agreement to accept Green's three-day suspension for the same "conduct" as Velez, shows that the termination of Velez is disproportionate to the underlying charges.

Much has been said regarding Velez's ninety-day suspension. However, **I CONCLUDE** that the record is devoid of any evidence by Irvington concerning the severity of the original charges. Irvington chooses instead to argue that Velez agreed to a "last chance agreement", which I have concluded did not exist and on Velez's prior disciplinary history. However, as I have **CONCLUDED** "there must be fairness and generally proportionate discipline imposed for similar offenses by public employers..." In re Stallworth, 208 N.J.192, and therefore, **I CONCLUDE** that termination was not

appropriate in the within matter, and that Velez should be suspended, like Green, for three-days.

ORDER

Accordingly, I **ORDER** that the action of the respondent, Irvington in terminating Velez is **REVERSED,** and that the appropriate discipline is a three-day suspension.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 5, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: October 5, 2018

Date Mailed to Parties:

lr

WITNESSES AND DOCUMENTS IN EVIDENCE

Witnesses

For Appellant:

Sgt. Velez

Carl Hamer

Det. William Gatling

For Respondent:

Officer Darryl Ewell

Officer Ajah Dobson

Officer Jose Zepeda

Lt. Mark Green, Capt.

Kenneth Price

Det. Maurice Taylor

Lt. Clinton Franks

Public Safety Director Tracy Bowers

Exhibits

For Appellant:

P-1 Sgt. Velez Commendations and Notable Events

P-2 Reports for Robbery on 10/12/17

P-3 Sgt. Velez Arrest Reports 10/12/17

P-4 Same as R-8 (Incident Number I-2017-087880 Dispatch Log)

P-5 Same as R-2 (Office of Internal Affairs Investigative Report Dated December 12, 2017)

P-6 Same as R-12 (Administrative Report October 13, 2017 – Lieutenant Clinton Franks to Captain Kenneth Price)

P-7 Same as R-10 (Administrative Report Order to Submit – Lieutenant Mark Green)

P-8 Lt. Mark Green Disciplinary Documents

P-9 Same as R-9 (Administrative Report Order to Submit – Patrolman Darryl Ewell)

P-10 Officer Darryl Ewell Disciplinary Documents

P-11 Officer Ajah Dobson Disciplinary Documents

P-12 Sgt. Jaime Velez Administrative Report Dated 10/20/17

P-13 Sgt. Jaime Velez Disciplinary Documents (Termination)

P-14 Sgt. Jaime Velez Complaint dated 9/10/17 Against Police Director Bowers

P-15 Officer Simon Johnson Report dated 9/10/17

P-16 Investigative Summary (1) by Det. William Gatling dated 9/13/17

P-17 Investigative Summary (2) by Det. William Gatling dated 1/02/18

P-18 Letter Dated 11/21/17 from Prosecutor's Officer to Director Bowers (complaint not sustained)

P-19 Case Management and Activity Log Sheet by Det. Gatling

P-20 Case Checklist and Summary Sheet (IA Case #2017-150)

P-21 Memo dated 1/15/18 from Det. Gatling to Prosecutor's Office

P-22 Memo dated 1/17/18 from Prosecutor's Office to Det. Gatling

P-23 Memo dated 3/6/18 from Det. Gatling to Sgt. Velez

P-28 Memo dated 1/11/16 assigning PBA President Maurice Gattison to the Police Director's Labor Relations Office

P-43 Final Notice of Disciplinary Action 4/20/18

For Respondent:

R-1 Final Notice of Disciplinary Action March 20, 2018

R-2 Office of Internal Affairs Investigative Report Dated December 12, 2017

R-3 Case Management and Activity Log Sheet IA #2017-201 and Case Checklist and Summary Sheet IA #2017-201

R-4 omitted

R-5 Incident Report October 12, 2017 Case Number CC-2017-009336/Incident Number I-2017-087880

R-6 Supplemental Investigation Report October 13, 2017

R-7 Supplemental Investigation Report October 17, 2017

R-8 Incident Number I-2017-087880 Dispatch Log

R-9 Administrative Report Order to Submit – Patrolman Darryl Ewell

R-10 Administrative Report Order to Submit – Lieutenant Mark Green

R-11 Administrative Report Order to Submit – Sergeant Jaime Velez

R-12 Administrative Report October 13, 2017 – Lieutenant Clinton Franks to Captain Kenneth Price

R-13 Administrative Report October 27, 2017 – Captain Kenneth Price to Deputy Chief Stephen Yannotti

R-14 Relevant Portion of Standard Operating Procedure #2016-16 (Amended 9/1/16)

R-15 Relevant Portion of Irvington Police Manual

R-16 Relevant Portion of General Order 2:00

R-17 Relevant Portion of Standard Operating Procedure #2017-09

R-18 Disciplinary Memorandum October 24, 2016 IA#2016-155

R-19 Disciplinary Memorandum March 20, 2018 IA#2017-201

R-20 Personnel Classification Order March 20, 2018

R-21 Disciplinary Memorandum Dated March 20, 2018 Director Bowers to Det./Sgt. Gerard Malek and Det./Sgt. Barry Zepeda

R-22 Sgt. Jaime Velez Concise Case History

R-23 HQ Dispatch

R-24 Dispatch Recordings

R-25 Officer Dobson and Lt. Franks Audio Statements

R-26 Officer Ewell Audio Statement

R-28 Plea Agreement October 20, 2016 Audio Recording

OAL

J-1 Ordinance of the Township of Irvington 11/4/15

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

December 4, 2018

William Fowler
299 Filmore Street
Apartment 4
Phillipsburg, New Jersey 08865

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *William Fowler v. Green Brook Regional Center, Department of Law and Public Safety*
(CSC Docket No. 2018-2915 and OAL Docket No. CSV 6408-18) - **SETTLEMENT**

Dear Mr. Fowler and Ms. Pinkas:

The appeal of William Fowler, a Truck Driver, Single Axle with Green Brook Regional Center, Department of Human Services, of his removal effective March 19, 2018, on charges, was before Acting Director and Chief Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on November 26, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on November 27, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on January 11, 2019. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 12, 2019.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 6408-18

AGENCY DKT. NO. 2018-2915

IN THE MATTER OF WILLIAM FOWLER,
GREEN BROOK REGIONAL CENTER,
DEPARTMENT OF HUMAN SERVICES.

William Fowler, appellant, pro se

Anita Pinkas, for respondent Green Brook Regional Center, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: October 30, 2018 Decided: November 26, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of William Fowler from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on May 4, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISISON** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 26, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and Chief ALJ

Date Received at Agency: 11-27-18

Date Mailed to Parties: 11-27-18

mph

OAL DKT. NO. CSV 6408-2018

AGENCY DKT. NO. 20 – 2018-2915

SETTLEMENT AGREEMENT

IN THE MATTER OF

William Fowler

AND

GREENBROOK REGIONAL CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 3/16/18 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.O. 4:08. A.9.3		
2.	NJAC 4A:2-2.3(a)6,	REMOVAL	3/19/18
3.	" " (a)12		
4.			
5.			

B. The Appellant William Fowler withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	ALL ABOVE	SUSTAINED	6 months suspension
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 3/19/18 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of William Fowler 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant understands this is a LAST CHANCE AGREEMENT; any future charge under Administrative Order 4:08, Offense A.9., Abuse of Sick leave, will result in removal. If removal is appealed any settlement agreement reached will not include Appellant's return to work.

J. Appellant agrees to be courteous to all staff at all times as well as professional and business-like. Inappropriate behavior will result in corrective/disciplinary action.

K. Appellant is encouraged to take advantage of the Employee Advisory Service as necessary.

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

10/30/18
DATE

William C Franklin
Appellant

10/30/18
DATE

Respondent

10/30/18
DATE

ON BEHALF OF Local 195, IFPTE

10/30/18
DATE

CBRC
ON BEHALF OF

OAL DKT. NO. CSV 6408-2018

CERTIFICATION

I, William C Fowler, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10/30/18
DATE

William C Fowler
NAME

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER COBB
Chair/Chief Executive Officer

December 4, 2018

Deborah A. Spencer
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Phillip Dowdell, DAG
Department of Law and Public Safety
P.O. Box 081
Trenton, New Jersey 08625

Re: *Jay Sieger v. Department of Law and Public Safety* (CSC Docket No. 2018-3533 and OAL Docket No. CSV 9705-18) - **SETTLEMENT**

Dear Ms. Spencer and DAG Dowdell:

The appeal of Jay Sieger, a Senior Public Safety Telecommunicator with the Department of Law and Public Safety, of his removal effective May 3, 2018, on charges, was before Acting Director and Chief Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on November 26, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on November 27, 2018. Accordingly, the time frame for the Commission to make its final decision will expire on January 11, 2019. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it complies with Civil Service law and rules, there is not a basis to further delay a final disposition in this matter. Thus, the Commission determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 12, 2019.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 9705-18
AGENCY DKT. NO. 2018-3533

IN THE MATTER OF JAY SIEGER, DIVISION OF STATE POLICE, DEPARTMENT OF LAW AND PUBLIC SAFETY.

Deborah A. Spencer, Local 195 IFPTE, for appellant Jay Sieger, pursuant to N.J.A.C. 1:1-5.4(a)6

Phillip Dowdell, Deputy Attorney General, for respondent Division of State Police (Gurbir S. Grewal, Attorney General, attorney)

Record Closed: October 30, 2018 Decided: November 26, 2018

BEFORE **LISA JAMES-BEAVERS,** Acting Director and Chief ALJ:

This matter concerns the appeal of Jay Sieger from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 9, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISISON** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 26, 2018
DATE

LISA JAMES-BEAVERS, Acting Director and Chief ALJ

Date Received at Agency: 11-27-18

Date Mailed to Parties: 11-27-18

mph

OAL DKT. NO. CSV 09705-2018S
AGENCY DKT. NO. 2018-3533

SETTLEMENT AGREEMENT

IN THE MATTER OF

Jay Sieger vs
Dept. of Law & Public Safety Div. of State Police

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

1. The Appellant withdraws his/her appeal and request for a hearing, and the Respondent agrees to: settle this appeal through a General Resignation. The appellant was immediately suspended on September 7, 2017, and the General Resignation will date back to the date of the immediate suspension.

2. The Respondent shall amend the Appellant's personnel records to conform to the terms of the settlement.

3. The Appellant waives all claims against the Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

4. Except for the assessment of the Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

5. The Appellant waives all rights, suits, actions, claims, whether known or unknown, vested or contingent, civil, criminal, or administrative, in law or in equity, against the State of New Jersey, the Department of, [or identify appointing authority] its agents, employees, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this agreement, including but not limited to all claims under Title VII of the Civil Rights Acts of 1964 and 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and any contract express or implied.

Law & Public Safety Division of State Police

6. Both parties agree to waive the right to file exceptions and cross-exceptions.

7. This agreement will become effective only if approved by the **MERIT SYSTEM BOARD**. Any disapproval by the Merit System Board shall not interfere with the rights of either party to pursue the matter further.

10/30/18
DATE

(Print name) Jr. H Sigua, APPELLANT

10/30/18
DATE

ON BEHALF OF APPELLANT
(Print name) Deborah A. Spencer
Local 195 IFPTE

10/30/18
DATE

Phillip Dandell, DAG
ON BEHALF OF RESPONDENT
(Print name) Phillip Dandell, DAG

CERTIFICATION

I, , being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **MERIT SYSTEM BOARD**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10/30/18
DATE (Print name) Jay H Bergen, APPELLANT

11-28-18

A-2

STATE OF NEW JERSEY

In the Matter of Cheryl Borowski
Kean University

CSC DKT. NOS. 2017-1322 & 2017-1391
OAL DKT. NO. CSV 09280-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 23, 2018 (NFA)

The appeal of Cheryl Borowski, former Adjunct Professor, Kean University, appeal of violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy), was before Administrative Law Judge Elissa Mizzone Testa (ALJ), who rendered her initial decision on October 23, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, as well as having reviewed the exceptions and reply, and made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 21, 2018, accepted the attached Administrative Law Judge's initial decision wherein the appellant's appeal was dismissed for lack of jurisdiction.

DISCUSSION

By way of background, in an unrelated appeal of the proper classification of a position filed by a State College employee in October 2017, four months after the subject matter was transmitted to the Office of Administrative Law for a hearing, the primary issue reviewed by the Commission was its jurisdiction with respect to certain classes of State College and University employees. After an exhaustive review of the legislative and regulatory history and the overlapping responsibilities between the Commission and State Colleges and Universities, it was determined that certain classes of employees, such as professors and adjunct professors, were not subject to the provisions of Title 11A of the New Jersey Statutes or Title 4A of

the New Jersey Administrative Code pertaining to the classification of positions. A subsequent review was undertaken to determine whether those classes were similarly not subject to Title 11A and Title 4A in the context of a discrimination appeal. Of note in this regard, *N.J.S.A.* 18A:64-21.2, which became effective on July 9, 1986, provides that professional members of the academic, administrative, and teaching staff are *not* subject to the provisions of Title 11A. Therefore, per that statute, professors, adjunct professors and other teaching staff are not considered Civil Service employees.

N.J.A.C. 4A:7-3.1(a)1 provides in pertinent part, that the State Policy applies to *all employees* and applicants for employment in State departments, commissions, *State colleges or Universities*, agencies, and authorities. *N.J.A.C.* 4A:7-3.2(a) provides that *all employees* and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy. Consequently, all employees of a State College or University, including those employees not covered by Title 11A may file a complaint alleging discrimination under the State Policy. However, the ability to appeal the resulting determination to the Commission is limited to specific classes of employees. Specifically, *N.J.A.C.* 4A:7-3.2(m) states that a complainant who is in the *career, unclassified or senior executive service*, or who is an applicant for employment, who disagrees with the determination of the State agency head or designee, may submit an appeal to the Commission. Moreover, *N.J.A.C.* 4A:7-3.2(n) provides that in a case where a violation has been substantiated, and no disciplinary action recommended, the party against whom the complaint was filed may appeal the determination to the Commission. Although *N.J.A.C.* 4A:7-3.2(n) does not specify that the "party against whom the complaint was filed" must be in the career, unclassified or senior executive service or an applicant for employment, it is clear from a full reading of *N.J.A.C.* 4A:7-3.2 that *the ability to appeal* a determination is to be limited to only applicants for Civil Service employment, or employees already serving in the career, unclassified or senior executive service, *i.e.*, individuals who are in the Civil Service or who are attempting to enter the Civil Service. To conclude otherwise is neither logical nor reasonable. In this regard, since *N.J.A.C.* 4A:7-3.2(m) specifically limits appeals from complainants only to employees or candidates subject to Civil Service law and rules, the same conditions must apply to *N.J.A.C.* 4A:7-3.2(n). To not conclude so would give parties against whom a complaint is filed who are not subject to Civil Service law and rules greater appeal rights than similarly situated complainants under *N.J.A.C.* 4A:7-3.2(m). No such intent can be found in the legislative or regulatory history.

Consequently, as the appellant in this matter was an Adjunct Professor, her appeal to the Commission of the determination made regarding the subject State Policy matter was invalid. The Commission notes that variables such as the fact that its interpretation of the rules above prohibiting such classes of employees the right to appeal discrimination matters to the Commission occurred after the

appellant's original appeal, or the fact that other previous appellants may have been afforded such rights, cannot be used as justification for the continuance of any such appeal. It is clear from the Commission's analysis that such employees do not have the right to appeal discrimination determinations to the Commission and any such appeals permitted previously were allowed in error. Thus, a current appellant cannot assert any estoppel or other rights to such an appeal as no vested or other rights are accorded by an administrative error. *See Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super.* 538 (App. Div. 1998). Accordingly, the ALJ's dismissal of the appellant's appeal for lack of jurisdiction was proper.

ORDER

The Civil Service Commission therefore dismisses the appeal of Cheryl Borowski for lack of jurisdiction.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF NOVEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. CSV 09280-17

AGENCY DKT. NO. 2017-1322 &
2017-1391

CHERYL BOROWSKI,

Petitioner,

v.

KEAN UNIVERSITY,

Respondent.

Raymond Staub, Esq., for petitioner (Destribats, Campbell, De Santis, McGee & Staub, attorneys)

Marolhin D. Mendez, Deputy Attorney General., for respondent (Gurbir S. Grewal, attorney)

Record Closed: October 19, 2018 Decided: October 23, 2018

BEFORE **ELISSA MIZZONE TESTA,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 28, 2017, the above captioned matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.A.C. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was conducted in this matter on June 14, 20 and 26, 2018. Prior to the submission of Post Summation Briefs, a Directive from the Director of the Civil Service Commission, Christopher Myers, was forwarded to the undersigned indicating that the OAL does not have jurisdiction to review this matter. See, correspondence dated October 4, 2018 and October 19, 2018 attached hereto. More specifically, that Adjunct Professors are not considered Civil Service employees and therefore, do not have the standing to appeal a State Policy determination. Since C.B. is serving in a position not subject to Title 11A, this Directive impacts her appeal before the OAL because the Civil Service Commission does not haver jurisdiction to review her appeal. Consequently, as the issue of the Commission's jurisdiction was not raised prior to its review of C.B.'s appeal, this matter was improperly referred to the OAL for a hearing.

ORDER

It is therefore **ORDERED** that this matter is hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-**

0312, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 23, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Date Mailed to Parties:
sej

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Director

October 4, 2018

Honorable Elissa Testa, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Cheryl Borowski v. State of NJ/ Kean University
OAL Docket No.: CSV 09280-2017N

Dear Judge Testa:

Kean University is in receipt of correspondence from the Director of the Civil Service Commission (CSC) regarding a separate matter that impacts this case. Please see attached letter dated October 1, 2018. In this letter, the Director expressly says adjunct professors are not considered Civil Service employees and therefore do not have the right to appeal a State Policy determination. This directly impacts Borowski's appeal as the CSC does not have jurisdiction to review these matters.

Given this letter, we request this matter be formally withdrawn. Should Your Honor need any additional information, please do not hesitate to contact our office.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: Marolhin D. Mendez
Deputy Attorney General

Cc: Raymond C. Staub, Esq.
Christopher Myers, Director of CSC

Phil Murphy
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

Deirdré L. Webster Cobb
Chair/Chief Executive Officer

October 19, 2018

Honorable Elissa Testa, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: In the Matter of C.B., Kean University; Discrimination Appeal (CSC Docket Nos. 2017 and 2017-1391)

Dear Judge Testa:

This letter is in furtherance of the above-referenced matter which was referred for a hearing at the Office of Administrative Law (OAL) by the Civil Service Commission (Commission) on June 21, 2017. In this matter, C.B. is challenging the determination of the Chief of Staff, Kean University, which found that she had violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, in a classification appeal filed by a State College employee in October 2017, four months after the matter of C.B. was referred for a hearing, the primary issue reviewed by the Commission was the matter of its jurisdiction with respect to certain classes of employees of the State Colleges and Universities. After an exhaustive review of the legislative and regulatory history and the overlapping responsibilities between the Commission and State Colleges, it was determined that certain classes of employees, such as professors and adjunct professors, were removed from the provisions of Title 11A of the New Jersey Statutes (Title 11A). As a result, this agency reviewed the status of the employees of State Colleges and Universities to determine whether professional members of the academic, administrative and teaching staff, and the non-professional and clerical staff in those institutions were removed from Civil Service with regard to discrimination matters. In particular, *N.J.S.A.* 18A:64-21.2, which became effective on July 9, 1986, provides that professional members of the academic, administrative, and teaching staff are *not* subject to the provisions of Title 11A. Therefore, professors,

adjunct professors and other teaching staff are not considered Civil Service employees, and thus, as set forth below, do not have the right to file an appeal to the Commission of a State Policy determination.

In that regard, *N.J.A.C.* 4A:7-3.1(a)1 provides in pertinent part, that the State Policy applies to *all employees* and applicants for employment in State departments, commissions, *State colleges or universities*, agencies, and authorities. *N.J.A.C.* 4A:7-3.2(a) provides that *all employees* and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy. Consequently, all employees of a State College or University, including those employees not covered by Title 11A may file a complaint alleging discrimination under the State Policy. However, the ability to appeal the resulting determination to the Commission is limited to specific classes of employees. *N.J.A.C.* 4A:7-3.2(m) states, in relevant part, that a complainant who is in the *career, unclassified, or senior executive service*, or who is an applicant for employment, who disagrees with the determination of the State agency head or designee, may submit a written appeal, within 20 days of the receipt of the final letter of determination from the State agency head or designee, to the Civil Service Commission. Therefore, it is clear that C.B., as a former Adjunct Professor with Kean University, does not have a right to appeal the Chief of Staff's determination.

Consequently, as the issue of the Commission's jurisdiction was not raised prior to its review of C.B.'s appeal, the matter of the disputes of material fact was improperly referred to OAL for a hearing. As noted above, the matter of jurisdiction arose in another case before the Commission and it was determined that certain classes of State College and University employees, such as adjunct professors and professors, were statutorily removed from the provisions of Title 11A effective July 9, 1986. Therefore, since July 2018, the Commission has advised those employees serving in a position not subject to Title 11A that it does not have the jurisdiction to review any type of appeal.

Sincerely,

Christopher Myers
Director

c: Elizabeth Davies, DAG
Mamta Patel

12-5-18

A-2

STATE OF NEW JERSEY

In the Matter of Dwayne Austin
Hudson County Sheriff's Department

CSC DKT. NO. 2018-1881
OAL DKT. NO. CSV 00726-18

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 7, 2018 BW

The appeal of Dwayne Austin, Public Safety Telecommunicator, Hudson County Sheriff's Department, 30 working day suspension, on charges, was heard by Administrative Law Judge Margaret M. Monaco, who rendered her initial decision on October 26, 2018 reversing the 30 working day suspension. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 30 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Dwayne Austin. The Commission further orders that appellant be granted 30 days back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF DECEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, Northern Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00726-18
AGENCY DKT. NO. 2018-1881

IN THE MATTER OF DWAYNE AUSTIN,
HUDSON COUNTY SHERIFF'S
DEPARTMENT.

Samuel B. Wenocur, Esq., for appellant Dwayne Austin (Oxfeld Cohen, attorneys)

John A. Smith III, Assistant County Counsel, for respondent Hudson County (Donato J. Battista, County Counsel)

Record Closed: October 25, 2018 Decided: October 26, 2018

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

This matter involves disciplinary charges against appellant Dwayne Austin, who is employed as a 911 operator with the Hudson County Sheriff's Department (the Department). Appellant appeals from a thirty-day suspension stemming from his use of sick time.

PROCEDURAL HISTORY

The Department issued a Preliminary Notice of Disciplinary Action dated September 20, 2017, informing appellant of the charges of inability to perform duties; chronic or excessive absenteeism; conduct unbecoming a public employee; and other sufficient cause issued against him. Specifically, the PNDA states:

> You have surpassed the allotted usage of sick days for calender [sic] year 2017. As of 9-20-17 you have logged 17 sick days. You have also demonstrated a pattern of absences on 4 separate occasions as indicated on the departmental reports and sign-in sheets therefore causing an inability and inefficiency to your performance by not be[ing] at your position during the directed hours of operation. Your lack of action for not following the Rules and Regulations of the Hudson County Sheriff's Office is conduct unbecoming a public employee.

After a departmental hearing, the Department issued a Final Notice of Disciplinary Action dated December 18, 2017, sustaining the charges and providing for appellant's suspension for thirty days. Appellant filed an appeal, and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on June 7, 2018. After the conclusion of the testimony, the record remained open for the receipt of post-hearing submissions. The parties filed briefs in support of their respective positions, and the record closed upon receipt of the last submission.

FACTUAL DISCUSSION

At the hearing, the Department presented testimony by principal personnel technician Richard Sires and 911 coordinator Elba D'Aiuto, and appellant testified on his own behalf. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following undisputed **FACTS**.

Appellant has been employed as a full-time 911 operator with the Department since June 20, 2014. (R-3.) Elba D'Aiuto, who holds the position of 911 coordinator, supervised 911 employees, including appellant, during the pertinent period.

Pursuant to the applicable collective-bargaining agreement, after an employee's first calendar year of service, the County provides the employee with 15 days of sick leave at the beginning of each calendar year, and unused sick leave is accumulated from year to year without limit. (R-2.) At the beginning of 2017, appellant had 19.5 accrued sick days and, after receiving 15 days for calendar year 2017, he had a total of 34.5 days of sick leave. (R-3.)

Appellant's normal shift was 4:00 p.m. to 12:00 a.m. Appellant's schedule rotated so that he had one out of every three weekends off and he was never regularly scheduled to work more than three or four days in a row. As of September 20, 2017, appellant had used 17 of his 34.5 sick days. (J-1.) He used sick days on April 6, 8, 9 and 10, 2017; June 21, 22, 23, 26, 27 and 28, 2017; July 30 and 31, 2017; August 2, 3, 4 and 31, 2017; and September 2, 2017. (See J-1; R-3.) The 17 days resulted from four sick-leave occurrences that were at least 2 days long. In April, appellant was out sick for 4 work days; he was out sick on April 6, he had a day off on April 7, and he was out sick on April 8, 9 and 10, 2017. In June, appellant was out sick for 6 work days; he was out sick on June 21, 22 and 23, he had days off on June 24 and 25, and he was out sick on June 26, 27 and 28, 2017. In July/August, appellant was out sick for 5 work days; he was out sick on July 30 and 31, he was off on August 1, he was out sick on August 2, 3 and 4, 2017, and he was off on August 5, 2017. In August/September, appellant was out sick for 2 work days; he was out sick on August 31, he was off on September 1, and he was out sick on September 2, 2017.

The County Employee Handbook, which appellant received, addresses "Sick Leave Abuse" and states:

> Abuse of sick leave or chronic or excessive absenteeism will result in discipline up to and including discharge. Abuse includes using sick leave when you are not ill. Examples of chronic or excessive absenteeism include situations where

> employees routinely use more than the amount of sick leave earned in a calendar year or where a pattern of absences is established.
>
> [J-3; emphasis added.]

A substantially similar provision is set forth in the collective-bargaining agreement. (See R-2.)

The Department Rules and Regulations, which appellant received, also addresses "Abuse of Sick Leave." (R-1.) Specifically, Section 2.1 of the Rules and Regulations states:

> An employee who has been absent on sick leave for periods totaling more than fifteen (15) days in one calendar year consisting of periods of less than five (5) days may be required to submit acceptable medical evidence for any additional sick leave in that year and may be the subject of disciplinary action.
>
> An employee whose absence on sick leave indicates a pattern; i.e., adjacent to days off, holidays or vacation or compensation days, which occurs more than five (5) times in one calendar year will be required to submit acceptable medical evidence for any additional sick leave in that year and may be the subject of disciplinary action.
>
> [Emphasis added.]

When an employee with the 911 call center is absent from work, another employee must cover the shift, which may result in mandatory overtime.

The submitted disciplinary record for appellant does not include prior discipline related to appellant's use of sick time. Appellant's prior disciplinary record consists of the following: a five-day suspension, via Notice of Minor Disciplinary Action dated January 23, 2015, for sleeping on duty and conduct unbecoming (R-5); a twenty-day suspension, with an additional ten days held in abeyance, for sleeping on duty (R-4); a two-day suspension, via Notice of Disciplinary Action dated May 9, 2016, for reporting late for duty and failing to call during the period of January to May 2016 (R-6); a five-day

suspension, via Notice of Disciplinary Action dated October 31, 2016, for reporting late for duty and failing to call during the period of January to October 2016 (R-7); a written/verbal warning on June 15, 2017, for reporting late for duty and failing to call during the period of December 15, 2016, to June 15, 2017 (R-8); and a written/verbal warning on July 3, 2017, for failing to call the 911 center while using sick time in June 2017 to update his status. (R-9).

In addition to the evidence that forms the foundation of the above findings of facts, a summary of other pertinent testimony follows.

The Testimony

Richard Sires

Sires addressed the absenteeism provisions set forth in the County Employee Handbook, the collective-bargaining agreement, and the Department Rules and Regulations. He agreed that the Department Rules and Regulations were more narrowly tailored to appellant's department than the County Employee Handbook, which applies to all County employees. Sires also agreed that the County Employee Handbook and the collective-bargaining agreement contain substantially similar language and refer to "situations where employees routinely use more than the amount of sick leave earned in a calendar year." Sires articulated his belief that exceeding fifteen sick days in a year for the first time would probably support a warning or something else. He did not know whether appellant had used more than fifteen sick days in any prior year. Sires acknowledged that the Department Rules and Regulations require more than five instances in one calendar year of alleged sick days adjacent to a scheduled day off, a holiday, a vacation day, or a compensation day for an employee to be disciplined. Although the Preliminary Notice of Disciplinary Action charges appellant with a pattern of absences on four separate occasions, Sires testified as to five occasions[1] and could not clearly explain the basis for some of appellant's absences

[1] These occasions included the following: appellant was out sick on April 6, 2017, and had a day off on April 7, 2017; appellant was out sick on June 23, 2017, in conjunction with the weekend off on June 24 and 25, 2017; appellant was out sick on August 2, 2017, in conjunction with time off on August 1, 2017;

being considered an "in conjunction" sick day. He further admitted that since the Department had identified only five instances, appellant did not violate Section 2.1 of the Department Rules and Regulations as it relates to a pattern of absences.

Elba D'Aiuto

D'Aiuto testified that she had spoken to appellant about his attendance around June 2017 and that this discussion occurred before her written/verbal warnings to appellant on June 15 and July 3, 2017. D'Aiuto acknowledged that this discussion was not memorialized in a document and that the warnings she issued do not reference the number of appellant's absences or a warning that he was approaching fifteen sick days. According to D'Aiuto, she previously counseled appellant several times about his tardiness and absences, but could not identify when this occurred, except as documented in the notice she issued in November 2016, which refers to appellant's pattern of absences. (R-7.) She acknowledged that this referenced pattern of absence was not the subject of disciplinary action. Although D'Aiuto opined that appellant had previously used more than fifteen sick days in a calendar year, she did not provide detail as to the year this occurred or documents to support her testimony, which is not reflected in any disciplinary action against him. Although D'Aiuto also testified about seeing appellant at the mall on one of the days that he had called out sick, I give no weight to this uncorroborated testimony, which appellant denied, in that it goes beyond the scope of the charges against him.

Dwayne Austin

Appellant described that he had an underlying medical condition (i.e., diabetes) that affected his ability to work. Appellant disputed D'Aiuto's assertion that he had previously used more than fifteen sick days in a calendar year. Appellant acknowledged that he had discussions with D'Aiuto regarding his attendance, but described that most of these discussions involved his lateness. He testified that, prior to

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appellant was out sick on August 4, 2017, in conjunction with the weekend off on August 5 and 6, 2017; and appellant was out sick on August 31, 2017, in conjunction with a day off on September 1, 2017. (See J-2.)

the disciplinary action in 2017, D'Aiuto did not discuss with him the number of sick days he used, and appellant brought in doctor's notes for all of his seventeen absences. Appellant described that he distinguished sick days from absences; he understood absences to be when a person chose not to go to work, and he was not aware that he could not use sick time if he was sick.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** the following additional **FACTS**:

Appellant suffered from a medical condition in 2017 and brought in doctor's notes for all of his seventeen absences. Although D'Aiuto had a discussion with appellant regarding his attendance in 2017, I am not persuaded that this discussion concerned the number of sick days that appellant had used, which topic is not documented in the warnings D'Aiuto later issued to appellant. The credible, competent evidence also fails to demonstrate that appellant had previously used more than fifteen days in a calendar year. Although D'Aiuto articulated a belief that appellant had previously used more than fifteen days, the Department did not introduce documentation regarding appellant's attendance prior to 2017, and appellant's prior disciplinary actions and written warnings do not involve his use of sick time. That appellant had previously exceeded his allotted sick days is further undermined by the fact that appellant has only been employed by the Department since June 2014 and had 19.5 accrued sick days at the beginning of 2017.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against him

and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The Department bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for, among other causes, an inability to perform duties, chronic or excessive absenteeism, conduct unbecoming a public employee, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Although the regulation does not define when absenteeism will rise to the level of chronic or excessive, it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently, Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531, and "excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit." American Heritage Dictionary 638 (3rd ed. 1992); see Rios v. Paterson Hous. Auth., CSV 3009-02, Initial Decision (August 1, 2005), adopted, MSB (September 13, 2005), http://njlaw.rutgers.edu/collections/oal/.

In the within matter, the County Employee Handbook, collective-bargaining agreement, and Department Rules and Regulations specifically define when an

employee's absence will be deemed to rise to the level of sick-leave abuse warranting disciplinary action. The County Employee Handbook and collective-bargaining agreement explicitly state that "chronic or excessive absenteeism include[s] situations where employees routinely use more than the amount of sick leave earned in a calendar year." (Emphasis added.) Clearly, an event must occur more than once before it can be considered routine. See Cambridge English Dictionary (defining routinely "as part of the usual way of doing things"), https://dictionary.cambridge.org/us/dictionary/english/routinely; Merriam-Webster (defining routine as "of a commonplace or repetitious character"), https://www.merriam-webster.com/dictionary/routine; English by Oxford Dictionaries (defining routinely as "part of a regular procedure" and "[f]requently and without proper consideration of the consequences"), https://en.oxforddictionaries.com/definition/us/routinely. Accordingly, by their terms, the County Employee Handbook and the collective-bargaining agreement require evidence that the employee has previously used more than the allotted amount of sick days in a given year before an employee can be subject to disciplinary action. In short, the Department failed to demonstrate that appellant had exceeded fifteen sick days prior to 2017.

The Department Rules and Regulations also do not support grounds for disciplining appellant because of his seventeen sick days. Rather, the Rules and Regulations state that an employee may be subject to disciplinary action when the employee "has been absent on sick leave for periods totaling more than fifteen (15) sick days in one calendar year consisting of periods of less than five (5) days." (Emphasis added.) The plain reading of this provision does not purport to capture situations when an employee exceeds fifteen sick days in a calendar year due to an extended sick leave consisting of periods of five or more sick days. In the within matter, appellant had four sick-leave occurrences, two of which totaled eleven days and were for periods of five and six days in length. It was only because of those extended absences that appellant used more than fifteen sick days in 2017.

The Department also failed to demonstrate a pattern of absences by appellant warranting disciplinary action. Initially, all of the identified pattern-of-absence days were part of longer sick leaves, and the Department failed to demonstrate the basis for

designating certain days as patterns-of-absence days. For example, some of the asserted patterned days were in the middle of extended sick leaves, while other sick days adjacent to scheduled days off were not considered pattern. More significantly, the Department Rules and Regulations define a pattern of absences that may subject an employee to discipline as when an employee uses sick days "adjacent to days off, holidays or vacation or compensation days, which occurs more than five (5) times in one calendar year." (R-1; emphasis added.) Simply put, the Preliminary Notice of Disciplinary Action charges appellant with a pattern of absences on only four occasions. Although Sires testified as to five occasions, this testimony also falls short of the more-than-five-times requirement set forth in the Rules and Regulations. Indeed, Sires candidly acknowledged that since there were only five alleged instances in 2017, appellant's absences did not violate this provision of the Department Rules and Regulations.

Based upon a review of the totality of the evidence, I **CONCLUDE** that the Department has failed to shoulder its burden of proving, by a preponderance of the credible evidence, that appellant's use of seventeen sick days constitutes an inability to perform duties, chronic or excessive absenteeism, conduct unbecoming a public employee, or other sufficient cause that provides grounds for disciplinary action against him.

ORDER

I **ORDER** that the charges set forth in the Final Notice of Disciplinary Action dated December 18, 2017, be and hereby are **DISMISSED**. I further **ORDER** that back pay and other benefits be issued to appellant as may be dictated by N.J.A.C. 4A:2-2.10.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 26, 2018
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: October 26, 2018

Date Mailed to Parties: October 26, 2018

jb

APPENDIX

List of Witnesses

For Appellant:

Dwayne Austin

For Respondent:

Richard Sires

Elba D'Aiuto

List of Exhibits in Evidence

Joint:

J-1 Stipulation dated June 7, 2018

J-2 Summary of Absences

J-3 Excerpt from the County of Hudson Employee Handbook and acknowledgment of receipt

J-4 Preliminary Notice of Disciplinary Action dated September 20, 2017

J-5 Final Notice of Disciplinary Action dated December 18, 2017

For Appellant:

None

For Respondent:

R-1 Excerpt from the Hudson County Sheriff's Office Rules and Regulations

R-2 Excerpt from the Collective Bargaining Agreement

R-3 Annual Attendance Record

R-4 Final Notice of Disciplinary Action dated July 14, 2016, with attachments

R-5 Notice of Minor Disciplinary Action dated January 23, 2015

R-6 Notice of Disciplinary Action dated May 9, 2016, with attachments

R-7 Notice of Disciplinary Action dated October 31, 2016, with attachments

R-8 Written/Verbal Warning dated June 15, 2017

R-9 Written/Verbal Warning dated July 3, 2017

STATE OF NEW JERSEY

In the Matter of George Bailey
Cumberland County, Department of Corrections

CSR DKT. NO. 2018-3124
OAL DKT. NO. CSV 06489-18

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 7, 2018 BW

The appeal of George Bailey, County Correction Officer, Cumberland County, Department of Corrections, removal effective April 17, 2018, on charges, was heard by Administrative Law Judge Dorothy Incarvito-Garrabrant, who rendered her initial decision on November 5, 2018 reversing the removal. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority from April 17, 2018 to the actual date of reinstatement. *See N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Public Safety*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues

concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of George Bailey. The Commission further orders that appellant be granted back pay, benefits, and seniority from April 17, 2018 to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF DECEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 06489-18

AGENCY DKT. NO. N/A

2018-3124

IN THE MATTER OF GEORGE BAILEY,
CUMBERLAND COUNTY.

Peter Paris, Esq. for appellant, George Bailey (Law Office of David Beckett, attorneys)

Theodore Baker, Esq., Cumberland County Counsel for respondent, Cumberland County

Record Closed: September 21, 2018 Decided: November 5, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Appellant, George Bailey, a Corrections Officer employed by Cumberland County, Department of Corrections (CCDOC or respondent) appeals from the determination of respondent that he be terminated, pursuant to a Final Notice of Disciplinary Action (FNDA), dated April 18, 2018, for violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming an employee; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically Cumberland County Department of Corrections Discipline Policy 3.02A, a/k/a 84-17 C(11) conduct unbecoming an employee.

The appellant denies the allegations that he had inappropriate sexual contact with a former inmate. He also contends that he was inappropriately added to a list of identified officers, who may have had improper relationships with that inmate, and that he was added to that group after that inmate instituted a civil suit in the United States District Court for New Jersey against the respondent and its corrections officers and officials. As a result, he maintains he was targeted for termination with these false and unsubstantiated allegations.

PROCEDURAL HISTORY

On March 30, 2017, respondent issued a first Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications against appellant. Following a departmental hearing February 2, 2018, the respondent issued a Final Notice of Disciplinary Action on April 18, 2018, sustaining the charges brought in the preliminary notice and terminating appellant from employment effective April 17, 2018. Appellant filed a timely notice of appeal. The matter was transmitted to the Office of Administrative Law on May 4, 2018, for hearing as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

On August 14, 2018, after the first day of the hearing, the Honorable Dorothy Incarvito-Garrabrant, ALJ, entered a Confidentiality Order, which was consented to by counsel for both appellant and respondent, to protect certain discovery and evidential material, which may contain sensitive and confidential information about the parties herein and third parties, which should not be disclosed to third parties, other litigants, or to the public.[1] three exhibits, one which was redacted in part and two which were not have been placed in a sealed envelope and transmitted with this decision.

[1] Counsel for the parties advised that other civil service disciplinary matters are pending before the (OAL) which involve this inmate and other corrections officers, arising from allegations of inappropriate conduct and relationships, among other charges.

The hearing in this matter was held on August 2, August 30, and September 4, 2018. At the time of the hearing, due to the time constraints and scheduling of the hearing, the parties discussed and agreed that the initial decision would be submitted on November 5, 2018. The parties filed post-hearing briefs and the record closed on September 21, 2018.[2]

FACTUAL DISCUSSION

Testimony

For Respondent

Jennifer Cantoni (Cantoni)[3] is a forty-two-year-old woman, who admitted to being a heroin addict since she was eighteen years old.[4] Cantoni's heroin addiction caused her to be repeatedly incarcerated in the Cumberland County Jail, and for a short sentence in New Jersey State Prison, for most of the last twenty-four years. Cantoni stated that her heroin use caused her to commit and be convicted of multiple criminal acts of shoplifting and drug and paraphernalia possession. (CCDOC-1.) Cantoni admitted that her life-long drug addiction and heroin use has led to health and loss of memory issues. Cantoni testified that she has suffered, family, social, legal, and financial problems, as a result of her drug addiction and use. Cantoni admitted she prostituted herself to support her drug addiction. She only recollected being free from drug use after completing a one-

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[2] Appellant and respondent consented to the admission of an additional exhibit labeled P-2, which was provided with appellant's closing brief. This exhibit was a copy of multiple text messages from and to the inmate involved in this proceeding and a separate correction officer, who was previously employed by respondent. The parties argued the relevance of these messages in their closing summations. P-2 was admitted into evidence and given the weight deemed appropriate by the undersigned ALJ.

[3] Cantoni was accompanied in this proceeding by her social worker and Mark Natale, Esq., the attorney representing her in her litigation filed in the U.S. District Court against respondent and several officers under Docket No. 1:17-cv-07893. (CCDOC-3.) By consent of all parties, Mr. Natale was permitted to be present throughout the proceedings, although he did not participate.

[4] At the time of her testimony in this matter, August 2, 2018, Cantoni was in a residential rehabilitation program at Integrity House in Newark, New Jersey. She had been released to that facility from the Cumberland County Jail as a result of her cooperation with investigators in this and related matters involving other correction officers. During her testimony, Cantoni denied being under the influence of any drugs, alcohol, or substances, which would impair her ability to understand what she was doing or her ability to testify.

year treatment program in Michigan in 1999. She began using heroin again within one year of that treatment.

Most of Cantoni's incarcerations were in the Cumberland County Jail. Cantoni related that her incarcerations started when she was eighteen. Female inmates are assigned to the "A-pod" unit at the jail, and are separated from male inmates. Over the course of her incarcerations, she became a "trustee" worker. A trustee worker was permitted to leave the unit and do jobs like cleaning the warden's office or assignments in the admissions office. Cantoni stated that she was not supervised while doing her trustee work. Cantoni also stated that there were officers who supervised the trustees. She then stated that she was not supervised, when cleaning the Warden's office. Cantoni denied that she manipulated any of the officers to be selected as a trustee worker. She stated that she was selected because "[she] was trustworthy." Cantoni testified that she tried to become friends with the officers to get cigarettes, food, and money in jail from them.

Cantoni stated that she first encountered appellant when she was working as a trustee in CCDOC jail. She believed she first met him about five years after she began serving sentences in the jail. Her first recollection was seeing him in about 2000 talking to other officers. Appellant supervised Cantoni once while she was required to go outside the jail to clean the windows. Cantoni testified she knew his name and who he was. Cantoni stated that appellant recognized her name a couple of years after she began going to jail because he called her by it, while she was in the jail. When asked if there was any physical contact with appellant in the jail, Cantoni indicated there was not. She further stated that he did not give her any contraband while she was in jail. Cantoni thought they were friends while she was incarcerated in jail.

Cantoni testified that in 2008 or 2009 she had her first contact with appellant. It was outside of jail. It occurred at 2nd Street in Millville. Cantoni said this is an area known for prostitution. Appellant picked her up and they went back to appellant's house where they had sex, for which he paid her. Cantoni stated she believed that appellant knew who she was, when he picked her up in Millville; however, she could not remember if he knew her name on this occasion. She believed his house was down the street from the jail in

Bridgeton. She did not recall the address, house, or street. She stated she remembered that his daughters' room was really pretty. She stated that appellant had twin daughters. Cantoni said that she was pretty sure the appellant drove a red SUV, but she was not sure if it was red or blue. Cantoni could not remember if he drove her back to Millville or not after their liaison.

She had learned in the jail that appellant had a transportation company that he owned.

Within two years, sometime between 2002-2005, Cantoni had her next contact with appellant. This was outside of jail. Cantoni stated that appellant called her. Appellant picked her up and took her to the same house. Robert Brownlow (Brownlow) was at the appellant's house doing construction. Cantoni knew Brownlow socially. While appellant and Cantoni were having sexual relations, appellant called Brownlow into the room and asked if he wanted to have sex with them. Cantoni stated she just gave him sad eyes to discourage him from joining in, and Brownlow declined the offer. Cantoni stated she knew Brownlow because he was a drug user. She knew Brownlow from jail.

The third contact between Cantoni and the appellant was at the Days Inn in Vineland. Appellant came to the Days Inn with a friend to buy lawn equipment from Cantoni's friend, Robert Kobash (Kobash), who had a lawn care business. Cantoni alleged that appellant paid Kobash three bricks of heroin for the lawn equipment. They made arrangements for her to go to appellant's house and have sex with him. Cantoni could not remember the date. She stated anywhere from 2001 to 2006 or 2007.

The fourth encounter occurred at her friend Lisette's apartment on Walnut Road. Cantoni needed money for heroin because she was sick and in withdrawal. Appellant came to the apartment and demanded oral sex, for which he would pay her $20. She was too sick, and he refused to give her the money for the heroin before he received the oral sex. Appellant ended up leaving with his money.

Cantoni and appellant had no other encounters outside of jail. Cantoni was subsequently sentenced to CCDOC jail again. During this jail term she saw appellant. He was still supervising the trustees.

Cantoni's son's father, Jimmy Pittman, met appellant in 2010 in jail.[5] He worked for the appellant in jail on a maintenance detail. Pitttan told Cantoni that appellant showed Pittman and others pictures of her birthmark, which is located on her lower back. Cantoni testified that she never saw the pictures and did not know they had been taken.

Cantoni admitted she never reported the incidents with appellant or the allegations about the picture to anyone at CCDOC. Cantoni was interviewed by Internal Affairs investigators Ortiz and Holbrook in 2016. Cantoni testified that, before speaking to them, she knew it had to be about another officer, Ellis, with whom she was involved in a relationship. When they called she testified that she knew Ellis was the only thing they could be calling me about. She did not mention appellant during that interview.

Ellis then went to the prosecutor's office about the picture and appellant. Subsequently, Cantoni gave an interview to the prosecutor's office on September 29, 2016. (CCDOC-2.) Relative to this interview, Cantoni testified that she was unable to tell them everything because she "was so messed up."

Cantoni testified that during that interview she was using heroin and scared. Cantoni admitted she told the investigators that she had not used heroin and was not under the influence during the interview. That was a lie. She alleged that she did not mention appellant during the interview because she was so confused at the time. It was only after Ellis talked to Cantoni about talking to the prosecutor's office that she did it. Cantoni testified that she asked Ellis "[w]ho do I talk about?" to which Ellis said tell it all. Cantoni only made the allegations against appellant after Ellis, got in trouble for their relationship and he urged her to talk about the other officers.

[5] Cantoni and Pittman's son was placed for adoption.

Cantoni testified that her drug use has "messed my brain up." She stated she remembers what occurred, but does not remember everything.

Cantoni acknowledged she is suing respondent and officers in federal court. (CCDOC-3.) Cantoni admitted that her drug use has damaged her body and her memory. She cannot recall dates and places. She engaged in prostitution activities regularly to support her drug habit.

In February 2017, Cantoni was interviewed by prosecutor's office by Investigator Cuff. Cantoni revealed she lied in the original interview because she was under the influence of heroin at that time. She told Cuff how she beat the drug tests she took.

Cantoni further testified that in jail she learned how to manipulate people. She had to lie part of the time as part of the prostitution and drug use lifestyle. Cantoni insisted she has never lied under oath.

Other than the incidents she testified to, she did not have any other contact with the appellant.

Michael Palau (Palau), Captain Cumberland County Department of Corrections, testified that he has been employed by the CCDOC for thirty-five years. He is the daily operations Captain. He testified that in or about 1995, recruits were trained by him in house. This was called agency training and was different from academy training. Palau stated that all recruits and officers were trained in policies and procedures prohibiting the fraternization and familiarity with inmates and ex-inmates. Palau testified that officers are prohibited from engaging in any relationships with inmates or ex-inmates. This was to ensure their credibility.

In 2000-2001, Warden Glen Saunders promulgated a new policy consistent with this prohibition. The officers acknowledged receipt of the policy through sign in sheets. CCDOC Policy 4.13 dealt with being unduly familiar with or fraternizing with inmates and ex-inmates. (CCDOC-4.) CCDOC 4.18 is the policy, which prohibits officers from engaging in unlawful activities. (CCDOC-5.) That policy was incorporated into and

replaced by CCDOC 4.22, which also provides that an officer cannot become overly familiar with inmates or ex-inmates. (CCDOC-6.)

Palau testified that he "assumed" appellant got all of the policies and procedures, but could not absolutely verify it because it appeared at least one sign in sheet was missing. However, appellant had actual notice of these policies because he had been involved in a previous Internal Affairs investigation. In that investigation, one of appellant's drivers in his transportation business parked a vehicle in the Captain's spot at the jail. The driver was a former inmate and was at the jail for a visit with an inmate. Appellant was charged with being unduly familiar with an ex-inmate. This charge was dismissed; however, this gave appellant actual notice of the policy in 2011.

Ernest Cuff, Jr., (Cuff), Chief of Staff, Cumberland County Prosecutor's Office, testified that he has been employed by the prosecutor's office for thirteen years. He was assigned to investigate accusations made by Cantoni. Cuff stated that this occurred after a declination to charge Ellis was issued. After that occurred, Ellis' attorney Daniel Rosenberg, Esq. provided information of wrongdoing by other officers, including the appellant.

Cuff investigated Cantoni's allegations about appellant. Appellant was one of thirteen officers identified by Cantoni for prohibited conduct. Relative to appellant, Cuff interviewed Cantoni, Pittman, Brownlow, who was incarcerated at Bayside State Prison, and had a telephone interview with Kobash. Cuff testified that Brownlow died in September 2017. Cuff had recorded his interview with Brownlow in Bayside. (CCDOC-7.)

Cuff stated that Cantoni was reluctant to hurt Ellis and his job. They had been in a relationship for seven to eight years. Cantoni admitted to Cuff that she is "manipulative," resulting from years of her lifestyle. As the officers became more familiar with her, she became more manipulative towards them.

Cantoni said that appellant was "another pig." Cuff stated that he asked her questions to verify her story about appellant. She could not describe appellant's house,

except to state that he had twin daughters with nice bedrooms. She never saw the pictures that appellant took and shared with Pittman. She was unaware appellant had taken any pictures of her.

Cantoni and Pittman had a child together. Cantoni stated that Kobash sold lawn equipment to appellant in return for three bricks of heroin. Cuff stated this was not corroborated.

Brownlow was a carpenter by trade. He worked at appellant's house. On one occasion, appellant got a phone call and left the residence. Appellant came back with Cantoni. Appellant offered for Brownlow to have sex with Cantoni and him. Brownlow declined the offer. Cantoni was a friend of Brownlow's fiancé. According to Cuff, Cantoni's and Brownlow's stories matched up about this incident.

Brownlow told Cuff that appellant had power with CCDOC. Appellant had inmates beat up other inmates. Cuff stated that this was not corroborated.

Cuff interviewed Pittman. Pittman told Cuff that appellant showed him a picture of Cantoni's tattoo and birthmark on her rear. Pittman could not name any other inmates who saw the photograph.

Cuff interviewed Kobash on the telephone. Kobash had been in a relationship with Cantoni. He called Cantoni a "liar." Kobash stated that he never sold any lawn equipment to appellant in exchange for heroin. A guy named Adam, who he had met in CCDOC and who had been a drug dealer, bought the equipment for cash. Kobash stated that appellant was not there when he sold the lawn equipment and did not know about the sale. Kobash stated that it is hard to tell the truth from lies when it comes to Cantoni.

There were no criminal charges against appellant. Cuff did not get phone records or any pictures after the criminal charges were declined. He never saw the alleged photograph.

Robert Brownlow, (Brownlow), died in September 2017. He was interviewed by Cuff on March 8, 2017, at the Southern State Correctional Facility. Brownlow knew Cantoni. His fiancé and Cantoni were friends before Cantoni became a prostitute to support her heroin addiction. Brownlow worked on appellant's maintenance detail in the CCDOC. Browlnow stated that he did work at appellant's home beginning in 2008. He identified the location of appellant's home and described it. He worked at the home prior to a garage being constructed there.

He was working at appellant's home when appellant received a telephone call and left. Appellant came back with Cantoni and they went into the bedroom. Appellant offered to have him join them having sex. After seeing Cantoni's look, Brownlow declined to have sex with them. Brownlow felt bad for Cantoni.

While in jail, Brownlow heard appellant tell other officers that Cantoni would have sex with them if they were interested.

Eventually, Brownlow refused to do any construction work for appellant because appellant refused to pay him for the work. He believed that appellant held this against him and made sure he did not get assigned to any work details when he was back in jail. Brownlow stated that appellant was a "dirty officer," who had the power to have inmates beat up by other inmates. However, Brownlow also stated that although appellant was bad, he was against the inmates having contraband or giving it to the inmates.

Brownlow stated that he also saw appellant pick up another former inmate in Millville, when she was prostituting herself to support her heron habit.

According to records, Brownlow was arrested and convicted of drug related charges and other criminal charges numerous times in Salem and Cumberland Counties. (J-1 through J-4.)

For Appellant

George Bailey, appellant, a corrections officer with the CCDOC, testified that he worked in this capacity for approximately twenty-one years. He is the officer in charge of maintenance. He supervises the maintenance crew. The maintenance crew is selected by him with referrals for certain inmates coming from other officers. He characterized his supervisory style as hard but fair to the inmates. He did not have a practice of being friendly or familiar with the inmates in or out of jail.

Appellant testified that he owns and drives a red 1999 Chevy Tahoe SUV. He drove it to work and parked it at the jail. In response to questioning about the fact that Cantoni said he picked her up in a red SUV, appellant testified that inmates can see the officer's cars parked in the lot from windows at the jail. Appellant denied he ever picked Cantoni up in his truck. Appellant stated that he does not have twin daughters. However, he does have daughters that are one year apart. Cantoni could have heard that in the jail. Appellant only supervised Cantoni once.

Appellant denied having contact with Cantoni outside of the jail. He denied ever having sex with her. He never purchased any lawn equipment from Kobash. He never had inmates beat up other inmates. Appellant denied that Brownlow ever worked on his house. He never invited Brownlow to have sex with him and Cantoni. Appellant testified that he knew that if he had a relationship with Cantoni in or out of jail, it would be a violation of policy. Appellant denied having any photograph of Cantoni and testified that Pittman lied.

Appellant's transportation business is for medical transportation. His business works for a company called Logisticare. In 2011, an issue arose with one of appellant's employees. A separate manager had done the hiring for the business. They did fingerprint background checks and if they came back clean, then the person could drive for the business. One of the driver's parked at the jail in the Captain's spot. Appellant was told by his superiors about it because it was one of his transportation vehicles. This is how appellant became aware that the person was a former inmate. The charges against him, which arose from this incident, were dismissed.

CREDIBILITY

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

Cantoni's rendition of the facts were implausible and unbelievable as they relate to this appellant. Her statements were inconsistent and contradictory. In this regard, Cantoni would have this tribunal believe that she was knowingly and voluntarily telling the truth as the key witness for respondent in this matter. However, Cantoni made admissions during her testimony, which subverted her credibility. Cantoni admitted that

she is manipulative as a result of being a drug addict, heroin user, and prostitute for most of her adult life. She stated that she had a habit of lying as a result of her lifestyle.

More importantly, Cantoni admitted to having health issues and memory loss issues because of her daily usage of heroin for approximately twenty years. The effects of these issues were visible during her testimony. Cantoni's physical appearance and movements showed a physical degradation from her years of heroin use. During testimony, she could not remember dates, years, or time frames. Cantoni would have this tribunal believe that while actively engaged in heroin use, under the influence of heroin, or in the throws of withdrawal, she could remember the details about her encounters with appellant. However, while remembering these events the oldest of which was in 2002, and the most recent of which was allegedly in 2008, ten to sixteen years ago, she could not remember any specific details. She could not recall what appellant's house looked like. She did not state what his bedroom looked like. She did not mention any physical characteristics of appellant which would substantiate her allegations. She stated to Cuff that appellant drove her home after each encounter only after she threatened to tell on him. However, she testified that he did not drive her back to her house. She could not remember how she got home. She said his truck was "red or blue." This lack of detail and inconsistencies made her testimony unbelievable. Her use of knowledge about appellant's daughters or the general location of his house near the jail could easily have been information acquired by her in jail from other officers or inmates. Simply put, none of the information she attempted to utilize to support her story about the appellant was intimate or intimately related to his home, where nearly all of the sexual encounters took place. Cantoni's extent of drug use and loss of memory give pause when weighing her credibility and determining if her testimony is reliable. Her deficits and continued criminal activity are particularly debilitating to her credibility.

Cantoni's allegation about the lawn equipment exchange between Kobash and appellant, at which she declared she was present, was completely suspect. Kobash denied the entire event and that appellant even knew about it. Even Cuff stated there was no corroborating evidence for this. Cantoni was adamant in her interview that she never did drugs with the officers she has made allegations against.

In sum, Cantoni was not a credible witness relative to her allegations about this appellant.

Furthermore, Cantoni's version of the facts has changed become more detailed and sensational over time. Cantoni admitted that in her first interview with Internal Affairs, she never mentioned appellant. In Cantoni's interview on September 29, 2016, with Investigator Tucker, she never mentioned appellant. In this interview Cantoni's responses were as follows:

Tucker: Ok. So during the time that you have um, been in out of um, the Cumberland County Jail facility, did um, you become associated with certain, um Correction Officers?
Cantoni: Yes.
Tucker: Ok. And those type of associations, did they lead to um, relationship outside of the jail?
Cantoni: Yes.
Tucker: Ok. Now specifically um, can you tell me um, just their names at this point. Who um, if anyone you had a ah, relationship with at the Cumberland County Jail?
Cantoni: Um, B.P., ah, E.O., ah, J.G., C.R. [Redacted by this tribunal. Initial's used for confidentiality.][6]
Tucker: That's four individuals, correct?
Cantoni. Yes.

(CCDOC-2 at p.3, lns. 5-17.)

Toward the conclusion of the interview, Cantoni provided the following:

Tucker: Ok, I'm just going over my notes, I think we're about ah, finished. Um, besides what we discussed um, is there anyone else that you could think of that you had a relationship with that we didn't talk about.
Cantoni: No.

(CCDOC-2 at p. 27,lns.7-11.)

[6] Appellant is not one of the identified officers.

Additionally, on February 7, 2017, Cantoni was interviewed by Cuff. Cantoni for the first time identified thirteen officers with whom she had inappropriate contact. (CCDOC-1). Cantoni even claimed that there were additional officers that she was involved with for a "one-time here and there thing." However, she could not remember their names. This disclosure coincides with her institution of litigation in the United States District Court of New Jersey under case number: 1:17-cs-07893 against respondents and its corrections officers.

On October 25, 2017, an Amended Complaint was filed in that litigation. Appellant was not one of the defendants sued in the original complaint. Appellant became a named defendant in the Amended Complaint's caption. However, his first name is misidentified. The allegations against appellant are as follows. In paragraph 56 of the Complaint, appellant is identified as having "naked pictures of Jennifer without her knowledge or consent." The complaint at paragraph 57 goes on to state that the appellant "showed these pictures to numerous guards and inmates without Jennifer's knowledge or consent."

In paragraph 75, the complaint further alleges that only three officers, including Ellis, regularly harassed and abused Cantoni "through unwanted touching and sexually inappropriate comments." Appellant is not mentioned in this paragraph.

In paragraph 85, the complaint alleges that only four officers had "met with Jennifer for sex for money while she was not in jail." Appellant is not one of the four officers. In fact, it is not alleged anywhere in the complaint that appellant had any sexual relations with Cantoni. In fact, it only alleges that appellant, wrongfully showed the photographs to other officers and inmates in the jail.[7]

Similar to these inconsistent statements, Cantoni's versions of the facts in her interviews and testimony are inconsistent. For example, Cantoni stated that when he picked her up at the Walnut Road apartments he took her back to his house to have sex in exchange for money. This was the occasion during which he asked Brownlow if he wanted to join them having sex. However, during her testimony, Cantoni alleged when

[7] Appellant has been dismissed from the complaint because of the statute of limitations.

she was at the Walnut Road apartments she had called appellant to come to the apartment because she needed money for heroin. She was in withdrawal. Cantoni testified that when she could not perform oral sex because of being sick, appellant left with his money. Cantoni's descriptions are clearly inconsistent. However, they are consistent with the fact that years of heroin use have caused Cantoni to have memory loss and certainly confusion.

During her interview with Cuff, Cantoni called appellant a "pig" and stated that when she next saw him while she was in jail he was a "jerkoff," in her interview with Cuff; thus, broadcasting her feelings toward appellant and showing her motive. Cantoni has an interest is a successful result to the federal litigation.

In sum, Cantoni's rendition of the facts did not have a ring of truth. The discrepancies in appellant's testimony and changing renditions of the facts made appellant's testimony unreliable and unbelievable. It may be that Cantoni's allegations against other officer's are more plausible and credible. However, as to this appellant, the inconsistencies, memory loss, admitted daily heroin use for twenty years, lack of documentary evidence, and lack of details in the material facts and circumstances make her rendition of the facts suspect and her testimony not credible. Cantoni's statements are not corroborated by any other credible testimony or statements in this proceeding.

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)93); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52: 14B-10(a); and N.J.A.C. 1:1-15(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable, (N.J.R.E. 802), unless it falls within an exception set forth in N.J.R.E. 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it. Id. at 51.

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

Furthermore, N.J.R.E. 804 provides in pertinent part as follows:

> (a) Definition of unavailable. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:
>
> ***
>
> (4) is absent from the hearing because of **death,** physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial... [Emphasis Added].

Brownlow was unavailable to testify in this proceeding because he died in September 2017. The Brownlow statements recorded by Cuff during his investigation on March 8, 2017, are admissible hearsay statements. (CCDOC-7.) The record of

Brownlow's criminal convictions and periods of incarceration are relevant and admitted evidence. (J-1 through J-4.)

However, similar to Cantoni's statements, his allegations are unsubstantiated by any corroborating credible testimony or documentary evidence. Similar to Cantoni, Brownlow's extent of drug use gives pause when weighing his credibility and determining if his testimony is reliable. His continued criminal activity is particularly debilitating to his credibility. Cuff found no evidence to corroborate Brownlow's allegations that appellant had inmates beat up other inmates in the CCDOC jail. Without appellant's opportunity to cross-examine Brownlow relative to his credibility, his relationships with Cantoni and the appellant, whether he was using heroin at the time he alleges he saw Cantoni at the appellant's house, etc., I **FIND** that Brownlow's statements have little weight and are unreliable. I **FIND** that no residuum of competent evidence existed to give credibility to Brownlow's hearsay statements and these statements did not credibly substantiate Cantoni's testimony.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to also be relevant and credible **FACTS** in this matter:

Appellant was a corrections officer, who has been employed by CCDOC in that capacity for approximately twenty-one years. Appellant was the officer in charge of maintenance and as part of his duties was responsible for supervising the maintenance work detail. Appellant occasionally supervised female trustee workers. Cantoni was often assigned as a trustee worker. Cantoni met appellant while she was incarcerated in CCDOC facility and assigned as a trustee to clean outside the jail building.

Cantoni is a forty-two year old female, who has been a drug addict and heroin user for nearly all of her adult life. Since age eighteen, Cantoni has used heroin daily and was during the past twenty-two years only "clean" for one year in 1999. As a result of her drug use, Cantoni has been repeatedly incarcerated over the last twenty-two years in the

CCDOC jail. She has been convicted of shoplifting, drug and paraphernalia possessions numerous times. She prostituted herself regularly to support her heroin habit. As a result of her time in jail, her drug addiction and usage, and her lifestyle, Cantoni has admittedly become manipulative and a liar. Additionally, Cantoni has suffered health issues and memory loss, as a result of her heroin usage.

Cantoni had a relationship for seven or eight years with a corrections officer named Ellis. This relationship was discovered and Cantoni was interviewed. Text messages between Ellis and Cantoni show they were engaged in an ongoing sexual relationship. Ellis was clearly concerned that Cantoni had been interviewed about him and that she had kept letters from him, which she was supposed to have destroyed, and which were in the investigators' possession. On March 4, 2017, Cantoni sent text messages to Ellis and wrote: "You used me to get back at people and now you're giving me you (sic) ass to kiss...lol! Its (sic) all good! I should have known better." (P-2 at p. 41.) Cantoni was willing to do anything to help Ellis. She was clearly motivated by their relationship to help Ellis. (P-2.) Cantoni's allegations against appellant are suspect as a result of this relationship as evidenced in the text messages.

When the investigation into Ellis began and Cantoni was interviewed, she did not mention the appellant. Thereafter, when she was interviewed by investigator Tucker of the Cumberland County Prosecutor's Office, on September 29, 2016, she did not mention the appellant, despite Tucker's repeated questions about who all the officers, with whom she had had a relationship in jail and outside of jail, were.

It is not until the third interview on February 7, 2017, conducted by Cuff, that Cantoni finally alleged that appellant had sexual relations with her for money on at least two occasions at his home, that he demanded oral sex from her once at her friend's apartment on Walnut Road when she was in active withdrawal and could not perform the act, and that appellant paid three bricks of heroin for her friend, Kobash's, lawn equipment. These allegations were made approximately seven months before she filed an amended complaint in federal court adding appellant to the list of defendants. In that amended complaint, she only alleged that he had disseminated a naked picture of her to other correction officers and inmates. Unlike the allegations against the other defendant

officers, Cantoni did not allege in any complaint that, knowing she was a former inmate, appellant had an inappropriate sexual relationship with her. Similar to the sensational development of claims against appellant, the list of officers who engaged in sexual relationships with Cantoni, grew with each interview she gave. This coincided with her increasing prospects for damages in the federal litigation.

In relation to the allegations against appellant, no credible testimony or documentary evidence was produced to support the allegations. No individual was produced to testify they had seen the photograph. No photograph was seen by anyone, except allegedly Pittman. No photograph of Cantoni was produced during this proceeding or discovered in the investigation conducted by the prosecutor's office. No phone records showing communications between Cantoni and the appellant were produced. Kobash specifically denies being paid three bricks of heroin by appellant for lawn equipment. Kobash was paid in cash. He admitted he probably used the cash to buy heroin because he was using at the time. This made Kobash's statement believable.

Cantoni cannot recall accurate dates or years for the events with appellant. She is not sure in which years these alleged encounters happened. Cantoni cannot recall basic details about appellant's home. She cannot consistently recall how she returned home after these alleged encounters. She provided inconsistent statements during the various interviews about the events, confusing what occurred where. The scant details Cantoni provided to substantiate her rendition of the facts, such as the color of appellant's car, the fact that he owned a transportation company, or that he had daughters who lived with him, could have easily been learned in the CCCDOC jail, in which she admitted she manipulated the officers.

No testimony or statements credibly corroborated Cantoni's allegations against this appellant.

Appellant did not engage in a sexual relationship with Cantoni. Appellant did not pay Cantoni for sex. Appellant did not pick up Cantoni in Millville in his 1999 red Chevy Tahoe in any year. Appellant did not exchange three bricks of heroin for Kobash's lawn equipment. No evidence was produced to show that appellant took or showed any

photographs of Cantoni naked and engaged in sex with him to other officers or inmates. No evidence was produced to show that appellant directed inmates to beat up other inmates.

On March 30, 2017, respondent issued a PNDA setting forth the charges and specifications against appellant. Following a departmental hearing February 2, 2018, the respondent issued the FNDA on April 18, 2018, sustaining the charges brought in both preliminary notices and terminating appellant from employment.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The appointing authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant's status as a correction's officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n,

115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

N.J.A.C. 4A:2-2.3(a)(6)

Appellant was charged with "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge of conduct unbecoming a public employee was appellant's unduly familiar and inappropriate relationship with Cantoni, who was a former

inmate. This charge was based on Cantoni's allegations that, knowing she was a former inmate, appellant hired her as a prostitute and had sexual relations with her on three separate occasions, shared a picture of her he surreptitiously took while they were having sex in 2008, and that he purchased lawn equipment from her friend in exchange for three bricks of heroin. For the reasons set forth above, Cantoni's testimony was not credible and unsubstantiated relative to the allegations she made against the appellant. No credible evidence was produced to substantiate these allegations.

As a corrections officer, appellant was held to a higher standard of conduct. The public respects officers for discovering, reporting, and championing the truth in circumstances of wrongdoing and while they are satisfying their duties. Had the egregious conduct alleged herein been supported, substantiated, and proven, it would violate this standard. However, the testimony and admitted evidence produced in this proceeding are insufficient to terminate appellant from his twenty-one -year career. Mere allegations do not warrant his termination of service.

Therefore, I **CONCLUDE** that appellant's behavior did not rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). I **CONCLUDE** that respondent has not met its burden of proof on this issue.

Appellant has also been charged with violating other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically Cumberland County Department of Corrections Discipline Policy 3.02A, a/k/a 84-17 C(11) conduct unbecoming an employee.

Cumberland County Department of Corrections Discipline Policy 3.02A, a/k/a 84-17.

84-17, as amended, provides in pertinent part as follows:

> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employee, relevant Department of Personnel Rules, appropriate Department bulletins or memoranda, the Handbook of Information and Rules for Employees of New

> Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

C(11) Conduct Unbecoming an Employee

Cumberland County Department of Corrections Code of Ethics, Article 13: Prohibited Conduct, provides in pertinent part as follows:

> ... The Corrections Officer will never discriminate by the dispensing of special favors or privileges to anyone, whether for remuneration or not, and never accept for himself/herself or his/her family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of he/her official duties. With the above in mind, no Corrections Officer, except in the discharge of duty, may knowingly associate with person engaging, allegedly engage in, or have a prior a prior history of engaging in unlawful activities. ... [Emphasis added].

Cumberland County Department of Corrections Policy 4.18, relating to over familiarization/fraternizing with inmates lists twelve improper activities and provides in pertinent part as follows:

> Employees shall not have a personal relationship with inmates and should not act in anyway that may cause that perception. Improper activities may include, but are not limited to the following:
>
> ...9. Dating or pursuing a personal relationship with inmates either inside or Outside (sic) of the facility; ...
>
> The policy covers inmates, ex-inmates, friends of inmates, family of inmates or ex-inmates. No staff can socialize with anyone in these categories. Any relationship that started in the jail would be strictly prohibited. Any appearance of a relationship would be sufficient cause for disciplinary action.

Policy 4.18 was updated and incorporated into Cumberland County Department of Corrections Policy 4.22., relating to over familiarization/fraternizing with inmates, which

became effective on June 30, 2016. It also lists twelve improper activities and provides in pertinent part as follows:

> Employees shall not have a personal relationship with inmates and should not act in any way that may cause that perception. Improper activities may include, but are not limited to the following:
>
> ...9. Dating or pursuing a personal relationship with inmates either inside or outside of the facility; ...
>
> The policy covers inmates, ex-inmates, friends of inmates, family of inmates or ex-inmates. No staff can socialize with anyone in these categories. Any relationship that started in the jail would be strictly prohibited. Any appearance of a relationship would be sufficient cause for disciplinary action.

Here, the testimony and evidence presented are insufficient to satisfy the requirement that there was even an appearance of a relationship between the appellant and Cantoni. Cantoni's testimony was not credible. No reliable evidence was produced to substantiate Cantoni's claims.

Therefore, I **CONCLUDE** that appellant's behavior did not rise to a level of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(11), specifically Cumberland County Department of Corrections Discipline Policy 3.02A, a/k/a 84-17 C(11) conduct unbecoming an employee and Article 13 of the Code of Ethics and policies 4.18 and 4.22. I **CONCLUDE** that respondent has not met its burden of proof on these issues.

N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause

Finally, appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, the Cantoni's allegations are unsubstantiated. Her testimony was not credible and her rendition of the facts in light of her life-long drug addiction and heroin use are completely

suspect. As such, I **CONCLUDE** that the respondent has failed to meet its burden of proof on this issue. I **CONCLUDE** that appellant's actions did **NOT** violate N.J.A.C. 4A:2-2.3(a)(12).

Accordingly, I **CONCLUDE** that respondent has failed to meet its burden proof on all charges made against the appellant. The administrative decision is **REVERSED**.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action, dated April 18, 2018, of the Cumberland County Department of Corrections against appellant, George Bailey, is hereby **REVERSED**. Appellant, George Bailey's, appeal is **GRANTED**. It is further **ORDERED** that all charges against the appellant are **DISMISSED**. It is **ORDERED** that appellant, George Bailey, be returned to his employment as a corrections officer with respondent, Cumberland County Department of Corrections.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 5, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: November 5, 2018

Date Mailed to Parties: November 5, 2018

lam

APPENDIX
LIST OF WITNESSES

For Appellant:

George Bailey, Appellant

For Respondent:

Jennifer Cantoni
Michael Palau, Captain CCDOC
Ernest Cuff, Jr., Chief of Staff Cumberland County Prosecutor's Office
Robert Brownlow (deceased)

LIST OF EXHIBITS

Joint:

J-1 Inmate Summary Report for R. Brownlow Cumberland County Run date 8/31/18 @14.59.05

J-2 Inmate Summary Report for R. Brownlow Cumberland County Run date 8/31/18 @ 14.55.58

J-3 Inmate Summary Report for R. Brownlow Run Salem County date 8/31/18 @ 15.03.04

J-4 Inmate Summary Report for R. Brownlow Cumberland County Run date 8/31/18 @ 14.57.56

For Appellant:

P-1 Cantoni Interview dated 3/20/1 - **Subject to confidentiality - Order placed in sealed envelope.**

P-2 Cantoni-Ellis Text Messages - **Subject to confidentiality - Order placed in sealed envelope.**

For Respondent:

CCDOC-1 Cantoni Criminal Record Documents

CCDOC-2 Cantoni Interview 9/29/16 - **Subject to confidentiality - Order placed in sealed envelope.**

CCDOC-3 US Federal Dist. Court Complaint dated 10/25/17

CCDOC-4 Policy 4.13

CCDOC-5 Policy 4.18

CCDOC-6 Policy 4.22

CCDOC-7 Recording Brownlow Statement to Cuff #1

In the Matter of Ramon Gross,
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NOS. 2017-4053 and 2017-4054
OAL DKT. NOS. CSV 11288-17 and 11289-17
(consolidated)

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 5, 2018 JM

The Civil Service Commission, at its meeting of December 5, 2018, acknowledged the attached settlement, as clarified, in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
DECEMBER 5, 2018

Deirdré L. Webster Cobb

Deirdré Webster Cobb, Esq.,
Chair/Chief Executive Officer

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
CONSOLIDATED
OAL DKT. NO. CSV 11288-17
AGENCY DKT. NO. 2017-4053

IN THE MATTER OF RAMON GROSS,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

OAL DKT. NO. CSV 11289-17
AGENCY DKT. NO. 2017-4054

IN THE MATTER OF RAMON GROSS,
ANCORA PSYCHIATRIC HOSPITAL,
DEPARTMENT OF HUMAN SERVICES,

William Nash, Esq., for appellant **(**Nash Law Firm, LLC, attorneys)

Jessica M. Saxon, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: November 1, 2018 Decided: November 2, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

These mattesr were filed with the Office of Administrative Law (OAL) on August 8, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and by their statements placed on the record, November 1, 2018.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 2, 2018
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Received at Agency: 11-5-18

Date Mailed to Parties: 11-5-18

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on November 1, 2018

2018 NOV

OAL DKT. NO. CSV 11288-2017,
11289-2017 S
AGENCY DKT. NO. 2017-4053, 2017-4054

SETTLEMENT AGREEMENT

IN THE MATTER OF
RAMON GROSS
AND
DEPT. OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL

D-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notices of Disciplinary Action dated June 1, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)4 Chronic or excessive absenteeism or lateness	Removal (for all charges)	6/1/17
2. N.J.A.C. 4A:2-2.3(a) 6 Conduct unbecoming a public employee		
3. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause		
4. Admin. Order 4:08, A-3.1		

Abandonment of job as a result
of absence from work as
scheduled without permission
for (5) consecutive days

5. Admin Order 4:08, E-1.6
   Violation of a rule, regulation, policy
   procedure, order or administrative
   decision

6. N.J.A.C. 4A:2-2.3(a) 6
   Conduct unbecoming a
   public employee

7. N.J.A.C. 4A:2-2.3(a)12
   Other sufficient cause

8. Admin Order 4:08, E-1.7
   Violation of a rule, regulation, policy
   procedure, order or administrative
   decision

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. Appellant, Ramon Gross, will be reinstated to the position of Human Services Assistant ("HSA") at Ancora Psychiatric Hospital.

C. The Appellant, Ramon Gross, withdraws his appeal and request for a hearing, and the Respondent, Appointing Authority Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3(a)4 Chronic or excessive absenteeism or lateness	Withdrawn (for all charges)
2. N.J.A.C. 4A:2-2.3(a) 6 Conduct unbecoming a public employee	
3. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause	
4. Admin. Order 4:08, A-3.1 Abandonment of job as a result of absence from work as scheduled without permission for (5) consecutive days	
5. Admin Order 4:08, E-1.6 Violation of a rule, regulation, policy procedure, order or administrative decision	
6. N.J.A.C. 4A:2-2.3(a) 6 Conduct unbecoming a	

public employee

7. N.J.A.C. 4A:2-2.3(a)12
   Other sufficient cause

8. Admin Order 4:08, E-1.7
   Violation of a rule, regulation, policy
   procedure, order or administrative
   decision

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department of Health from releasing information on this matter to anyone who has a release executed by appellant, or as otherwise consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department of Health with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ramon Gross's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

11-1-18
DATE

Ramon Gross, Appellant

11-1-18
DATE

ON BEHALF OF Appellant

11-1-18
DATE

ON BEHALF OF Respondent

10-24-18
DATE

ON BEHALF OF Department of Health

CERTIFICATION

I, Ramon Gross, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

11-1-18 — DATE

Ramon Gross — Ramon Gross

Angiulo, Nicholas

From: Jessica Saxon <Jessica.Saxon@law.njoag.gov>
Sent: Monday, November 26, 2018 10:43 AM
To: Angiulo, Nicholas; Bill Nash
Cc: Messina, JoAnn; Rosemarie Coculo
Subject: Re: In the Matter of Ramon Gross, Department of Health, Ancora Psychiatric Hospital - OAL Docket Nos. CSV 11288-17 and CSV 11289-17 (consolidated) - SETTLEMENT

Hi Mr. Angiulo,

I apologize, I thought Mr. Nash had gotten back to you. We agreed to the below terms:

Appellant should be reinstated as of 11/17/16 without back pay and with the time period between 11/17/16 to the actual return date be marked as an authorized leave of absence without pay.

Thank you,
Jess Saxon

From: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Sent: Monday, November 26, 2018 7:00 AM
To: Jessica Saxon; Bill Nash
Cc: Messina, JoAnn; Rosemarie Coculo
Subject: RE: In the Matter of Ramon Gross, Department of Health, Ancora Psychiatric Hospital - OAL Docket Nos. CSV 11288-17 and CSV 11289-17 (consolidated) - SETTLEMENT

Mr. Nash and DAG Saxon:

I have not yet received clarification on this matter. Please advise as soon as possible.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Jessica Saxon [mailto:Jessica.Saxon@law.njoag.gov]
Sent: Tuesday, November 13, 2018 11:50 AM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; Bill Nash <wnash@thenashlawfirm.com>
Cc: Messina, JoAnn <Joann.Messina@csc.nj.gov>
Subject: Re: In the Matter of Ramon Gross, Department of Health, Ancora Psychiatric Hospital - OAL Docket Nos. CSV 11288-17 and CSV 11289-17 (consolidated) - SETTLEMENT

Good morning,

I will have to get back to you and confirm with my client.

Thank you,
Jessica Saxon

From: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Sent: Tuesday, November 13, 2018 6:54 AM
To: Bill Nash; Jessica Saxon
Cc: Messina, JoAnn
Subject: RE: In the Matter of Ramon Gross, Department of Health, Ancora Psychiatric Hospital - OAL Docket Nos. CSV 11288-17 and CSV 11289-17 (consolidated) - SETTLEMENT

Mr. Nash and DAG Saxon:

I am the Deputy Director in charge of this agency's hearing unit. We have received the consolidated settlement regarding Ramon Gross from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, while the settlement indicates that Mr. Ramos is to be reinstated and waives back pay, the record appears to indicate an inaccurate date of the removal/resignation not in good standing and does not specifically reflect how to record the time period from the original date of removal/resignation not in good standing to the date of reinstatement. In this regard, the settlement indicates the removal/resignation not in good standing date as June 1, 2017 while the Final Notices indicate the date as **November 17, 2016**. Also, before a settlement can be acknowledged by the Civil Service Commission, all periods of time must be specifically accounted for in an employee's personnel record. **Thus, please clarify the correct date for the removal/resignation not in good standing and how to categorize the time from that date to reinstatement (e.g., as an approved leave of absence without pay, or something else?).**

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.
CONFIDENTIALITY NOTICE The information contained in this communication from the Office of the New Jersey Attorney General is privileged and confidential and is intended for the sole use of the persons or entities who are the addressees. If you are not an intended recipient of this e-mail, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this communication in error, please immediately contact the Office of the Attorney General at (609) 292-4925 to arrange for the return of this information.

12-5-18

In the Matter of Bryan Jannell,
Mercer County, Department of
Executive

CSC DKT. NO. 2018-2298
OAL DKT. NO. CSV 03440-18

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 5, 2018 JM

The Civil Service Commission, at its meeting of December 5, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
DECEMBER 5, 2018

Deirdré L. Webster Cobb

Deirdré Webster Cobb, Esq.,
Chair/Chief Executive Officer

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 03440-18
AGENCY DKT. NO. 2018-2298

IN THE MATTER OF BRYAN JANNELL, MERCER COUNTY, DEPARTMENT OF EXECUTIVE.

Bryan Jannell, appellant, pro se

Stephanie Ruggieri D'Amico, Assistant County Counsel, for respondent, Mercer County, Department of Executive (Paul R. Adezio, County Counsel)

Record Closed: October 30, 2018 Decided: November 1, 2018

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 6, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 1, 2018
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 11-1-18

Date Mailed to Parties: 11-2-18

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Fully executed Settlement Agreement, received by the Office of Administrative Law on October 30, 2018

PAUL R. ADEZIO, MERCER COUNTY COUNSEL
BY: KRISTINA E. CHUBENKO, ASSISTANT COUNTY COUNSEL
McDADE ADMINISTRATION BUILDING, ROOM 201
640 SOUTH BROAD STREET
P.O. BOX 8068
TRENTON, NEW JERSEY 08650-0068
609-989-6511
Attorney for the County of Mercer

2018 OCT 15 P 1:30

IN THE MATTER OF BRYAN JANNELL	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Settled Prior to Administrative Law Hearing	:	**CSV 03440-2018S**

THIS SETTLEMENT AGREEMENT dated October 12, 2018 is entered into by and between Bryan Jannell ("Employee") and the County of Mercer ("County") (collectively "the parties").

WHEREAS, Employee was employed at a Public Safety Telecommunicator Trainee with the County in the Emergency Services Communication Center; and

WHEREAS, on or about January 4, 2018 Employee was released from employment at the end of his working test period; and

WHEREAS, Employee appealed the release at the end of his working period with the Civil Service Commission ("CSC") which was docketed as CSC Docket #2018-2298; and

WHEREAS, the CSC transferred the matter to the Office of Administrative Law ("OAL"), docket number CSV 03440-2018S; and

WHEREAS, the parties would like to amicably resolve the matters due to the uncertainties and expense of litigation; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein and further good and valuable consideration, the parties mutually agree as follows:

1. The County agrees to amend the release at the end of working test period to a

resignation in good standing. Employee understands and agrees that he will not seek reemployment or reinstatement or accept reemployment with the Emergency Services Communication Center.

2. Employee agrees that this matter is fully resolved.

3. This Agreement is not, and shall not in any way be constructed, as an admission by the County and the Employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to or by employee, but instead constitutes the good faith settlement of a disputed claim and the parties specifically disclaim any liability to each other or to any other person. The parties have entered into this Agreement for the sole purpose of resolving the subject matter of this case and any related claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

4. Employee agrees that this Agreement shall operate as a complete and final disposition of this matter. As consideration for the County agreeing to these terms, Employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims relating to the subject matter of this agreement that he has now to any relief of any kind from the County, whether or not he now knows about those rights, arising out of his employment with County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII of the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including

sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel, invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealings; promissory estoppel; negligence; violation of public policy, Conscientious Employment Protection Act; New Jersey Law Against Discrimination, Equal Pay Act; New Jersey Employer-Employee Relation Act; New Jersey Family Leave Act and any other claims for unlawful employment practices with regard to these matters. It is emphasized that Employee is waiving all possible claims against the County with regard to this matter.

5. Employee represents and certifies that he has carefully read and fully understands all of the provisions of and effects of this Agreement and further, certifies that he is voluntarily entering into this Agreement and that the County has not made any representations concerning the terms of effects of this Agreement other than those contained herein.

6. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under laws of the State of New Jersey. The language of all parts of this Agreement shall, in all cases, be constructed as a whole, according to its fair meaning and not strictly for or against any of the parties.

7. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining part(s) term(s) or provision(s) shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

8. The foregoing constitutes a full and final disposition of this matter.

9. Employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

10. This Agreement may not be modified, altered or changed, except upon the prior express written consent of the parties.

11. This Agreement is the result of negotiations with Employee and Employee had the opportunity to seek legal advice at his choosing.

12. This settlement fully and finally disposes of all issues in controversy. It is reached by way of compromise.

13. This Agreement shall not be considered binding and or final until approved by and executed by the County Administrator and or his designee. Any subsequent disapproval by the Civil Service Commission shall cause all the terms and conditions of this agreement to be null and void and shall not interfere with the rights of either party to pursue this matter further.

Dated: 10/12/18

ANDREW MAIR,
MERCER COUNTY ADMINISTRATOR

Dated: 10/12/18

BRYAN JARNELL, EMPLOYEE

12-5-18

In the Matter of Brenda Meeks, City of Newark, Police Department

CSC DKT. NO. 2019-75
OAL DKT. NO. CSR 10129-18

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 5, 2018 JM

The Civil Service Commission, at its meeting of December 5, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
DECEMBER 5, 2018

Deirdré L. Webster Cobb

Deirdré Webster Cobb, Esq.,
Chair/Chief Executive Officer

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 10129-18

IN THE MATTER OF BRENDA MEEKS,
CITY OF NEWARK.

Anthony J. Fusco, Jr., Esq., for Appellant, Brenda Meeks (Fusco & Macaluso Partners, LLC, attorneys)

Courtney Durham, Assistant Corporation Counsel for Respondent, City of Newark (Kenyatta Stewart, Acting Corporation Counsel, attorneys)

Record Closed: October 26, 2018 Decided: November 2, 2018

BEFORE **JOHN P. SCOLLO**, ALJ:

This matter concerns the appeal of Brenda Meeks from the action of the City of Newark. The appeal was filed with the Office of Administrative Law (OAL) on July 10, 2018, pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

NOV. 2, 2018
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

Brenda Meeks, Appellant,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
v.	:	**OAL DOCKET NO.: CSR 10129-2018**
CITY OF NEWARK, Respondent	:	**SETTLEMENT AGREEMENT**

IT IS HEREBY AGREED by and between the City of Newark ("City"), Newark Fraternal Order of Police, Lodge 12 ("Union"), and Employee Brenda Meeks[1] ("Meeks"), to resolve the disciplinary matter as it relates to the Final Notice of Disciplinary Action ("FNDA") dated June 15, 2018. Rather than continuing further with the appeal of Meeks's Removal at the Office of Administrative Law on the charges of Intoxication or Illegal Use of Drugs; Disobedience of Orders-Random Drug Testing and other sufficient causes, as codified at N.J.A.C. 4A:2-2.3{a}10; 4:2-2.3{a}11; NPD Rules and Regulations 18:9.6 and General Order 99-4, Section VII, the City, the Union and Meeks (collectively referred to hereinafter as the "Parties") have determined to resolve this matter by this Agreement, and agree as follows:

1. The Parties hereby agree that all charges associated with the FNDA issued on June 15, 2018 will be upheld.
2. Meeks agrees to accept a Resignation from her Position of Police Officer with the City of Newark. The City will amend the disciplinary action in the FNDA to reflect the status of her removal from employment.
3. Meeks agrees that her Resignation is contingent upon the stipulation that she may never seek employment with City of Newark again at any time in the future.

4. Meeks further waives any and all rights or claims which she has or may have to a hearing on the merits of the disciplinary action taken under

[1] On the date which gave rise to the incident noted in the Final Notice of Disciplinary Action, Ms. Meeks was employed as a Police Officer, with the Newark Police Department.

this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the PNDA.

5. Meeks and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
6. Meeks and the Union each further agree that there is no consideration due Meeks, her counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from her employment and/or the execution of this Agreement, except as otherwise provided herein.
7. Except for the assessment of Meeks's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.
8. Meeks and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the PNDA.
9. Meeks is bound by this Agreement. Anyone who succeeds to Meeks's rights and responsibilities, such as heirs or the executor of her estate, shall also be bound.
10. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.
11. Meeks and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

12. This Agreement contains the sole and entire agreement between Meeks, The Department of Public Works and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Meeks specifically represents and acknowledges in executing this Agreement that she has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
13. Meeks agrees and acknowledges that she has been fully and fairly represented by her Union in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.
14. Meeks agrees and acknowledges that she has had full opportunity to review this Agreement with her counsel and/or union representation and she enters into same knowingly and voluntarily.
15. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
16. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.
17. By signing this Settlement Agreement, Meeks states that:
    a) She has read it;
    b) She understands it and knows that she is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common

law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c) She agrees with everything in it;

d) Her representative negotiated this Agreement with her knowledge and consent;

e) She has been advised to consult with her attorney prior to executing this Agreement, and has in fact done so;

f) She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

10/2/18
Date

BY: _____
Director of Public Safety

9/28/18
Date

BY: _____
Union Attorney/Representative

9/28/18
Date

_____
Brenda Meeks

Approved as to Form and Legality:

10/3/18
Date

_____
Law Department

CERTIFICATION

I, Brenda Meeks, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/28/18
DATE

NAME
Brenda Meeks

In the Matter of Enmanuel Pena, Borough of Elmwood Park, Police Department

CSC DKT. NO. 2019-413
OAL DKT. NO. CSR 12298-18

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 5, 2018 JM

The Civil Service Commission, at its meeting of December 5, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE CIVIL SERVICE COMMISSION ON DECEMBER 5, 2018

Deirdré L. Webster Cobb

Deirdré Webster Cobb, Esq.,
Chair/Chief Executive Officer

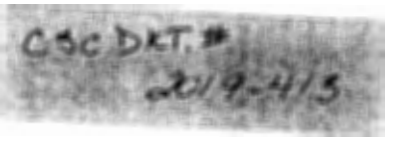
Inquiries and Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 12298-18



IN THE MATTER OF ENMANUEL PENA,
BOROUGH OF ELMWOOD PARK.

Michael P. Koribanics, Esq., appearing for appellant

Arthur R. Thibault, Jr., Esq., for respondent

Record Closed: November 2, 2018 Decided: November 7, 2018

BEFORE **DANIELLE PASQUALE**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on December 14, 2016, for determination as a contested case pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

November 7, 2018
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: _____

Mailed to Parties: _____

lr

attachment

ENMANUEL PENA, Petitioner, v. BOROUGH OF ELMWOOD PARK, Respondent.	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. CSR 12298-18

AGREEMENT AND RELEASE

The above parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

NOW THEREFORE, in consideration of the mutual covenants contained herein, the parties hereby agree to the following terms as full and final settlement of the above-captioned matter:

1. Enmanuel Pena ("Pena") and the Borough of Elmwood Park ("Borough" or "Elmwood Park") hereby agree to settle the instant appeal of the Final Notice of Disciplinary Action ("FNDA") dated May 18, 2018 pending under OAL Docket No. CSR 12298-18.

2. The FNDA dated May 18, 2018 will be dismissed and a new FNDA will be issued to reflect Pena's resignation in good standing effective March 1, 2019.

3. Concurrent with the execution of this Agreement, Pena shall submit to Chief of Police Michael Foligno, a valid and binding irrevocable letter of resignation from his employment with the Elmwood Park Police Department. A copy of this resignation letter is attached hereto as Exhibit A.

4. Notwithstanding the binding and irrevocable nature of Pena's letter of resignation, the letter will be held in escrow until March 1, 2019.

5. Between May 18, 2018 and November 2, 2018, the Borough's records will reflect that Pena was on an unpaid leave of absence. Between November 3, 2018 and February 28, 2019, Pena shall be placed on a paid leave of absence at his current rate of pay through such period with all normal and ordinary deductions at regular pay intervals. During this leave of absence with pay, Pena shall not accrue or accumulate any further time-related benefits, i.e. sick, vacation, personal, SAD, holiday or time due. All existing accumulated time shall be forfeited and Pena shall not receive health or any other benefits during this paid leave of absence. In the event that Pena becomes employed at another law enforcement agency prior to March 1, 2019, all remaining monies due from the Borough during his paid leave of absence shall be paid out in a lump sum and his resignation with the Borough shall become immediate.

6. In consideration of the terms of this Agreement, Pena acknowledges that, other than what is set forth above, he has been fully paid all wages and other benefits, and he is not owed any further monies or benefits from the Borough, whether by way of collective negotiations agreement, Borough policy, or otherwise, and that he specifically waives any claim for further benefits or monies and agrees that the Borough is not obligated to make any further payment or provide any further benefit.

7. In further consideration of this Agreement, Pena agrees that he will not apply for or otherwise seek employment with the Borough or any of its departments, affiliates or subdivisions and agrees that neither the Borough nor any of its departments, affiliates or subdivisions has an obligation, whether arising under the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq., under contract or policy, or otherwise, to hire or employ him in the future.

8. Elmwood Park agrees that in response to inquiries from prospective employers and/or reference requests, Elmwood Park shall state only that Pena resigned in good standing and

provide his dates of employment and positions held, except as otherwise required by law, rule, regulation, subpoena or other legal process or requirement. With respect to any background investigation by any prospective employer, such prospective employer shall be permitted to review records, including personnel or internal affairs records, only upon receipt of written authorization by Pena. All such requests will be directed to and responded to by the Chief of Police. The Borough agrees to execute approval of an intergovernmental transfer form if so presented by another Civil Service jurisdiction.

9. Pena waives any and all rights to file a grievance and any other form of appeal concerning this matter.

10. Pena, on his own behalf and on behalf of his heirs, executors, administrators, successors and assigns (hereinafter collectively referred to throughout this Agreement as "Pena") hereby releases and forever discharges the Borough of Elmwood Park, and all affiliated and related entities, including but not limited to their respective past, present and future trustees, officers, members, employees, agents, representatives, attorneys, successors and assigns and the estates and/or heirs thereof (hereinafter collectively referred to throughout this Agreement as "Elmwood Park") from any and all claims, known and unknown, resulting from anything which has happened up to the effective date of this Agreement, including those claims identified in his Notice of Tort Claim, and including any claims for attorneys' fees and costs.

Without limiting the foregoing provision in any way, Pena releases all claims relating to or arising out of any conduct of Elmwood Park, any aspect of his employment with Elmwood Park, and/or the cessation of his employment with Elmwood Park, including, but not limited to all claims under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.; Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended

thereby; the Civil Rights Act of 1866, 42 U.S.C. § 1981, et seq.; the Civil Rights Statutes contained in 42 U.S.C. §§ 1983, 1985, 1986 and 1989 and any related laws; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq.; the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff; the Workers Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, et seq.; the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.; the Equal Pay Act, 29 U.S.C. § 206(d); the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, et seq.; the Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001, et seq.; the New Jersey Constitution; the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et seq.; the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, et seq.; the Federal Family and Medical Leave Act, 29 U.S.C. § 2601, et seq.; the New Jersey Equal Pay Act, N.J.S.A. 34:11-56.1, et seq.; the Millville Dallas Airmotive Plan Job Loss Notification Act, N.J.S.A. 34:21-1, et seq.; the New Jersey Security and Financial Empowerment Act, N.J.S.A. 34:11C-1; the New Jersey Genetic Privacy Act, N.J.S.A. 10:5-43, et seq.; the New Jersey Fair Credit Reporting Act, N.J.S.A. 56:11-20, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq.; the Occupational Safety and Health Act, 29 U.S.C. § 651, et seq.; the Fair Labor Standards Act, 29 U.S.C. § 201, et seq.; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq.; the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq.; the New Jersey Wage Collection Law, N.J.S.A. 34:11-57, et seq.; New Jersey Statutory Provisions Regarding Retaliation and/or Discrimination under the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-1; et seq.; the False Claims Act, 31 U.S.C. § 3729, et seq.; the New Jersey False Claims Act, N.J.S.A. 2A:32C-1, et seq.; and any other Federal, State or local equal employment opportunity or other laws,

regulations, or ordinances; contract; quasi-contract; negligence; interference with contract/business advantage; fraud; defamation; intentional and/or negligent infliction of emotional distress; any common law claim(s) for wrongful employment action; and any other duty or obligation of any kind or description to the fullest extent permissible by law. Pena does not hereby waive (1) his right to enforce or challenge this Agreement; (2) any vested rights which he may have under any employer sponsored benefit plan; (3) the right to file any unwaivable charge or complaint (although Pena does waive and release any right to recover damages in connection with any such charge or complaint relating to anything which has happened up to the date he signs this Agreement); (4) rights or claims that cannot lawfully be released; and/or (5) rights or claims arising after the effective date of this Agreement. In connection with this release, Pena represents that as of the date of execution of this Agreement, he has not filed a workers' compensation claim against Elmwood Park and is unaware of any work-related illness or injury. Pena acknowledges and agrees that he has been fully and timely paid all wages, overtime compensation, benefits, and/or other amounts owed in connection with his employment with Elmwood Park, except for those amounts specified in this Agreement.

11. In accepting this Settlement, Pena acknowledges that he is waiving his right to proceed to a hearing on his appeal to the New Jersey Civil Service Commission pending at the Office of Administrative Law under Docket No. CSR 12298-18. Pena understands that this Agreement is contingent upon the approval of the Civil Service Commission and further understands that, once approved by the Civil Service Commission, the aforementioned appeal will be deemed resolved and the matter closed.

12. This Agreement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties.

No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement.

13. If any of the provisions, terms, clauses, or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum, such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed severable, such that all other provisions, terms, clauses, and waivers and releases of claims and rights contained in this Agreement shall remain valid and binding upon all parties. If the voided term is material, the parties shall immediately commence negotiations for a replacement provision of substantively similar value.

14. This Agreement shall inure to the benefit of, and may be enforced by, the parties hereto and all of their respective heirs, legal representatives, successors and assigns.

15. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement. The parties further agree that this Agreement shall not be filed with any court except in an action to enforce or challenge its terms.

16. Pena acknowledges that he has had ample time to consult with his attorney of record, Michael Koribanics, Esq., throughout the negotiations that preceded his execution of this Agreement; that he has been represented by counsel during the entirety of this matter; that he has carefully read and fully understands all of the provisions of this Agreement, including the Release; that he is voluntarily executing this Agreement without coercion or duress; that he has had adequate time to review this Agreement and the release contained in this Agreement; and that he

understands and acknowledges that he is waiving any right to proceed to a hearing at the Office of Administrative Law by signing this Agreement.

17. The parties acknowledge that this Agreement is a joint product and shall not be construed for or against any party on the ground of sole authorship. This Agreement may be executed in multiple originals, each of which shall be considered an original instrument, but all of which shall constitute one (1) agreement, and shall bind the parties hereto and their successors, heirs, assigns, and legal representatives.

Date: 11/2/18

Enmanuel Pena

ACKNOWLEDGEMENT

STATE OF NEW JERSEY :
ss.:
COUNTY OF :

I certify that on Nov. 2, 2018, Enmanuel Pena personally came before me and acknowledged under oath to my satisfaction, that she:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his act and deed.

Date: 11/2/18

Notary Public of the State of New Jersey
Michael Koribanics ESQ

BOROUGH OF ELMWOOD PARK

Date: 11/2/18

By: Michael Folgueras

Exhibit A

March 1, 2019

Michael Foligno, Chief of Police
Elmwood Park Police Department
182 Market St.
Elmwood Park, NJ 07407

Re: Resignation

Dear Chief Foligno:

I hereby resign my employment with the Elmwood Park Police Department.

Sincerely,

Enmanuel Pena

A-4

STATE OF NEW JERSEY

In the Matter of John Rivera
Township of Belleville, Department of Public Works

CSR DKT. NO. 2016-1368
OAL DKT. NO. CSV 00228-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 7, 2018 BW

The appeal of John Rivera, Laborer 1, Township of Belleville, Department of Public Works, removal effective February 21, 2014, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on November 2, 2018 reversing the removal. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 5, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority from February 21, 2014 to the actual date of reinstatement. *See N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Public Safety*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues

concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of John Rivera. The Commission further orders that appellant be granted back pay, benefits, and seniority from February 21, 2014 to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF DECEMBER, 2018

Dolores Gorczyca

Dolores Gorczyca
Member
Civil Service Commission

Inquiries
and
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00228-16
AGENCY REF. NO. 2016-1368

IN THE MATTER OF JOHN RIVERA,
TOWNSHIP OF BELLEVILLE,
DEPARTMENT OF PUBLIC WORKS.

Catherine M. Elston, Esq (C. Elston & Associates, for appellant John Rivera attorneys)

Michael A. Cifelli, Esq., (Florio Kenny Raval, attorneys) for respondent Township of Belleville

Record Closed: September 28, 2018 Decided: November 2, 2018

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

John Rivera (appellant[1]) appeals from disciplinary action taken by respondent, Township of Belleville (Belleville) Department of Public Works (DPW), to remove him from his position as a Laborer on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). The charges relate to allegations of creating a hostile work

[1] While the parties used the designation "Petitioner" for Rivera, the OAL protocol is to refer to the employee as the appellant.

environment for fellow employees in the DPW through bullying, verbal abuse, intimidation, and threats.

PROCEDURAL HISTORY

Appellant was suspended without pay effective February 21, 2014, by Preliminary Notice of Disciplinary Action handed to appellant the previous day. Therein, it stated that a departmental hearing would be held on March 18, 2014; however, that date was adjourned because discovery had not yet been received. As of April 11, 2014, appellant had still not received discovery or a hearing due to ongoing discovery and other prehearing issues. The departmental hearing did not commence until December 2, 2014, and continued on December 5, 29, 2014, and February 9 and 20, March 13, and April 9, 2015. The opinion of the Hearing Officer was issued on August 3, 2015, and adopted by the Interim Township Manager on September 11, 2015, in the Final Notice of Disciplinary Action. Appellant filed an appeal on September 29, 2015, which was granted by the Civil Service Commission on December 28, 2015.

The appeal was transmitted to the Office of Administrative Law (OAL), on December 30, 2015, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was assigned to the Honorable Imre Karaszegi, A.L.J., on or about January 8, 2016. A hearing notice was sent scheduling the matter for July 19 and 21, 2016. Prior to that date, the hearing dates were adjourned until September 27, 2016, at the request of Belleville. Upon Judge Karaszegi's nomination for the Superior Court, the September hearing had to be adjourned. The matter was re-assigned to me on or about October 14, 2016. Within days, my office was attempting to get hearing dates scheduled for 2016 but ultimately, we could not get consensus for a date until February 2, 2017.[2] The notice for that hearing had been sent on October 18, 2016. That date also had to be adjourned.

[2] By electronic mail sent from counsel for Belleville to my chambers on January 24, 2017, and following his request for an adjournment of the February 2, 2017, hearing date, it was acknowledged:

> That is correct, back pay will continue if Mr. Rivera is reinstated without interruption. The Town of Belleville will not make any argument to the contrary and is prepared to pay Mr. Rivera for all time, including time in the adjournment period, IF he is reinstated.

The hearing was re-scheduled for April 24, 2017. On April 18, 2017, Belleville filed a Motion to Quash Subpoenas on two higher ranking officials of the town, which had been served two weeks prior on March 30, 2017. Telephonically on April 20, 2017, I reviewed the motion with the parties and memorialized on the record on the first day of the hearing my decision that I was deferring the motion to quash the subpoenas to demand in person testimony of the Mayor and the Township Attorney, without prejudice to appellant's right to renew the request for their testimony if it proved essential. Any subpoenas for documents would be responded to by Belleville.

The hearings were commenced on April 24, 2017, but additional dates were needed on September 6, 2017, February 6 and 23, and April 17, 2018.[3] Post-hearing summations were permitted to be filed, after receipt of the transcripts and another adjournment request, on September 28, 2018, on which date the record closed.

FACTUAL DISCUSSION

Robert Welter testified for Belleville. He has been the Assistant Road Supervisor for approximately five years and has been with the DPW for a total of twenty years. Welter was also the Shop Steward for the approximately forty-four DPW workers at the time of these alleged incidents.

Welter testified that he had heard rumors of Rivera bossing around other workers, but he never spoke to appellant about any of them. Welter stated at the hearing that he had purchased a fundraiser ticket for Mayor Kimble's fundraiser in the winter of 2014 but did not provide any other support.[4] He did not recall which laborers

[3] Transcripts of the plenary hearings at the OAL shall be identified as follows:
Transcript of hearing April 24, 2017: "1T page number: line number"
Transcript of hearing September 6, 2017: "2T page number: line number"
Transcript of hearing February 6, 2018: "3T page number: line number"
Transcript of hearing February 23, 2018: "4T page number: line number"
Transcript of hearing April 17, 2018: "5T page number: line number"

[4] Central to this contested matter was the fact that May 2014 was a municipal election during which a mayor and council would be chosen.

attended the fundraiser, but he did see Esposito, Gilbert, and Balsamo at that particular fundraiser.

On cross-examination, Welter testified that at no time did he receive any complaints about appellant from any of his members; nor did Balsamo or Gilbert ever complain to him about appellant. In fact, Welter testified that he had heard only rumors or gossip that appellant was bossing people around on the job site and did not believe in acting on gossip. He personally never heard appellant talk politics on the job.

Vincent Sousa was hired by Belleville DPW on or about November 4, 2013, as a laborer. He initially worked in the mechanic shop performing brake jobs, oil changes, changing tires, and taking out motors of the Township's vehicles. During snowstorms, he would prepare the salters and snowplows. Sousa also worked with the Water Department. In this job, laborers have to dig to locate water mains. The water mains are about five to six feet deep. It is important that when a laborer is in the hole digging around the main that the other laborer at street level ensure safety. Sousa was also required to assist with shoveling and salting during snowstorms.

During one snowstorm in the winter of 2014, Sousa was told by appellant that he was "going to work today." This occurred at the Senior Center. Sousa understood that comment to mean that he did not work particularly hard on other days. He felt that appellant was bossing him around. There was another incident at the Recreation Center where Sousa was going to help Fiscella take down a snow blower from the back of a truck when Rivera snapped at him saying, "you're going to help me, jerk-off?"

During that same storm, Sousa testified that appellant and Fiscella spoke of newer DPW employees getting fired after the election. Sousa did not discuss politics with appellant directly, but he claimed to have overheard him discussing politics with others by the punch clock. Sousa claimed that appellant did once tell him that both he and his mother would lose their jobs after the election.

On cross-examination, Sousa acknowledged that he had supported Mayor Kimble and his ticket in the upcoming 2014 election. He attended at least five of the

Mayor's fundraisers. Sousa stated that he made various complaints about appellant to supervisor Rocco Balsamo and Shop Steward Welter but could point to no evidence or specifics to support that statement. Sousa admitted that he had been one of the workers who had taken a break from shoveling snow to engage in a snowball fight when appellant reacted by yelling at them all to get back to work. As testified to also at the departmental hearing regarding the snowball fight, Sousa reported that appellant told him: "Stop horsing around and get to work." He recalled other comments to the effect that they should grab the shovel and get back to work, and to stop being a "jerk off." These comments were conceded to have taken place just once and at the Recreation Center. In total, Sousa and appellant worked together only three times during the storms that winter. Sousa was never in a truck with appellant.

Further, it was clarified that Sousa had assumed he could be one of the DPW workers to lose his job if the election upset the Kimble ticket because he felt that he was one of the last ones hired. Yet, he knew that there were other DPW members hired after him, as he had worked there for two years by then. With respect to his testimony concerning his mother's job, Sousa confirmed on cross-examination that his job and that of his mother were not, in fact, connected. She was a crossing guard. Lastly, Sousa acknowledged that he never turned down overtime during snowstorms even if it meant he might have to work with appellant. Further, he did not recall complaining about appellant at the February 19th meeting in the town manager's office.

James DiModica was hired as a laborer in the DPW on January 5, 2014. DiModica was called into shovel snow during the snowstorms in January and February of 2014. DiModica testified that he worked with appellant only during the first snowstorm in 2014. DiModica thought appellant was a supervisor based upon his attitude because he was bossing around other workers. For example, DiModica was waiting in the truck with other workers to salt behind those that were shoveling ahead. Rivera came by the truck and yelled at them to "get the fuck out of the truck."

DiModica recalled that there was pizza for the workers the next day. DiModica texted Mauriello to inform him about the pizza, but Mauriello advised that he was with appellant eating Chinese food. DiModica was on the salting crew spreading salt after

the shoveling crew cleared the snow when appellant screamed at the employees to get to work.

On cross-examination, DiModica admitted that he and others were sitting in a truck staying warm when appellant yelled at them to get out and help. While there were two other DPW members, John Romano and Pete Velardi, who were in the truck with DiModica at this time, neither of them complained. DiModica acknowledged that appellant was not yelling and cursing at him but just generally used a curse word, which really did not bother him.

DiModica testified that he never observed or heard appellant talk about anybody losing their jobs because of the election. DiModica did not report appellant to anyone verbally, or informally, and he did not write a written complaint. DiModica further testified that he did not want to "make a big thing" out of what happened with appellant and that the only person he spoke to was Balsamo. At the February 19th meeting with the town manager and town attorney, he just told them about the small "bossy" incident with the shoveling and the salting.

On further cross-examination, DiModica confirmed that Balsamo would tell everyone in the breakroom that there were fundraisers being held for the Mayor and that he would make tickets available so they could attend. DiModica ultimately confirmed that Balsamo told the DPW members that going to the fundraisers would get you further on the job, that you want to "show your face" at the fundraisers.

Michael Mauriello been employed for four years as a laborer, but his employment for Belleville began on January 6, 2014. His duties consist of picking up bags, taking care of the grass, patchwork on the roads, and other miscellaneous tasks. Within the first two weeks there was a snowstorm. During one snow storm, Mauriello was traveling in a municipal pick-up truck with appellant and Fiscella. The truck had a bench seat with Fiscella driving, appellant at the window, and Mauriello in between them. Mauriello stated at this hearing that the two men were discussing politics. Appellant told him that if Mayor Kimble's opposition won, they would take over and make changes. Mauriello also testified that when DiModica texted him about pizza at town hall, appellant said that

Esposito could "choke on his pizza." Mauriello recalled later during that snowstorm, appellant and Sousa cursing at each other from a distance. Mauriello complained to Balsamo because he felt uncomfortable.

On cross-examination, Mauriello admitting attending Mayor Kimble's fundraisers out of loyalty to the person to whom he felt he owed his job even though he did not like getting involved in politics. Mauriello clarified that appellant only remarked that a new administration might lead to some changes for the better. There was no threat to jobs. It made him uncomfortable, however, because he could tell that Fiscella and appellant were not loyal to Kimble. Nevertheless, they were both good workers. Mauriello merely asked Balsamo to put him on a different crew for snowstorms because he did not want to get involved in talking politics. Accordingly, he only worked with appellant for that one heavy, overnight storm. He did not hear appellant state that DPW workers would lose their jobs if Kimble lost the election; only that changes would be made.

Louis Sacchiero was also a new DPW laborer in January 2014. He similarly thought that appellant was a supervisor based upon the way he screamed at others to get to work. Sacchiero only worked with Rivera once during a snowstorm. Sacchiero testified that the incident where appellant cursed at the other DPW workers who were having a snow ball fight took place from 70-100 yards away down the hill. Sacchiero testified that he never had any meetings with Balsamo or Gilbert regarding appellant. Sacchiero also agreed that it is not uncommon to hear DPW workers curse while working.

Giuseppe D. Cofone has been a Belleville DPW laborer for eleven years. He worked with appellant only a few times. He described appellant's demeanor as being harsh. Cofone testified that he heard Rivera discussing politics regarding a "new regime." On cross-examination, Cofone denied that he made any complaints about appellant to either Balsamo, Esposito or Murphy, or at the February 19th meeting in the town manager's office. Cofone admitted that when workers are not shoveling fast enough or throwing salt fast enough, someone has to step up and take charge. Appellant did yell at others to get back to work or to work harder. Cofone confirmed that

he never felt that his job had been threatened by appellant and he never heard appellant tell anyone else that they might lose their jobs if Mayor Kimble lost.

William Gilbert is the Supervisor of the DPW, overseeing approximately forty-six employees. He described the structure of the DPW and his responsibilities. He has been a Belleville employee since 1985, starting as a laborer and thereafter getting promoted to mechanic and then management. Gilbert then explained the steps he took after Balsamo brought the DPW worker complaints to him. He testified that he condensed the worker's written complaints down to a two-page letter (Exhibit R-1), on February 20, 2014, and then shredded the underlying documents. He stated: "I shredded them for security. I didn't want other people to know what was going on." [T3:18:24-25.]

On cross-examination, Gilbert testified that it was Sousa, Mauriello and DiModica who had written complaints, the same three individuals who had been in Balsamo's office earlier. While Belleville had a harassment complaint procedure and policy in place, and a complaint form, neither Balsamo nor Gilbert advised these three employees to use the form or procedure set forth in the policy. Gilbert discussed the complaints from the DPW workers with Balsamo and then, alone, with Esposito.

Kevin Esposito is currently the Township Tax assessor. He was the Interim Township Manager between 2012 and 2016. As interim Township Manager, Esposito would oversee the day-to-day operations of the municipality. Esposito hired appellant in 2013 after he met with him seeking full-time employment. Esposito recalled that Rivera was experiencing financial hardship, but also had good recommendations and qualifications. Esposito described appellant's history of positions with the Township, starting with code inspector. He also set forth the documents that each new employee was provided and which each had to acknowledge. Esposito testified that appellant was transferred from code enforcement because there was a declining need for inspectors.

Esposito described a meeting held on February 19, 2014, with himself, the town attorney Murphy, Gilbert, and Balsamo. The union shop steward Welter was also

present. The laborers who were present were Marra, Cofone, Mauriello, Sousa, DiModica, and Sacchiero. Mauriello reported appellant's comment "he can choke on his pizza." Esposito stated that he was told by several workers during that meeting that appellant threatened that they should not be supporting certain political groups and that everyone would be fired in the future. Appellant was reportedly aligned with a political power broker in town – Richard Yanuzzi.

Esposito decided that appellant was causing a distraction on the jobs undertaken by the Water Department and that such behavior put himself and his co-workers in harm's way. The complaints were summarized by Gilbert and Balsamo as follows: 1) he is saying what did you do to get thrown out of the garage; 2) they are going to lose their jobs when the election happens in May; 3) he is yelling and giving orders, and talking about when his organization takes over how everything is going to change; 4) he is constantly threatening workers about what will happen after the election during work hours; 5) when the manager bought the DPW workers pizza during a snow storm, he would not take an employee to get a slice of pizza at the manager's office and told the employee that the manager should choke on his pizza, and 6) that he cannot wait until May to walk in his office and fire the town manager. [Exhibit R-1.]

Esposito then convened a meeting with Gilbert, Murphy and appellant to address the complaints. The Preliminary Notice of Disciplinary Action (PNDA) was prepared prior to the meeting. Esposito stated that he had intended to give appellant an opportunity to respond to the allegations, but appellant became too angry, shouting "this is bullshit" and flailing his arms. Esposito determined to give him the PNDA right then and advised appellant that he was suspended without pay. Appellant was charged with conduct unbecoming of a public employee and other sufficient causes. Esposito testified that he based that upon the hostile work environment due to bullying, verbal abuse, intimidation, and threats to fellow employees.[5] Esposito insisted that appellant

[5] Esposito testified that he received complaints from a member of the public and another Belleville employee about appellant prior to his re-assignment to the DPW. However, in both instances the individuals refused to reduce their complaints to writing. The member of the public allegedly advised Esposito that appellant, in his duty as a code inspector, was aggressive and hostile towards a property owner. As this is inadmissible hearsay without a residuum of competent evidence supporting it, it shall be disregarded. Further, appellant was never advised of these complaints or given the opportunity to tell his side of the story.

was not disciplined due to his political affiliations; rather, he was disciplined due to concerns of the other employees' safety and work place environment.

On cross-examination, Esposito admitted that he was the person who conducted the investigation and made the determination to fire appellant. Neither Esposito nor Balsamo asked any questions of appellant, and the PNDA was already prepared for his immediate suspension without pay prior to appellant entering the meeting. There was also no attempt by Esposito to interview other laborers or Fiscella, even though he was a witness and/or participant in several of the alleged incidents. Esposito seemed confused and uncertain when questioned as to the exact timeline of his investigation. The verbal complaints of the three workers might have been received on February 19 or 20; the timing of the complaints of Cofone and Maura were even less certain; although all these complaints were allegedly summarized in the Gilbert and Balsamo memorandum dated February 20.

Esposito also confirmed that it was against public policy for anyone to solicit monies for political fundraisers or to sell tickets to such events during the workday and on town property.

Rocco Balsamo has been employed by the Belleville DPW for 14 years. He was the Assistant Superintendent of DPW at the time of these incidents. His duties included meeting with each Department supervisor to review the assignments of the employees and pass along any orders from the Superintendent. Balsamo first met appellant in 2014 in Esposito's office when he was being transferred into the DPW. Rivera was assigned as a laborer in the Water Department.

Balsamo stated that he received complaints against appellant regarding one or two snowstorms from a group of newer employees over the course of a couple of days. He then asked that group of workers to come to his office. Balsamo was advised by Mauriello that he felt threatened and that appellant bossed him around. Mauriello told Balsamo that he was not allowed to get pizza, that he could not go for a break, and that appellant remarked that he did not do his job properly. Sousa complained about Rivera yelling, cursing, and demeaning him about working hard. Cofone complained about him

taking the lead and acting like a supervisor. DiModica and Sacchiero complained about the same issues. According to Balsamo's testimony, the employees felt threatened because they were told there would be changes after the upcoming election and they were new hires. Also, Balsamo testified that he was told by the employees that they felt threatened and were not focusing on their jobs because of the upcoming election. Balsamo explained that he was concerned for their safety.

Balsamo testified that he took notes on exactly what he was told by the laborers and then presented them to Gilbert. After presenting the complaints to the DPW Superintendent Gilbert, Balsamo testified that Gilbert summarized them in writing and presented it to the Township Manager Esposito. Balsamo testified that he was called into the meeting with the Township Manager and Gilbert as to the complaints. He also attended another meeting with Esposito and the Township Attorney Murphy to review the complaints.

On cross-examination, Balsamo testified that even though he claimed that appellant's fellow laborers felt threatened, he was unable to identify any of the language or wording used that made them feel that way. Balsamo could also not recall anyone specifically saying that appellant used the term "regime change."

Joseph Marra was not called to testify but his departmental testimony of February 20, 2015, was admitted into the record. Therein, Marra could not recall working with appellant, or ever hearing him talk politics. Marra also denied hearing any other workers complain about appellant.

Vincent Fiscella, Jr. presented testimony on behalf of appellant. Fiscella was a laborer with Belleville between approximately October 3, 2011 through May 13, 2014.[6] Fiscella stated that during the snowstorms, the crews were given over twenty properties to clear of snow and lay down salt. Those properties included around town hall, which

[6] Fiscella was terminated by respondent due to allegations unrelated to those herein. In Vincent Fiscella, Jr., Twp. of Belleville Dept. of Public Works, OAL Dkt. CSV 2891-15, both the Initial Decision (October 22, 2015) and the Final Decision (December 16, 2015) reversed his termination, finding one charge unsupported and one charge worthy of only a written reprimand. Fiscella was also reinstated to municipal employment and awarded mitigated back pay and some counsel fees.

is a full block around, police parking lots, library, a recreation center, which is up a hill, and the senior citizen building. In the winter of 2014, there were a few significant snowstorms with very heavy snow. Fiscella recalled for one snowstorm, he was partnered with appellant and Mauriello. He testified that the town had snow blowers but that they were inoperable, which clearly made the job more arduous and time consuming. The laborers had worked throughout the night on that occasion. Fiscella said it was bitterly cold and all he and appellant wanted to do was get done and get warm.

Fiscella observed that throughout the night, the other DPW workers made excuses, such as having to get salt or shovels, in order to find some relief from the cold, leaving appellant, Mauriello, and himself to shovel. At some point, appellant recommended calling Fiscella's father, the Superintendent of Grounds at the Belleville Board of Education, to ask to borrow a snow blower. Fiscella's father agreed to provide the snow blower so their crew of three picked up the blower along with ramps to get it on the truck. Needless to say, it was a miserable storm and everyone was tired and cold. Fiscella observed appellant wearing a backbrace – of a Home Depot type -- when appellant took off his jacket at lunch. Fiscella further testified that appellant complained of his back hurting him, that it was sore and aching, and that he had surgery on his back.

Fiscella testified that the only discussion he recalled them having while they were in the vehicle concerned a comparison between how the Board of Education was well-operated as compared to the town, especially regarding broken trucks and equipment, and the general organization of the management. Fiscella testified that his father's trucks were older, but in tip-top shape, clean and functioning. So, he stated that the discussion was more about how the town could be run better if a new administration was voted in.

Fiscella further stated that after working through the night, he had called the Road Supervisor, Bob Welter, to ask if they could stop to get something to eat, which was granted. The only place open was a Chinese buffet on Main Street, so the three of them went there to eat. Appellant paid for Mauriello's lunch. After eating, Fiscella

testified that he got a call from Welter telling them to return to City Hall because they needed the snow blower there to clean. Fiscella recalled that upon arriving, as they were taking the snow blower off the truck, Gilbert pulled up and said, "There's pizza inside if you guys want." At that point, Fiscella was indifferent to that news as they had just eaten. Fiscella confirmed that appellant was seen yelling at the workers who were throwing snowballs down the hill from the Recreation Center and not working. He recalled that appellant had also cursed while yelling at the men who were sitting in a truck earlier in the storm.

On cross-examination, Fiscella stated that he did not know appellant very well prior to and during their mutual employment with Belleville. His father knew appellant from the Board of Education, and Fiscella and appellant would see each other at the local cigar store where they hung out. Cigars were the subject of conversation in the break room on occasion. Because Fiscella had had a prior career in a more political agency, he knew better than to talk politics on the job; about which he could not say the same for Balsamo.

John Rivera testified on his own behalf. Appellant was initially hired to be an inspector for code enforcement. He remained in that position for approximately one year. Appellant was then transferred to be a clerk in the Municipal Court, but there was a conflict because of the fact that he was a Board of Education Trustee. He was then transferred to the DPW effective December 11, 2013. Appellant believed that the transfer was politically motivated. He was also not happy about having to work in the DPW because of his age and a bad back.

Appellant was assigned to the Water Department where that he received no complaints about his performance from Balsamo or Gilbert. Appellant testified that he worked two or three snowstorms the winter of 2014, where he and other laborers had to work fourteen to eighteen hours at a time. As others have stated, appellant testified that the snowstorms that year were comprised of one to two feet of very wet and heavy snow.

Unfortunately, appellant found that the DPW snowblowers were all broken and even some shovels were less than ideal in functionality. He also testified that there were no radios in the truck and the lift gates on the trucks were also broken, requiring the DPW members to do everything manually. Appellant confirmed that there were over 20 properties that had to be shoveled. Although they would be split into separate groups, one group would follow up on another group to finish clearing and salting a property. Appellant stated that there would be three laborers to a truck, and that he was always put with Fiscella during the snowstorms. Fiscella was always driving. Because the trucks had no radios, the supervisors would call Fiscella by phone. Appellant recalled that Sacchiero was with them in a truck for one storm but only for approximately two hours, and Mauriello for another occasion.[7]

Appellant testified that there was no conversation about politics with Sacchiero. The conversation he had with Fiscella about politics with Mauriello in the truck concerned how none of the town's equipment was working during a big snowstorm. After they contacted Fiscella's father, who was head of buildings and grounds for the Belleville Board of Education, to borrow a snow blower from the Belleville Board of Education, the conversation turned to how things would change for the better if the other candidates won. This was strictly in the sense of the town equipment and how the town seemed to be deteriorating with the upkeep and planning that seemed missing at that point. Appellant denied making any comment that anyone would lose their jobs after the election, nor did he ask Mauriello who he was planning on voting for.

With respect to the "pizza incident," appellant testified that they had been working since late evening and they had worked all through the night for twelve hours without food or a break other than grabbing coffee. Fiscella got a call from Gilbert telling them to go to lunch. Because of the storm, just about everything was closed but they found a Chinese restaurant on Main Street and went to eat there. Appellant paid for everyone's lunch. At that point, they had the snowblower in the truck, but they were tired, wet and cold. His back was killing him. When these three were done with lunch, they were told

[7] Appellant testified that Cofone was on the truck with him for about twenty minutes. On that occasion, appellant was driving and Cofone was on the back of the truck spreading salt, but he was never inside the truck with him.

to go to town hall to clear the property. It was then that they found out that Esposito bought pizza for everyone. Appellant admitted that he made the statement that "Well, he can choke on his pizza," but it was because he was upset that he just paid $35.00 for Chinese food when they could have had free pizza. All he wanted to do was just finish clearing the properties and be done with this snow duty.

At one point, when appellant and Fiscella were clearing snow at the Senior Center, which runs around 200 yards, he was working to get the sidewalk clear. When appellant was approximately 100 yards towards the train trestle, he turned around, stopped the machine, and looked back. He observed several guys were down there having a snowball fight, including Sousa, DiModica and two or three others. Fiscella was right next to him. At that point, he yelled to them, "Pick up a fucking shovel, we got work to do." They picked up shovels and started working. On another occasion, DiModica and other members were sitting in a truck, with the windows closed staying warm, while he and the others were outside shoveling. Appellant did yell to them: "Get out of the truck. Let's go."

Appellant stated that at no time during the snowstorms did he ever witness Gilbert or Balsamo on the road. It was rare to see any supervisors out in these snowstorm events. He also reiterated that at no time when he met up with other groups of DPW workers did they hang out outside and talk politics. He never had a one-on-one conversation with Sousa about politics and he never commented that his mother was going to lose her job. There was only one verbal run-in when appellant felt that Sousa was standing around while Fiscella obviously needed help getting the snowblower off the back of the truck.

Appellant denied that he had any conversations with Cofone, DiModica, Sacchiero, or anyone other than Fiscella about Belleville politics, especially in light of his belief that the reason he was transferred to the DPW was as punishment for his political views. Appellant rarely stopped in the breakroom but walked through it to get to his truck. In the Water Department, laborers did not have to go to the breakroom to get assignments. With respect to his work with the Water Department, appellant stated that

he only worked two water main jobs with each of Cofone and Sousa when they were shoveling dirt into a hole during which they had no conversation.

Appellant testified that on the day he was served with the PNDA, he was told to respond to town hall to see Esposito. He was not told what it was about and he had no idea of what was coming. Balsamo, Gilbert, Murphy and Esposito were there, as well as union representative Welter. He was immediately told that he was being suspended without pay because he had been "abusive" and "harassed" toward some of the other laborers. He was handed the PNDA within the first minutes of being there. Appellant said to Welter, "This is bullshit, help me here, what's going on?" Appellant testified that nobody spoke to him and nobody asked him his version of any of the alleged incidents. They told him he could get a hearing. Appellant insisted that his tone at the meeting was level because he was trying to save his job and his only income. He emphatically denied that he was yelling loudly and flailing his arms. At the hearing, he explained that he has a metal plate in his arm from an accident and "flailing" is not something he does with his arms.

On cross-examination, appellant admitted to the yelling he did during the snowstorms but stated that such was only in response to other employees shirking their jobs and in the absence of any supervisors.

It was clear both at the hearing and through reading the post-hearing submissions of both parties that this relatively short employment relationship was contentious and the employment action herein challenged was infused with at least some politics. Belleville's perspective was hyperbolic and fairly far afield of the actual evidence in the record.[8] Rivera's argument emphasized political connections and perceived conflicts.[9] My task is to see the truth through the weeds.

---

[8] For example –

> [Appellant]'s suspension stems from a vitriolic campaign of harassment, intimidation, and hostile conduct against virtually all his fellow laborers during which he subjected them to regular threats that he would gain political power and eliminate their livelihoods.
>
> [Respondent's Brief at 4.]

And --

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Credibility, or, more specifically, credible testimony must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). I **FIND** that respondent's witnesses were less credible than appellant. Credibility means the testimony as a whole holds or hangs together and makes sense. After listening carefully to every witness, it was clear to me that this entire case turned on the exaggerations and over-reactions, whether intentional or unintentional, of Balsamo and Esposito. At the hearing, they were placed in a position to defend a decision to immediately suspend without pay and then terminate a low-level DPW laborer on "safety concerns" that stemmed almost entirely from two big snowstorms in 2014 during which no one was hurt, threatened or confronted by hostile elements other than Mother Nature. Conversely, appellant's testimony was consistent, forthright, and believable, even when he admitted to raising his voice during those long hours of shoveling.

FINDINGS OF FACT

Accordingly, and based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to

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> The laborers of Belleville's Department of Public Works deserved the ability, particularly during the historically brutal winter of 2013 – 2014, to attend to their critical job responsibilities without the distraction of a never-ending barrage of threats to their employment as well as crude personal insults.
>
> [Respondent's Brief at 6.]

[9] Appellant, who used the label "cousin" to describe the familial relationship between Gilbert and the Mayor seventeen (17) times, also had a decided bent to his post-hearing presentation –

> There is no dispute that all those involved in the decision to investigate, charge, suspend without pay, and terminate [appellant] supported the Mayor in the upcoming election by raising money, by selling tickets to the Mayor's fundraisers and/or purchasing tickets to the Mayor's fundraisers and/or participating in the fundraisers and/or actively campaigning for the Mayor[.]
>
> [Appellant's Brief at 2.]

observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Appellant is in his mid-fifties, having graduated high school in 1980. He took some college courses but did not matriculate. After some typical odd jobs, appellant was employed in security, then the banking and bond industry, and for a longer period in hospital financial services.

2. Appellant began employment with Belleville in early 2013 as a property maintenance inspector within the code enforcement department.

3. Appellant was also the President of the Board of Education for the Township of Belleville during all relevant times herein, specifically, two three-year terms from 2010 to 2016.

4. Appellant was transferred initially to the municipal court in or about November 2013, but it was then confirmed that his position with the school board prohibited that job assignment.

5. Appellant was thereafter transferred to the Department of Public Works as a laborer in the Water Department on or about December 11, 2013.

6. The reasons for that transfer cannot be determined on this record.

7. There were two snowstorms discussed in detail at the hearings.

8. Appellant yelled at some fellow laborers who were throwing snowballs while he and some others were still shoveling snow.

9. Appellant and Fiscella discussed the hope that a new municipal administration would operate the DPW better and provide functional equipment.

10. Mauriello was assigned to the same truck as appellant and Fiscella for only a few hours during one of the storms. He was uncomfortable with their viewpoints on the town government but never felt threatened in any manner.

11. The conversation between appellant and Fiscella while Mauriello was in the truck with them, which was only on and off for a few hours during one snowstorm, centered on frustrations with the DPW equipment and the invidious comparison to the BOE equipment.

12. Mauriello was never asked for whom he was planning on voting for Mayor and council.

13. All of the laborers had worked long, cold, and hard hours during these snowstorms. It is fair to surmise that everyone was tired, hungry, cold, and cranky. Each person reacts individually to those types of stressors.

14. Appellant got permission to take a meal break and treated Mauriello and Fiscella to a Chinese buffet before any of them knew about the free pizza back at the municipal building.

15. Appellant's comment that Esposito could "choke on his pizza" was not a threatening comment, but one expressed out of fatigue and aggravation, insofar as he had just paid for his and the others' meal. No reasonable person would have taken that comment literally when placed in context.

16. It is not unusual or surprising that DPW laborers use curse words during normal and/or heated conversations.

17. Appellant, as one of the oldest laborers, as well as President of the Board of Education, was probably not emotionally prepared to be doing manual labor at the bottom of the DWP pecking order. He had a propensity to be a little bossy to younger workers who he perceived were not pulling their weight even though he had been given no supervisory authority.

18. Appellant did not bully, harass or threaten any other laborer during these two snowstorms. Similar to many others on that job, his speech to get back to work was sprinkled with some common curse words.

19. During these two heavy snow events, there was no supervisory presence

outside with the DPW crews shoveling and salting the public properties. Insofar as truck radios were non-functional, the DPW crews were pretty much on their own – self-governing -- during those long, overnight hours.

20. During regular Water Department jobs, appellant never harassed, threatened or bullied any fellow laborers.

21. Appellant did not threaten anyone's job in anticipation – that is, "if and when" – a new administration was to be elected in May 2014.

22. Every witness for respondent was politically and actively loyal to the Mayor. Appellant and Fiscella were politically and actively loyal to the challenger to the Mayor. Every person presented his belief that all the other person's witnesses were too political during working hours.

23. Appellant did not lobby other laborers to his political viewpoint in the break room. Appellant was rarely in the break room and even if he passed through, the conversation was just as likely to be about cigars as the election still months away.

24. Appellant did not threaten anyone's employment. Appellant expressed his opinion and observations that when elections are over and if new people are in positions of authority, changes are inevitable.

25. No laborer could reasonably have felt threatened, intimidated, or in a hostile work environment as a result of appellant's differing municipal allegiances.

26. Balsamo, who was in a supervisory position, did occasionally solicit laborers to purchase tickets to the Mayor's fundraising events that winter during working hours and on municipal property.

27. Balsamo let DPW workers know that their future employment prospects would not be hurt if they attended the Mayor's functions.

28. Only three laborers complained about appellant, and none of them felt that their jobs had been threatened.

29. This disciplinary action relies almost exclusively on verbal interactions between DPW laborers during two heavy snowstorms in February 2014.

30. No DPW employee's safety was ever at issue in any of the alleged complaints.

31. Neither Esposito or Balsamo attempted to discuss with appellant toning down his bossiness or viewpoints.

32. Appellant was given no verbal warning or written reprimand for these or any other allegations for his employment in Belleville.

33. Appellant was never given any minor or major period of suspension for these or any other allegations for his employment in Belleville.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so,

the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, Belleville bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933).

Initially, appellant argues that the proceedings below were tainted by a conflict of interest in violation of the Ethics Law:

> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family . . . has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independent of judgment.
>
> [N.J.S.A. 40A:9-22.5(d).]

Appellant asserts that during the period of the investigation of the complaints about him, Gilbert was the Mayor's cousin and he was aware that appellant was not supporting the Mayor. Similarly, it is argued that Murphy investigated the complaints by interviewing the witnesses, but he had been the Master of Ceremonies for the Mayor at his fundraisers. Balsamo, the other managerial employee involved in this disciplinary action, sold tickets to laborers for the Mayor's fundraising events. Appellant asserts that the appearance of impropriety standard should be applied in what he refers to as a quasi-judicial proceeding, thusly: "'Would a reasonable, fully informed person have

doubts about the judge's impartiality?'" Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 223 (2013) (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)).

I **CONCLUDE** that the argument of an ethical conflict of interest at play in the bringing of the Preliminary Notice of Disciplinary Action must be set aside because the proceedings here at the OAL are de novo. Accordingly, appellant's challenge as to validity of his suspension and termination after a local hearing based on political bias, and that the proceedings should be held to be void ab initio must fail. In re Morrison, 216 N.J. Super. 143, 151 (App. Div. 1987). Even if the municipal attorney and DPW management were prejudiced and should have recused themselves, this is an entirely new hearing in which all evidence bearing on the case must be sought, and a substituted decision as to substantiation is made as if there had been no prior hearing and decision, thus correcting any prejudice which may have existed at the local level. See also Marro v. Civil Serv. Dep't, 57 N.J. Super. 335, 345-46 (App. Div. 1959); Carr v. Sharp, 454 F.2d 271, 272 (3d Cir. 1971).

Accordingly, this dispute turns solely on the factual underpinnings of the allegations, and not whether persons who drafted and investigated them for presentation at a departmental hearing were biased or had an appearance of impropriety.

Based upon the facts set forth above, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant was a threat to the safety of other crew members who needed to be immediately suspended without pay on February 20, 2014, effective February 21, 2014. There were no reports that any worker felt that his safety was threatened by the presence of appellant on the job. No testimony was produced at these hearings that anyone was so distracted by thoughts of possibly losing a job several months later as a result of things appellant might have said that they could not concentrate on their jobs. These assertions strains credulity. There were also no complaints about the quality of the work appellant did or the effort he applied, notwithstanding a bad back, arm injury, and being older than the average laborer.

In addition, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant's offense of being occasionally outspoken about the local politics and at times crude or bossy in his vocal interactions with fellow laborers rose to the level of bullying, harassment, or creating a hostile work environment. This conclusion is buttressed by the record facts showing that no one complained about appellant or made his conversations a big deal until Balsamo and Gilbert brought the workers into a common interview session on February 19, 2014. Further, the use of common curse words by DPW laborers, especially during arduous snowstorm duty, is hardly grounds for termination. If it was, I dare say most towns would have empty DPW departments.

Accordingly, I **CONCLUDE** that respondent has not met its burden of proof on these disciplinary charges and that they must be dismissed. Whether this was politics at play, bad blood, or personalities rubbing the wrong way, there was simply barely any smoke to these charges and certainly not a blazing fire of outrageous work behavior as characterized by respondent. The respondent's assertions are also undermined by its failure to keep any underlying notes, complaints or statements, and by its utter failure to actually "investigate" both sides.

Even if I had concluded that Belleville had proven these disciplinary charges, I would **CONCLUDE** that the penalty imposed here was excessive and shocking to my sense of fairness. This entire situation could and should have been handled with a verbal warning or written reprimand. Put bluntly, these are trumped up charges on which Belleville has wasted its public resources, when the proper managerial approach would have been to remind everyone as to the behavior expected in that work environment.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Township of Belleville, Department of Public Works against appellant John Rivera is hereby **REVERSED**. It is further **ORDERED** that

appellant John Rivera is entitled to back pay and any other benefits that would have otherwise accrued had he not been removed.

It is further **ORDERED** that reasonable counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 2, 2018

DATE

Gail M Cookson

GAIL M. COOKSON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Vincent Fiscella, Jr.

John Rivera

For Respondent:

Robert Welter

Vincent Sousa

James DiModica

Michael Mauriello

Louis Sacchiero

Giuseppe D. Cofone

William Gilbert

Kevin Esposito

Rocco Balsamo

LIST OF EXHIBITS IN EVIDENCE

Joint:

J-1 Preliminary Notice of Disciplinary Action, dated February 20, 2014

For Appellant:

A-1 [not in evidence]

A-2 [not in evidence]

A-3 [not in evidence]

A-4 [not in evidence]

A-5 [not in evidence]

A-6 Testimony of Joseph Marra at Departmental Hearing, dated February 20, 2015; Letters on hearing delays

A-7 Errata and Revisions, Township of Belleville Employee Manual

A-8 Discovery Demands – Attachments to Certification of Counsel, dated December 4, 2014

For Respondent:

R-1 Letter from Bill Gilbert and Rocco Balsamo, dated of February 20, 2014

R-2 Interoffice Memorandum from Thomas M. Murphy re John Rivera, dated February 19, 2014

R-3 Excerpts of Employee Manual on Workplace Violence and Anti-Harassment

R-4 Interoffice Memorandum from Kevin M. Esposito re Employee Transfer, dated December 11, 2013

R-5 Acknowledgement of Receipt of Employee Handbook, John R. Rivera, dated April 1, 2013

R-6 Township of Belleville Employee Manual

R-7 To Whom It May Concern Letter re harassment complainants, dated February 21, 2014

R-8 Acknowledgement of Receipt of Other H.R. Documents, John R. Rivera, dated April 1, 2013

R-9 Township of Belleville Resolution No. 12-116, re Civil Rights Policy, dated April 26, 2012

In the Matter of Aaliyah Thomas,
Ancora Psychiatric Hospital,
Department of Health

CSC DKT. NO. 2018-100
OAL DKT. NO. CSV 10749-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 5, 2018 JM

The Civil Service Commission, at its meeting of December 5, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
DECEMBER 5, 2018

Deirdré L. Webster Cobb

Deirdré Webster Cobb, Esq.,
Chair/Chief Executive Officer

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10749-17

AGENCY DKT. NO. 2018-100

IMO AALIYAH THOMAS, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

William Nash, Esq., for Aaliyah Thomas, appellant

Marc Malfara, Employee Relations Officer, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2), for Department of Human Services, Ancora Psychiatric Hospital, respondent

Record Closed: November 9, 2018 Decided: November 14, 2018

BEFORE **CARL V. BUCK, III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on July 31, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Aaliyah Thomas from the action of the respondent, Department of Human Services, Ancora Psychiatric Hospital. At the scheduled hearing on November 9, 2018, the parties filed a fully executed Settlement Agreement. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

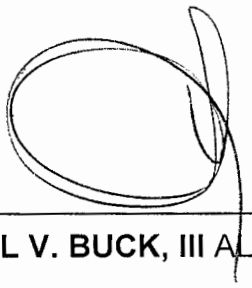
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.



November 14, 2018
DATE

CARL V. BUCK, III ALJ

Date Received at Agency: 11-14-18

Date Mailed to Parties: 11-15-18

/lam

APPENDIX

EXHIBITS

Joint:

J-1 Settlement Agreement

For Petitioner:

None

For Respondent:

None

J-1

OAL DKT. NO. CSV 10749-2017 SS
AGENCY REF. NO. 2018-65

SETTLEMENT AGREEMENT

IN THE MATTER OF AALIYAH THOMAS
AND
Ancora Psychiatric Hospital/DOH

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated June 20, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C.4A:2-2.3(a)6-Conduct unbecoming	20 days	7/92017
2 N.J.A.C. 4A:2-2.3(a)12- Other sufficient cause	" "	" "
3. 4:08 C-8.1 Falsification	" "	" "
4. 4:08 El.3 Violation of Policy	" "	" "

B. The Appellant **AALIYAH THOMAS** withdraws his appeal and request for a hearing, and the Respondent Appointing Authority agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C.4A:2-2.3(a)6-Conduct unbecoming	WITHDRAWN
2 N.J.A.C. 4A:2-2.3(a)12- Other sufficient cause	" "
3. 4:08 C-8.1 Falsification	" "
4. 4:08 El.2 Violation of Policy	" "

This agreement shall also resolve certain charges contained in a Final Notice of Discipline dated 3/16/2017 containing charges of NJAC 4A:2-203(a)(6) conduct unbecoming, NJAC 4A:2-203(a)(7) Neglect of Duty; NJAC 4A:2-203(a)(12) Other Sufficient cause; A.O. 4:08 B2.1 Neglect of Duty; A.O. 4:08 B7.1 Serious mistake; A.O. 4:08 E1.4 Violation of Rule/Policy, all of which are being withdrawn. Also being withdrawn are charges from Disciplinary ID#11640 containing NJAC 4A:2-2.3(a)(6) conduct unbecoming and NJAC 4A:2-2.3(a)(12) other sufficient cause and C-8.2 falsification and E1.5 violation of Rule.

C. The parties have agreed to the following:

1. To date, appellant has been suspended for a total of 20 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the appellant is as follows: 20 DAYS

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Authorized Leave of Absence without Pay.

Additionally, Appellant shall be reinstated to her prior position as a Food Service Handler. Appellant shall not return to Ancora Psychiatric Hospital and shall be given an authorized leave of absence to pursue a transfer to another place of employment within the Department.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Ancora Psychiatric Hospital (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of AALIYAH THOMAS's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Both parties agree not to file exceptions or cross exceptions in this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

See next page

Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

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J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 11-9-18

AALIYAH THOMAS, APPELLANT

DATE: 11-9-18

WILLIAM A. NASH, Esq.
ON BEHALF OF APPELLANT

DATE: 10-16-18

Marc Malfara, ERO
ON BEHALF OF RESPONDENT

CERTIFICATION

I, AALIYAH THOMAS, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 11-9-18

AALIYAH THOMAS

12-19-18

A-1

STATE OF NEW JERSEY

In the Matter of Ronald Green
Union County,
Department of Human Services

CSC DKT. NO. 2019-17
OAL DKT. NO. 10327-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 19, 2018 BW

The Civil Service Commission, at its meeting of December 19, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF DECEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10327-18

AGENCY DKT. NO. 2019-17

IN THE MATTER OF RONALD GREEN, UNION COUNTY DEPARTMENT OF HUMAN SERVICES.

Julia Barocas, Union Representative for appellant (AFL-CIO District 1)

Allan Roth, Esq., for respondent (Roth D'Aquanni, LLC, attorneys)

Record Closed: November 29, 2018 Decided: November 29, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 17, 2018, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a settlement conference on November 29, 2018 and during that time, the parties engaged in settlement discussions and agreed to settle

the matter. The signed Settlement Agreement indicating the terms of settlement is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 29, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Date Mailed to Parties:
sej

ALLAN C. ROTH, LLC
150 Morris Avenue, Suite 303
Springfield, NJ 07081
973-258-1288

IN THE MATTER OF

RONALD GREEN

DEPARTMENT OF HUMAN SERVICES
DISCIPLINARY HEARING

UNION COUNTY, NEW JERSEY
STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, Ronald Green ("Employee") and Union County ("County"), hereto that the above-captioned matter be and is hereby settled upon the following terms and conditions:

1. The following charges in the Preliminary Notice of Disciplinary Action dated March 13, 2017, to Employee charging him with violation of *NJAC* 4A:2-2.3(a)1: Incompetency, Inefficiency and Failure to Perform Duties; *NJAC* 4A:2-2.3(a) Neglect of Duty and *NJAC* 4A:2-2.3(a)12: Other Sufficient Cause: violation of Division policies and work rules related to the processing of expeditated cases shall be sustained. All other charges in the Preliminary Notice shall be dismissed.

2. The penalty related to this Preliminary Notice shall be a six (6) working days unpaid suspension, which shall be served at the discretion of the County. At the discretion of the County, Employee shall be permitted to utilize Paid Time Off ("PTO"), with the exception of sick time, to satisfy a portion of this penalty.

3. The parties agree that three (3) suspension days of the six (6) days above, shall be held in abeyance for a period of one (1) year from the date this Agreement is signed. Employee further understands and agrees that if new disciplinary action is initiated against him for Incompetency, Inefficiency, or Failure to Perform Duties, Neglect of Duty, and/or violation of County policies and work rules relative to completion of work and rules related to case banking/cutoff day procedures and he is found guilty of those violations (or enters into a settlement agreement disposing of such charges), the three (3) days originally held in abeyance will be imposed, in addition to the penalty imposed for the new disciplinary infraction.

4. In addition, Employee shall serve five (5) additional working days unpaid suspension related to the previous settlement agreement dated February 19, 2016. At the discretion of the County, Employee shall be permitted to utilize Paid Time Off ("PTO"), with the exception of sick time, to satisfy a portion of this penalty.

5. Employee understands and agrees that this disciplinary action will be maintained in his personnel file and, for progressive disciplinary purposes, will be considered a six (6) day penalty, in addition to the twenty-five (25) working day suspension from February 19, 2016.

6. Employee voluntarily enters into this Stipulation and Settlement.

7. Employee voluntarily and in consideration of the above, hereby waives and releases the County, its employees, officials, agents and assigns from all claims, stemming from the instant charges or the basis of these charges, that he may have or have had as of the date of this Agreement, against the County, its employees, officials, agents and assigns, including but not limited to all discrimination claims, liabilities, costs, and attorney fees under federal, state and local statutory and or common law, including Title VII of the Civil Rights Act ("Title VII," 42 U.S.C. 2000(e) et seq.), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act (the "ADEA," 29 U.S.C. 621 et seq.), the Equal Pay Act ("EPA"), the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) and the New Jersey Civil Rights Act.

a. This Waiver and Release specifically does not in any way waive or limit Employee's right to file a charge with or testify, assist or participate in an investigation, hearing or proceeding conducted by the U.S. Equal Employment Opportunity Commission ("EEOC") under the ADEA, Title VII, the ADA or the EPA.

b. Employee hereby agrees to waive his right to any monetary or equitable recovery should he or any federal, state or local administrative agency pursue any claims on his behalf arising out of the instant disciplinary charges and/or the basis of these charges and promises not to seek or accept any award, settlement or other monetary or equitable relief from any source or proceeding brought by any person or governmental entity or agency on his behalf or on behalf of any class of which he is a member with respect to any of the claims he has herein waived.

8. Each party shall bear the costs of their own legal fees.

9. Employee shall not institute any appeal or any other action with respect to this matter.

10. Employee has read the above stipulation and conferred with counsel and/or a Union representative and hereby agrees to abide by the terms of this settlement agreement.

11. This settlement agreement is not intended to establish precedent in any

future disciplinary matters.

EMPLOYEE

DATED: 11/29/18

RONALD GREEN

EMPLOYEE REPRESENTATIVE

DATED: 11/29/18

JULIA BAROCAS,
CWA STAFF REPRESENTATIVE

COUNTY OF UNION

DATED: 11/29/18

ALLAN C. ROTH, ESQ.
SPECIAL COUNSEL TO THE
COUNTY OF UNION

A-2

STATE OF NEW JERSEY

In the Matter of Cassy Pollander
City of Gloucester Police Department

CSC DKT. NO. 2018-800
OAL DKT. NO. CSV 15144-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 21, 2018 BW

The appeal of Cassy Pollander, Police Officer, City of Gloucester Police Department, release at the end of the working test period, effective August 24, 2017, was heard by Administrative Law Judge Judith Lieberman, who rendered her initial decision on November 19, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 19, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Cassy Pollander.

This is the final administrative determination in this matter. Any further

review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF DECEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 15144-17

AGENCY DKT. NO. 2018-800

IN THE MATTER OF CASSY POLLANDER,
GLOUCESTER CITY, POLICE DEPARTMENT.

Arthur J. Murray, Esq., for appellant, Cassy Pollander (Alterman and Associates, LLC, attorneys)

Joseph Antinori, Esq., for respondent, Gloucester City, Police Department, (Brown & Connery, LLP, attorneys)

Record Closed: October 4, 2018 Decided: November 19, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

The appellant, Cassy Pollander, appeals her dismissal by the respondent, Gloucester City Police Department (Department), at the end of her working test period.

PROCEDURAL HISTORY

On August 24, 2017, the respondent notified the appellant that her employment with the Gloucester City Police Department was terminated, effective August 24, 2017, and advised her of her right to appeal the termination. The appellant filed a timely appeal and the matter was transmitted to the Office of Administrative Law on October 13, 2017, for hearing as a contested case. The case was heard on June 5, 2018 and June 6, 2018. The record remained open for the receipt of written summations by the parties. On October 4, 2018, all summations were received, and the record closed that day.

FACTUAL DISCUSSION AND FINDINGS

Sergeant James Little worked for the Gloucester's City Police Department for thirteen years and has been a sergeant since 2016. He became a Field Training Officer (FTO) in approximately 2010 and received training for the position, including but not limited to instruction concerning training and evaluation of new recruits through the Field Training Program. The Field Training Program lasts twelve weeks for those recruits who do not encounter problems. The program is comprised of three phases: general police department operations and structure, motor vehicle stops, and observation of the officer as he works alone. Failure to successfully complete the Field Training Program would result in termination.

Little was the appellant's FTO. He utilized the Field Training Program – Recruit Training Manual, which enumerated each work function or objective that he was to review with the appellant. (J-4.) The appellant was required to perform and be deemed proficient in each category to pass the Field Training Program. The appellant received written materials concerning the functions and objectives listed in the manual and Little instructed her concerning each item. The appellant was then required to instruct and perform each function. Little indicated on the manual the date the appellant was first trained concerning a particular function or objective; the date the appellant performed the function or objective, either on the job or in a scenario-based training; and the date when she was deemed proficient in the subject. Little and the appellant initialed each entry when she was deemed proficient. Ibid. This portion of the appellant's training commenced August

27, 2016, and Little initialed the last entries on December 12, 2016. Ibid. Little explained that this did not mean that the Field Training Program was necessarily complete at that time.

Little was also required to review with the appellant multiple items listed on a Daily Observation Report ("DOR") (J-5.), and sign-off on the DOR when the appellant performed each item. On a daily basis, he assessed the appellant's performance and graded it using a numeric rating system. A rating of "1" through "3" indicated unacceptable performance; "4" was minimally acceptable; "5" through "7" was above average. Each day's DOR was signed by the appellant, Little, and a supervisor. Little reviewed the appellant's performance and progress with her daily or once every two or three days, and offered guidance concerning how she could improve. He directed her to policies and procedures when necessary. The appellant could be re-evaluated on subsequent days and could receive a higher rating if her performance improved. The DOR process commenced August 27, 2016, and ended January 19, 2017.[1]

September 19, 2016, was the first day Little formally evaluated the appellant's performance. That day, he found the appellant's performance was least satisfactory with respect to "Problem Solving-Decision Making." He wrote, "Pt. C. Pollander was unsure on several calls for service. She would not make eye contact with people she was dealing with. Her confidence level is low and she needs to work on speaking up while speaking with the general public." (J-5 at 110-111.) This continued to be a problem for the appellant, which Little recorded and discussed with her throughout the Field Training Program:

- On September 20, 2016, Little wrote the appellant was "very uncomfortable while processing a prisoner. She was hesitant to control the prisoner while fingerprinting him. This issue was discussed with her." Ibid. at 112-113.

- On September 23, 2016, the appellant "showed signs of being nervous and timid when asked to perform self-initiated field activity." Ibid. at 114-115.

[1] The data in the DOR was transferred, in summary form, to a Biweekly Progress Chart . (J-6.)

- On September 25, 2016, the appellant's "least satisfactory area of performance" involved officer safety. The appellant "responded to a removal of an intoxicated male from a bar. The male approached her and was standing very close to her. She became very nervous and would not tell the male to back away from her. I had to move the male away from her. While placing the same male under arrest he resisted other officers' attempts to place him in handcuffs. Ofc. Pollander stood by and would not intervene." Ibid. at 118-119. The appellant's performance was not acceptable, and she received a score of "3" for officer safety because she did not take control of the scene and allowed the male suspect to control it. Ibid.

- On October 3, 2016, the appellant's performance was not acceptable with respect to "problem solving - decision making." She needed "to work on being more confident when handling minor calls for service. She becomes very unsure and nervous when first arriving on scene. This will improve with experience." Ibid. at 124-125.

- On October 7, 2016, the appellant's least satisfactory area of performance was again "problem solving – decision making." Little wrote she "still needs to improve on her field performance. She becomes nervous at times and needs guidance." Ibid. at 128-129.

- On October 8, 2016, the appellant's least satisfactory area of performance was "self-initiated field activity." Little wrote, the appellant "still needs to improve on her field performance. She becomes nervous at times and needs guidance. She needs to be aware of her surroundings and identifying suspicious activity." Ibid. at 130-131.

- On October 9, 2016, the appellant's performance in the area of "self-initiated field activity" was not acceptable. Little wrote the appellant "still needs to

improve on her field performance. She becomes nervous at times and needs guidance." Ibid. at 132-133.

- On October 13, 2016, the appellant's performance in the area of "office safety general" was not acceptable. Little wrote about an incident in which the appellant entered a vacant house without having her weapon out; walked through the first floor without checking corners; kept her weapon at her side when she unholstered it; did not point the weapon in the direction she was walking while she walked to the second floor; and "rushed from room to room without covering corners" on the second floor. Ibid. at 136-137. "I counseled Ofc. Pollander on scene and showed her several times how to clear steps and rooms." Ibid. Little also wrote the appellant was struggling in the area of "problem solving-decision making. While handling basic calls for service, which she has performed in the past, she freezes and look to me for advice. She needs to learn to make decisions on her own. This will come with time but she should be further along in this area." Ibid. Little discussed this with the appellant.

- On October 18, 2016, the appellant's performance in the area of "problem solving and decision making" was not acceptable. Little wrote the appellant, "continues to struggle in this area. She has been advised on several occasions to make decisions to solve the problem at hand." Ibid. at 140-141.

- On October 27, 2016, the appellant's performance was deemed "not acceptable" in five areas. Little wrote about a domestic violence call to which the appellant responded but "did not take charge of the scene or separate the parties involved." Ibid. at 150-151. Little wrote the appellant "continues to struggle in this area. When faced with a stressful situation, she freezes up and is unsure of how to solve the issue at hand. Upon arriving at the scene of a disorderly female call, Ofc. Pollander was advised the female left the area and was possibly in an apartment in that location.

She left the scene without checking any of the apartments." Ibid. Little reviewed this with the appellant.

- On October 31, 2016, the appellant's performance was "not acceptable" in the areas of self-initiated field activity and problem solving-decision making. Little wrote the appellant "continues to struggle in the area of [problem solving-decision making]. I have retrained her in this area. She understands and accepts that she needs to do a better job." Ibid. at 152-153.

Throughout the Field Training Program, Little conducted scenario-based training with the appellant. The training addressed domestic violence, room clearing, felony car stops, in addition to other matters. Several officers, including Chief Morrell, recreated the incidents or actions to be addressed and the appellant responded. The officers provided feedback to the appellant concerning her responses.

The appellant was also required to take four "Cycle Quizzes" that tested her proficiency with, among other things, codes, Department policies, Attorney General Guidelines. (J-7.) The appellant passed each of the four quizzes. Ibid.

Little prepared End of Phase Evaluation reports. In the first, dated, September 29, 2016, he wrote the appellant was not yet performing at "solo beat officer level." (J-8 at 246-248.) Little referenced the incident involving an intoxicated man, in which the appellant allowed him to "get too close to her on a call without asking or advising him to step back, before I intervened." Ibid. He also noted that she had "problems identifying suspicious activity as well as MV violations[,] and "had to be counseled on several occasions about officer safety issues." Ibid. "She approached vehicles during MV stops without looking in the back seat, prior to speaking with the driver. She did not blade[2] herself while speaking with drivers and stood at the driver's side door, looking down at documents with both hands. Although this will come with more experience she needs to

[2]An officer should "blade" himself by directing his gun away from a person when standing face to face with that person. This ensures the weapon is not near a suspect. The appellant was trained concerning blading prior to the above incidents.

identify the safety issues and fix them." Ibid. A supervisor reviewed and signed Little's report. Ibid.

Little prepared an October 27, 2016, End of Phase report that indicated the appellant was not then "performing at solo beat officer level." (J-8 at 249-250.) She "continued to struggle with decision making and self-initiated field activities. There were numerous times during this training period that [she] drove around the city without making any MV stops. During those times, I was with her and observed numerous MV violations. When [she] did make MV stops she often did not issue a traffic summons. Ofc. Pollander had safety issues during this time period. While responding to a domestic disturbance, she allowed all parties involved to continue to argue with one another. While on scene of an open door to an abandoned house, she entered without having her weapon out and did not clear corners." Ibid. Little wrote about these incidents on the End of Phase report because the appellant continued to have problems in these areas.

Given the appellant's performance and his belief that she was not qualified to serve as a solo officer, Little requested an extension of the appellant's Field Training Program. He discussed his concerns with his sergeant and Lieutenant Morrell and submitted a November 24, 2016, Field Training and Evaluation Program Remedial Training Report, in which he indicated the appellant's performance was "below standard" and she "needed special training concerning decision making, self-initiated field activity and officer safety." (J-9.) Little wrote the appellant "has a hard time when dealing with stressful situations. She often freezes and looks to fellow officers for help. She hesitates to take control of the scene. I have talked to Ofc. Pollander about her performance on several occasions. She was counseled on this issue as well." Ibid. The report also noted the appellant was "struggling with identifying and making MV stops. When she does make the MV stops she often gives verbal warnings. I discussed this with Ofc. Pollander on several occasions, and also demonstrated MV stops. With more time this area should improve." Ibid. With respect to officer safety, the report noted, the appellant "sometimes struggles in this area. She cleared a vacant residence without unholstering her weapon and she did not clear any corners. While on scene of a domestic disturbance she allowed numerous people to argue in front of her without taking action. I've discussed these

issues with her on numerous occasions." Ibid. The appellant signed the report on November 24, 2016, and she was approved for two additional weeks. Ibid.

On December 13, 2016, Little issued a DOR in which he indicated the appellant's performance was unsatisfactory in the areas of officer safety-suspects/prisoners and control of conflict-voice. (J-5 at 196-197.) He wrote:

> Ofc. Pollander conducted an MV stop at King and Mercer Street. When she requested backup units she did not provide the correct location. Upon arriving on the scene, Ofc. Pollander was standing out front of [a residence]. She advised me that while conducting a MV stop the female driver exited the vehicle and went inside [the residence]. She went on to state that she attempted to take the suspect into custody and the suspect pulled away from her and entered the residence. I entered the residence with another officer and had to wrestle her to the floor, where she was subsequently placed under arrest. While wrestling with the suspect, Ofc. Pollander stood by and did not actively assist myself with the lock-up. Ofc. Pollander turned her back on the suspect and began to walk away look for street sign, at which point she gave an incorrect location. She then allowed the suspect to enter the residence with[out] attempting to stop her. Also, it was learned a male was with the suspect, which Ofc. Pollander did not tell arriving officers prior to entering the residence.
>
> While reviewing Ofc. Pollander's [body worn camera], it was learned that [she] did not take control of the incident. She allowed the suspect to continue to control the scene and would not listen to her commands. She also did not activate her body worn camera during the initial MV stop. While processing the suspect at Police H.Q.'s Ofc. Pollander stood by and had to be told to finish processing her.
> Ibid.

That same day, Little submitted a Remedial Training Report in which he described the above incidents and concerns. He noted the appellant "has a hard time when dealing with stressful situations. She continues to freeze up and looks to fellow officers for help. She hesitates to take control of the scene. I've talked to Ofc. Pollander about her performance on several occasions. She was counseled on this issue as well." The appellant signed that report. (J-9.) Little requested the appellant receive additional training and memorialized this in a December 14, 2016, Formal Notice of Unsatisfactory

Performance/Progress report, in which he wrote, "Failure to bring your performance up to an acceptable level will result in your re-phasing, and could result in not successfully completing the Field Training and Evaluation Program, which would result in your termination." (J-10). The appellant signed the Formal Notice of Unsatisfactory Performance on December 14, 2016. Ibid. She received additional remedial field training.

On January 19, 2017, Little prepared a third End of Phase report, at the end of the appellant's field training. He indicated the appellant was performing at "solo beat officer level." (J-8 at 251-252.) He indicated that he believed the two additional remedial training sessions were helpful; however, the appellant needed additional training concerning officer safety and would need another officer to provide guidance. He explained the appellant, "had to be remediated two times during this phase of training. I felt that her self-initiated field activities were lacking as well as decision making skills. During this training phase, I conducted numerous training scenarios with her, which covered building clearing, domestic violence calls and MV stops. Toward the end of this phase her confidence level increased and she was far more comfortable handling calls for service. She rarely looked to other officers for help and made decisions on her own. She will make a great asset to the Gloucester City Police Department. She needs to continue her studies and learn from minor mistakes. I feel that she needs to be placed with a supervisor who will monitor her activities and make the appropriate corrections." Ibid. Little no longer served as the appellant's FTO after she completed the Field Training Program.

Sergeant Jason Flood joined the Department in 2002 and has been a Sergeant since November 2009. While the appellant was in the Field Training Program, Officer Little discussed the appellant's performance with him. Little expressed concern about her safety and stressful situations skills and that the appellant did not take action and was not assertive. Flood and Little conducted scenario-based training for the appellant. They placed her in high stress situations to see how she would act and they critiqued her performance, noting positive and negative aspects of her responses, and stressed the safety aspects of the scenarios. He and Little spoke with the appellant about these concerns throughout her year with the Department.

After the appellant passed the Field Training Program, Flood became aware of an incident in which she was flagged down while responding to a call. The appellant's response caused him concern and he counseled her about the need to be more assertive and to take control of the scene. He stressed the importance of ensuring officers' safety. Flood's conversations with the appellant primarily concerned high stress, officer safety issues.

Flood also addressed the appellant after she responded to a call concerning two homeless men who were trespassing and drinking alcohol. The appellant responded to the scene alone. She used a flashlight because it was dark at that time. One of the men told her to turn off her flashlight and she did so. This presented a "huge safety aspect, not only that but she allowed the suspect to dictate what was going to happen during the stop." (T2[3] 8:17-19.) Also, one of the men acted in a flirtatious manner toward the appellant. Based upon his review of the appellant's body worn camera video, Flood believed the appellant "did not outright rebuff those flirtations, she didn't flirt back with him but she should have been a little more assertive" and made it clear that she was in charge of the scene. (T2 8:21-25.) Also, the appellant turned off her body camera too soon. Flood told Morrell that he was concerned about the appellant's performance.

Flood and Captain Morrell spoke with the appellant about this incident. Morrell explained that the officer is in charge and the suspect may not dictate an officer's actions during a stop. He also explained that the appellant committed a safety violation by turning off her flashlight; she should have rebuffed the flirtatious suspect immediately; and addressed the early end of her body camera video.

Flood told the appellant that the administration reviewed her body worn camera videos and that her difficulty handling stressful situations and poor judgment might jeopardize her future with the Department. He "stressed to her that she needs to take action, be assertive, handle the jobs herself and prove that she can do the job herself." (T2 10:12-14.)

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[3] T1 refers to the transcript of the June 5, 2018, hearing date in this matter. T2 refers to the transcript of the June 6, 2018, hearing date.

After Flood advised the appellant that she needed to be more assertive, they responded to a domestic dispute together. As the appellant spoke with the two parties at the scene, Flood concluded the matter did not rise to the level of a domestic violence incident, as a crime had not occurred and there was not a threat of violence. Flood expected the appellant to tell the complainant that the police involvement was unwarranted. However, she did not. Flood took over because too much time had elapsed, and it appeared the appellant was unsure how to proceed. Flood discussed the incident with the appellant.

Based upon his interactions and observations of the appellant, Flood believed that, although she could handle "day to day routine calls", she froze when confronted by stressful situations and did not take "assertive action and handle the issue at hand." (T2 13:9-11.) His opinion of her capacity was "confirmed during the last incident when she allowed the driver to drive off the scene." (T2 21:22-23.) He explained:

> [E]very day in police work you . . . might not be involved in stressful situations. In those situations she did fine. When a stressful situation came up . . . there were concerns and they were addressed with her. As I said, Officer Little and I would address them with her and the last time happened to be that incident where the driver drove off. After then I had severe concerns about her ability to take action during stressful situations.
>
> [T2 21:22 to 22:7.]

Flood was not aware that the appellant had received documents concerning her performance and the risk of her not passing the working test period between January 19, 2017, and July 31, 2017. He did not recall preparing a document addressing his concerns while he was the appellant's supervisor, which was for approximately one year.

Lieutenant Stephen Burkhardt has been employed by the Gloucester City Police Department for twenty-three years and has served as a lieutenant for two and one-half years. He served as a sergeant for twelve years. As lieutenant, he served as supervisor of the Field Training Program with Captain Morrell.

FTO Little spoke with Burkhardt several times about the appellant's deficiencies during the Field Training Program. Little relayed his concerns about the appellant's performance while under stress and noted that it impacted the performance areas for which she was being evaluated, such as control of a conflict and officer safety. Little and Burkhardt discussed ideas for her training and Little asked Burkhardt to speak with the appellant. Burkhardt reviewed the appellant's training manual and observed the problems Little had encountered. He was also aware, from Little, Chief Morrell and Captain Morrell, that officers were assisting the appellant with scenario training and instruction, to help improve her decision making and conflict control skills.

Burkhardt spoke with the appellant in November 2016. They discussed the problems that Little identified and that were recorded in her file. He discussed ways she could better prepare to improve her performance in those areas and offered advice concerning contingency planning and other performance areas. He offered her "the same advice that was given to my own son who was a new officer about the same time as Officer Pollander and the things that I was telling him to try to prepare him and educate him, I gave the same advice to Officer Pollander." (T1:216-12-16.)

Burkhardt conducted an internal affairs investigation of which the appellant was the subject. On January 3, 2017, he issued a report on his investigation. He found the appellant did not comply with Department policy concerning use of her body worn camera during a traffic stop. She activated it after she had exited her vehicle and had already begun to engage with the driver of the stopped vehicle. This was contrary to the policy governing use of body worn cameras. Burkhardt recommended a "verbal reprimand" because this was the appellant's first violation of this policy. (J-22 at 335.) Chief Morrell issue an "oral reprimand" and noted that "[a]ny future violations may result in further discipline such as loss of time/suspension." (J-22 at 331.)

During his review of the body worn camera footage, Burkhardt observed that the appellant did not have control of the traffic stop and events following the stop. The driver of the stopped vehicle exited her vehicle and walked to the front door of her house. Neither action should have occurred; the appellant should have directed her to stay in the vehicle. Also, the appellant did not call out her location when she exited her vehicle, thus,

no one knew where she was or what she was doing. Burkhardt also observed on the camera footage that, while other officers were asking where she was, the appellant walked away from the driver to look for a street sign so she could respond to the officers. Furthermore, the driver was able to walk into her house and close the door, while the appellant was present. Burkhardt believed the appellant demonstrated a lack of control and created officer safety problems by turning her back on the other parties involved and looking for her location. He considered this a "serious violation." (T1:221-17.) In addition, the appellant did not tell the other officers who reported to the scene that a second person was present. Consequently, when the other officers entered the house to assist the appellant with the driver, they were surprised to find a second person there. This put the other officers at risk. Burkhardt relayed his concerns to the appellant's FTO. Burkhardt was not consulted prior to the appellant's release from the Field Training Program on January 19, 2017 (J-11.)

On August 8, 2017, Burkhardt reviewed the appellant's body worn camera video in response to an incident that involved domestic violence and eluding. He observed her actions and determined her overall performance was below standard. She "failed to act in a manner consistent with the responsibilities and duties of a police office as well as the general rules and regulations set forth in the [Department] Rules and Regulations." (J-23 at 361.) Although the camera was activated late, he observed and learned from the appellant's report that the appellant drove her vehicle into a parking lot after a woman flagged her down. A man was also present there and the appellant proceeded to engage with both people before she announced her location and advised others of the circumstances. She should have immediately radioed her location and the nature of the incident to Central Communications. Her failure to do this was problematic, as the appellant was outnumbered, it was dark and no one else was in the area, and "things can go bad in a second and nobody is going to know that she's there in trouble." (T1 223:11-13.)

Furthermore, when the appellant drove into the parking lot, the man drove his vehicle alongside hers, such that their drivers' doors were "meeting." (T1 223:25.) The appellant exited her vehicle and was thus between both vehicles. Given that she did not know what the circumstances were at that time, this presented safety concerns "because the guy could have assaulted her with the door of his truck or sideswiped her." (T1 224:1-

3.) The appellant should have pulled away and moved a safe distance from the other vehicle.

The appellant walked to the woman and spoke with her briefly before starting to walk back to the man. The man started to drive away, notwithstanding the appellant telling him to stay. Burkhart recognized that she was "trying to deal with two people that are irate[,]" which is difficult, and that any officer could be involved with an individual who ignores him. (T1 224-8.) However, the appellant did not get the entire license plate number of the truck, even though she was standing immediately behind it. She alerted other officers that the man left the scene and she then returned to the woman. The woman provided the man's name, date of birth, and where he lived. The appellant did not immediately relay this information to other officers. She continued to speak with the woman for over five minutes before she received a call from the dispatcher who asked if the appellant had any additional information about the man. The appellant relayed the information at that time. This created officer safety concerns and demonstrated a lack of control and initiative, as well as a failure to follow procedures. The incident raised concerns for Burkhardt regarding whether the appellant was fit to serve. He explained:

> [A]fter considering her training records and . . . the first [internal affairs] investigation and then this one, it seemed to me in my observation and in my experience dealing with recruits that her main issue was her performance under stress and . . . that problem branches out into other issues.
> And unfortunately . . . issues like that command presence, the critical decision making, and officer safety are the most critical parts of a patrol officer's job and she's lacking in those areas because of her performance under stress and to me it . . . seems like it's more of a personality thing. . . . [S]he kind of shies away from conflict I think, which most people don't like conflict, but I think she has a problem with the conflict and tries to avoid it and when it presents, she kind of freezes up and can't make . . . the correct decisions and act quickly and I think that's what is the cause of . . . these other issues.
> [T1 226:12 to 227:7.]

Burkhart authored an August 11, 2017, Internal Affairs report concerning his investigation of the incident. (J-21.) He did not recommend discipline, as he believed she did not intentionally fail to perform her duties. Rather, he thought she was "incapable of it in those situations." (T1 228-13-14.) He wrote in his report that he and the appellant

"discussed the fact that she had a great deal of additional training during and after her field training period and that she has nearly one year of experience on the street, yet still failed to respond appropriately and perform her duties properly during this incident." Ibid. He added that he "wasn't sure if she was just indecisive, wasn't sure how to do her job, or didn't have it in her to step up and take action. I also told her that I was concerned whether or not she was capable of fighting to protect herself or her fellow officers, or make an arrest, if need be." Ibid.

Burkhardt added that, at the end of the working test period, August 24, 2017, he was concerned that "eventually someone was going to suffer because of it, either herself or fellow officers or a citizen, because I was afraid she was going to . . . freeze up as she's shown to freeze up and not make the proper decisions and that's a liability to her and the other officers that we work with[.]" (T1 227:12-19.]

Burkhardt completed a "Report on Progress of Probationer," which indicated the appellant's performance during the work test period, from August 26, 2016 through February 26, 2017, was unsatisfactory. (J-16.) The report was prepared August 3, 2017 and was signed by the appellant, Burkhardt and Chief Morrell. Burkhardt was present when the appellant was provided a copy of the form. The progress report did not provide for an extension of the working test period or indicate that the appellant was to be terminated. (J-16.) Chief Morrell told the appellant she should have received the evaluation, but she had not received it. The August 3, 2017, report was to serve as her six-month evaluation.

Burkhardt explained that the form was prepared late because he and Chief Morrell did not previously know they were required to complete the form. The appellant was thus not advised, in writing, at or about the end of the initial review period, that her performance was unsatisfactory. Burkhardt was also not aware of any meetings with command level staff at or about the end of the initial review period during which the appellant was advised of her unsatisfactory performance. Burkhardt believed the August 3, 2017, notice was the first time the appellant was advised she received an unsatisfactory review for the first six months of her working test period.

Burkhardt prepared a second "Report on Progress of Probationer" for the working test period February 26, 2017, through August 26, 2017. This report was also dated August 3, 2017. This was before Johnson issued any reports from his observation of the appellant. The appellant's performance during this portion of the working test was deemed unsatisfactory and an extended working test was authorized. (J-17.) The Report was signed by the appellant, Burkhart and Chief Morrell. The Chief had warned the appellant, during the August 3, 2017, meeting that she was at risk of termination.

Burkhardt discussed an extension of the appellant's working test period with Chief Morrell and Captain Morrell and they requested permission to extend her training period by an additional ninety days. They also decided to assign the appellant to Sergeant Johnson so that he could observe her. This was motivated by the August 11, 2017, Internal Affairs report. Burkhardt agreed that the appellant could benefit from the guidance of Johnson, an experienced FTO. The goal was to "get another set of eyes on the problem and see if there's anything we could do. I agreed 100 percent with exhausting all the options that we had." (T1:193-18 to 25.) Johnson was instructed to "evaluate basically as a shadow, ride with Officer Pollander, and just observe what she's doing and what she's not doing" and report to Burkhardt. (T1:196-20-22.) The appellant was advised of this on August 14, 2017.

The Department was subsequently advised it was not permitted to extend the appellant's working test period. Chief Morrell completed an August 24, 2017, "Report on Progress of Probationer" for the working test period August 24, 2016, through August 24, 2017. (J-18.) It advised the appellant's performance was unsatisfactory and she was to be terminated. Ibid. Burkhardt signed the form. Burkhardt noted that the appellant had been warned that she was at risk of termination.

Burkhardt also noted that the end date on termination notice did not match the end date on the two other progress reports. He thought that, perhaps, August 26, 2016, was the appellant's first day of employment after her August 24, 2016, graduation from the Academy, though he was not sure.

Sergeant Johnson has been employed by the Department since 1999 and became a Sergeant in 2014. On August 14, 2017, he met with Chief Morrell, Captain Morrell and Lieutenant Burkhardt who told him that the appellant's working test period was being extended; that she was having some problems with safety and command presence; and they wanted him to observe her and report his observations. He had not previously supervised the appellant. Johnson reviewed the appellant's training manual from her field training and some of her body camera tapes. Commencing August 19, 2017, the appellant was assigned to Johnson for ninety days. He was to report his observations each day they worked together. He was not instructed to train her. Johnson told the appellant about this assignment and that he would write a report each/ day they worked together.

Johnson and the appellant worked together twice, on August 20, 2017, and August 23, 2017. They rode in the same police vehicle those days. Johnson had several concerns about the appellant, which he reported to Burkhardt. (J-15.) On August 20, 2017, Johnson observed the appellant on several jobs and traffic stops. He noted she did not actively search for work and appeared to not notice several vehicle infractions that were in view. He wrote:

> Ptl. C. Pollander does not attempt to quickly catch up to suspected violators to initiate a traffic stop. At one point, a vehicle rolled a stop sign in front of us as we were parked facing south, approximately 50 feet from the intersection of Collings Road and Essex Street. The offense was obvious and she did not notice. After pointing out and telling her to "to stop that car" she allowed 3 vehicles to pass us and get them between the violator and her patrol vehicle instead of driving around the cars in front of us in closing the gap. Once she turned onto Essex Street the car was no longer visible (it turned north onto Fillmore and ultimately stopped in front of the house on Sherman). Ptl. C. Pollander seemed unsure of how to find the offender after passing Fillmore in noticing it heading north. She was finally able to catch up to the offender after the offender had already parked and was exiting her vehicle. A verbal warning for the rolling of the stop sign was issued by me and we continued on.
> [J-15 at 301-302.]

Johnson complimented the appellant's "good command of the stops." Ibid. He noted that the radio calls they responded to were not stressful and the appellant handled each job professionally and efficiently, and he observed no problems with those types of stops. Ibid. Although the appellant did not receive a copy of the memorandum, Sgt. Johnson discussed his observations with her on August 23, 2017, the next time they were on patrol together.

In his August 23, 2017, memorandum to Burkhardt, Johnson noted that the appellant "actively looked for and stopped several violations including one that I did not even notice. She did much better in this area." (J-15 at 303.) He also commended her handling of two stops and arrests, after he reminded her of a Department policy concerning custodial arrest of suspended drivers. Ibid. He noted that she did not check rear threats on August 20, 2017, because she believed Johnson was covering for her then. He advised her to proceed as if he were not there and she handled stops without "officer safety issues." Ibid. He did not "observe anything unsafe or problematic" during several stops that were not "stressful." Ibid.

Johnson did not form a conclusion concerning whether the appellant had been adequately trained. He was not consulted by his supervisors concerning the appellant's termination. During the two days he worked with the appellant, he did not observe how she performed in stressful situations. Each of the matters with which they were involved were ordinary and not stressful.

Chief Brian Morrell worked for the Gloucester City Police Department for nineteen years and became Chief in January 2016. The appellant was the first person he hired. He received verbal reports from Burkhardt and Captain Morrell concerning her capacity to handle stressful situations on the street and officer safety issues. He found that the appellant continued to have difficulty with decision making, handling of stressful situations and officer safety issues after she was released from the Field Training Program.

Scenario-based training was established to help the appellant. Morrell played a "bad guy" in a domestic violence scenario, so he could observe how the appellant would react to a person on the street who challenges her authority. He saw that the appellant's

performance varied; she performed poorly on some occasions and was "okay" other times. (T1 239-6.) He offered her constructive criticism afterward.

Morrell reviewed the internal affairs investigation of the appellant's use of her body worn camera and had concerns about her tactics and safety. She failed to control the suspect; allowed the driver to exit her vehicle and enter her home; did not know her location; and either did not call out her location or called out the wrong location because officers who were attempting to assist her could not find her. Morrell noted, "in those critical seconds anything could have happened." (T1 240:20.) Furthermore, the appellant stood directly in front of the door as she attempted to enter the house, while arguing with the person who was inside the house. The appellant's position placed her at risk of being shot by that person. The appellant should have stood to the side of the door or in another location that would have given her a tactical advantage. This was compounded by the appellant's failure to alert other officers that a second person was in the house, which placed all officers at risk. The appellant was trained concerning these issues.

Morrell reviewed the second internal affairs report, as well as the appellant's statement and her body worn camera video. This again caused Morrell to have concerns about the appellant's tactics and her safety. She allowed the suspect to control and dictate the events. She did not immediately alert the Department that she was involved with the incident; she went back and forth between the two people involved; and the man who fled from her had "the tactical advantage the entire time because he was seated in a truck above her." (T1 243:6-8.) Morrell noted the appellant did not know if the man had a weapon and, given how they were positioned, the appellant would have had no time to react had he exited the truck and attempted to attack her. Furthermore, after the man fled the scene in his truck, she failed to report important information to the responding officers and officers who were searching for the man.

On August 3, 2017, Morrell and Burkhardt met with the appellant because they were approaching the end of her working test period. The appellant had not passed the working test period and Morrell wanted to give her another ninety days to attempt to pass. He told the appellant her performance to date was unsatisfactory, particularly with respect to decision making, officer safety, street tactics and ability to handle stressful situations.

He told the appellant he would request permission from the Civil Service Commission to extend the working test period ninety days. He was not obligated to do this; he wanted to provide the appellant an additional opportunity to improve her skills and pass the test period.

During the same meeting, he gave the appellant two Civil Service Evaluation forms, both dated August 3, 2017. He testified that, when he inquired about an extension of the working test period, he learned that he was required to complete the forms. Even though the appellant did not receive one of the forms until almost six months after the end of the review period, the appellant was already aware of the concerns expressed in the document. He noted that the appellant should have been aware of the concerns, given "multiple safety violations, three Internal Affairs Investigations, and countless conversations[.]" (T1 275:19-21.) He acknowledged, however, that it would have been "fair" had the Department's concerns about her performance been memorialized and provided to her after she completed the Field Training Program and before the August 3, 2017, Evaluation Form.

Before the Civil Service Commission responded to his request for an extension of the appellant's working test period, Morrell decided to transfer the appellant from Flood to Johnson's supervision. He believed that, at that time, the appellant had received sufficient training and instruction. He hoped that if another officer rode with the appellant each day, observed her, and corrected any problems that arose, the appellant would pass her extended probationary working test period.

After the reassignment of the appellant to Johnson, Morrell learned that the Civil Service Commission denied his request to extend the appellant's working test period.[4] He, Burkhardt, Captain Morrell and PBA delegate Barbara Kane then met with the appellant. Chief Morrell told her that they tried to extend her working test period but their request was denied by the Civil Service Commission. The Department was, thus,

[4] On August 23, 2017, the Commission advised the City of Gloucester that an extension is permissible only when an employee took an approved leave of absence or furlough. The length of any extension would be limited to the amount of time used during the approved leave or furlough. (J-24.) Morrell testified that he did not recall discussing whether an extension was permissible prior to making the request.

required to either deem the appellant's performance satisfactory or terminate her employment. Morrell testified that, although he liked the appellant, he terminated her because he believed either she, another officer or a civilian was going to get hurt. Because the extension request was denied, Morrell issued an August 24, 2017, Report on Progress of Probationer, which notified that her performance was unsatisfactory and she would be terminated, and a letter explaining the appeals process (J-18, 19.)[5]

The appellant, **Cassey Pollander,** graduated from West Virginia University with a bachelor's degree in criminology in 2014. She applied for and was offered a position as a police officer with the Department, which was contingent upon graduating from the Academy. She started a twenty-two-week program with the Academy on April 4, 2016 and graduated on August 25, 2016. She commenced working as an officer with the Department on August 26, 2016.

She was required to complete a Field Training Officer Program, during which she was evaluated by an FTO and/or a sergeant with respect to a number of performance areas. She was assigned to Sgt. Flood's platoon under FTO Jimmy Little. The other FTOs were Sgt. Johnson, Kenneth Iepson and Keith Wall.

The Field Training Program was approximately three months long. The appellant's FTO was with her throughout the program to judge her progress and to provide instruction and respond to problems or questions. The program is conducted primarily in the field but is also conducted at police department headquarters. The appellant and her FTO traveled in the same vehicle except towards the end of the program during which time the appellant rode alone in her vehicle.

The appellant was aware that FTO Little recorded in the Field Training Program-Recruit Training Manual Acknowledgement Forms (J-4.) the areas in which she received training, the date of the training, the date she performed the training and "Final Sign-off."

[5] Morrell noted that the dates on the second Progress Report are incorrect. He should have written that the start and end dates of the working test period were August 26, 2016, and August 26, 2017. (J-18.)

FTO Little and the appellant initialed each entry; the appellant's initials were adjacent to "Recruit Officer" ("RO"). The last entry was dated December 12, 2016. Her field training continued for approximately one additional month after the last entry. (J-4.) (T1 36)

FTO Little also completed a "Daily Officer Report" ("DOR") for every shift that he and the appellant worked together. (J-5) Little rated the appellant's performance on various aspects of her performance, commencing August 27, 2016 and ending DOR January 19, 2017.

The appellant and Little would review the DOR and discuss her scores and how she might improve her rating, when necessary. The DOR was the only written documentation concerning the appellant's performance and areas where improvement was necessary. Biweekly Progress Charts contained the ratings from the DOR forms for August 27, 2016 through January 19, 2016. The appellant reviewed the biweekly progress charts when she met with her FTO.

The appellant was administered quizzes throughout the Field Training Program. (J-7.) The appellant and FTO reviewed the quizzes and discussed any incorrect answers. The FTO provided suggestions for improvement.

End of Phase Evaluations were issued, which identified the appellant's strengths and weaknesses throughout each phase of her training. (J-8.) FTO Little reviewed this information with her and he offered suggestions concerning how to improve where necessary. The evaluations were signed by the appellant, FTO Little and Sgt. Iepson. The last End of Phase Evaluation was issued in January 2017.

The appellant had three phases of training and an additional remedial phase. She was required to participate in a remedial training phase because it was determined that she was not then operating at a solo officer capacity. The remedial training involved reviewing matters the appellant previously engaged in and how she could handle those matters. She recalled that this added a month or two to her Field Training Program. Remedial Training Report Evaluations, dated November 24, 2016 and December 13, 2016, were issued and were signed by the appellant, FTO Little and Sgt. Iepson. (J-9.)

On December 14, 2016, a Formal Notice of Unsatisfactory Performance was issued to the appellant and signed by her, FTO Little and Sgt. Iepson. (J-10.) The document addressed areas in which the appellant needed improvement. Little discussed it with her and she understood that she would be sent for training on street survival at the Academy. The appellant attended and completed the street survival class at the Gloucester County Police Academy as well as a de-escalation training program that all Department members were required to complete

On January 9, 2017, Chief Morrell issued an internal affairs investigation report concerning the appellant's misuse of her body worn camera. (J-20.) As a result of the investigative findings, she received an oral reprimand. The appellant explained that the report followed a motor vehicle stop with which she was involved. She activated her vehicle overhead lights to indicate to the car in front of her that it should stop. The female driver of the stopped vehicle got out of her car and tried to go into a nearby house. The appellant forgot to activate her body worn camera as she exited her patrol vehicle. She activated it when she realized her mistake. This prompted the initiation of an internal affairs investigation.

On January 19, 2017, a Field Training Program Final Report, was issued. It indicated that the appellant had been released from the field training program. (J-11.) The appellant understood this to mean that she had successfully completed the program and would be released as a solo officer even though she would still be subject to a probationary period through August 2017. The appellant would then function as a police officer on patrol on her own, in a vehicle without another officer.

The appellant and another officer were the subjects of another internal affairs investigation concerning a domestic violence incident to which they responded. When she arrived at the scene Officer McKinney was talking to the person he believed was the victim. Neither the appellant nor McKinney got information from the victim and they instead entered the house to speak with the alleged defendant. Officer O'Donnell arrived at the scene and spoke with and gathered information from the victim. He learned that the victim was seventeen years old. The appellant believes she had been disciplined for

this incident and had been told that she would attend a course concerning Attorney General guidelines for these situations.

The appellant claims that she met with supervisors on various occasions to discuss "how she could improve a situation," but that they did not discuss her progress. (T1 53:18.) Between January 19, 2017, when she completed the Field Training Program, and August 14, 2017, when she was advised that she had been reassigned to a different shift, she did not receive any memoranda, emails or other written documentation from supervisory staff concerning her performance, other than the Internal Affairs reports that she received. No supervisory staff spoke with her about areas in which she needed to improve.

On August 3, 2017, she met with Chief Morrell and Lieutenant Burkhart. They reviewed areas of her work that were unsatisfactory and advised that they would extend her working test by three months. The appellant was given a "Report on Progress of Probationer," which indicated her performance during the work test period, from August 26, 2016, through February 26, 2017, was unsatisfactory. The report was prepared August 3, 2017. It did not provide for an extension of the working test period nor indicate that the appellant was to be terminated. (J-16.) Chief Morrell told the appellant she should have received a six-month evaluation but had not. This report was to serve as her six-month evaluation. The appellant did not recall any discussion concerning the unsatisfactory rating.

The appellant was also provided a second "Report on Progress of Probationer" for February 26, 2017, through August 26, 2017. This report was dated August 3, 2017. The appellant's performance during this portion of the working test was deemed unsatisfactory and an extended working test was authorized. (J-17.) Both forms were signed by the appellant, Lieutenant Burkhart and Chief Morrell.

With respect to the second unsatisfactory rating, the Chief and Lieutenant told the appellant that her decision-making skills were lacking and they had concern for her safety and other officers' safety. The appellant did not recall seeing any documentation explaining their concerns. She was told during the August 3, 2017, meeting that she

would be terminated at the end of her extended working test period if she did not improve in the areas in which she was deficient.

The appellant was the subject of a third internal affairs investigation, which resulted in an August 11, 2017, investigation report. (J-21.) A woman flagged down the appellant to report that there had been a hit-and-run accident. A man told the appellant that he hit the woman's car because she had thrown a rock at it. As the appellant spoke with the woman in an effort to "calm down the situation," the man drove off in his vehicle, ignoring the appellant's direction for him to stop. The appellant explained that she, "chose to stay with the female at the scene instead of chasing after the driver of the vehicle until I could figure out what the situation was." (T1 57:9-11.) The appellant was interviewed, and she understood that she was the subject of an internal affairs investigation because the Department believed she did not complete her duties properly. She did not recall receiving a written report contract concerning this incident as she was terminated before the outcome of the investigation. She had not previously seen the internal affairs investigation report.

On August 14, 2017 the appellant was "reassigned to a different shift" under the supervision of Sgt. Johnson. (J-14.) At that time, she believed that her working test period had been extended.

On August 24, 2017, the appellant met with Chief Morrell and Burkhart and was given a notice of termination. (J-18.) The notice advised that her performance during her working test period was unsatisfactory. Ibid. She was advised that her working test period had not been extended because the Civil Service Commission denied the Department's request. She was also given a memorandum from Chief Morrell, dated August 24, 2017, advising that she was terminated effective immediately and she could appeal this decision to the Civil Service Commission within twenty days. (J-19.) The appellant was unaware of the termination prior to the August 24, 2017, meeting.

With respect to discussions about her performance, the appellant recalled a conversation with a Captain, in the late spring or early summer of 2017, about an incident in which she was involved. The Captain reviewed a recording of an incident with her, and

he advised her how she could have handled the situation differently and improve her performance. She also recalled a discussion with the Lieutenant after the first internal affairs investigation, during which he expressed appreciation that the incident occurred during her Field Training Program, and not while she was working on her own. He told her to keep up the good work. She was also counseled by Sergeant Flood after an internal affairs investigation concerning compliance with Attorney General guidelines and the need to confirm the age of domestic violence victims. She also met with Sergeant Johnson at or about August 20, to discuss his memorandum.

On cross-examination, the appellant acknowledged that her field training program had been extended twice, rather than once, and that it ended January 19, 2017, rather than November 2016, when it should have ended. Her program was approximately twenty weeks long, rather than twelve, which is the routine length of field training programs. During the training program, Officer Little counseled her concerning how to handle stressful situations and making better decisions at those time.

The appellant acknowledged that, even though she completed the Field Training Program, she was still on a probationary period in conjunction with her working test period. She also acknowledged that, at that time, the Department continued to have concerns about her performance, particularly her ability to handle stressful, confrontational situations, and it arranged for her to participate in hypothetical scenarios that would allow role playing of such circumstances. She recalled the January 19, 2017, End of Phase Evaluation Report, Officer Little wrote that she still had significant weaknesses, as she had to be "remediated" two times during this phase of training and her "self-initiated field activities were lacking as well as decision making skills." (J-8.) He added:

> During this training phase, I conducted numerous trading scenarios with her, which covered building, clearing, domestic violence calls and MV stops. Toward the end of this phase her confidence level increased as she was far more comfortable handling calls for service. She rarely looked to other officers for help and make decisions on her own. She will make a great asset to the Gloucester City Police Department. She needs to continue her studies and learn from minor mistakes. I feel that she needs to be placed with

> a supervisor who will monitor activities and make the appropriate corrections.
>
> [Ibid.]

The appellant acknowledged that Officer Little recommended "more scenario-based training" for the appellant. Ibid. After January 19, 2017, officers developed hypothetical scenarios in which the appellant could roll play in order to help her develop skills and handling stressful, confrontational situations. The Department established this for the appellant, to help improve her performance. Some of the scenarios involved domestic violence incidents and how to clear buildings. She was reassigned to Sergeant Johnson's platoon in August 2017, "so that he could supervise me and that I would be in the vehicle with him and he would be discussing my performance with her supervisor throughout my extended working test period that the Department was going to give me." (T1:79-20-24.) This was intended to permit another officer to evaluate the appellant's performance as the Department wanted to have the input from a different officer, in addition to that of Sergeant Flood. The appellant was told by Sergeant Flood that if she did not improve in certain areas, she would be terminated, even though her field training was done. Although the appellant did not specifically recall that Officer Little told her that he believed she needed to be monitored by a supervisor after the Field Training Program was done, she testified that she had no reason to believe that he did not so advise her.

The appellant also recalled that Lieutenant Burkhardt counseled her in November 2016, concerning the need for her to engage in contingency planning to "help increase the speed and accuracy of the decision-making process in high stress situations." (J-21 at 365.) Lieutenant Burkhart reflected on that conversation in an internal memorandum that memorialized his August 11, 2017, meeting with the appellant. He wrote in the memorandum that they revisited their November 2016, conversation and he asked the appellant "if she had ever thought about what her plan would be if a male was coming at her and threatening to assault her. She stated she never thought about that scenario." Ibid. Lieutenant Burkhardt continued:

> I expressed to Ptl. Pollander that it bothered me that we talked so long ago, at great length, about contingency planning and

> that she never took the initiative to follow through with this to improve her job performance and for her own safety, along with the safety of the officers she serves with. We discussed the fact that she had a great deal of additional training during and after her field training period and that she is nearly one year of experience on the street, yet still failed to respond appropriately and perform her duties properly. During this incident. I then expressed my concern as to the cause of this problem. I told her I was not sure if she was just indecisive, was not sure how to do her job, or did not have it in her to step up and take action. I also told her that I was concerned whether or not she was capable of fighting to protect yourself or her fellow officers, or make an arrest, if need be.
> [Ibid.]

The appellant acknowledged that it is important for a police officer to be able to handle confrontational, stressful situations. Failure in this regard could pose a danger to her, her fellow officers and the public. When asked if she had an "understanding throughout the one year working test period that one of the concerns that the [Department] had with you is that you had difficulty handling stressful, confrontational situations[,]" the appellant answered, "It was my understanding that they were more concerned with my decision-making which ultimately led to their evaluation of me possibly freezing up in stressful situations." (T1:80-22-25.) She was told this by Little during her field training and by other officers, including Flood, after the training was over. She acknowledged that the Department attempted to help improve her performance where it was lacking.

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp, 53 N.J. Super. 282, 287 (App. Div. 1958). A credibility determination requires an overall assessment of the witness's story in light of its

rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

As the fact finder, I had the ability to observe the demeanor, tone, and physical actions of the witnesses during the hearing. Each of the Department's officers, Sergeant Little, Sergeant Johnson, Sergeant Flood, Lieutenant Burkhardt and Chief Morrell, comported themselves professionally and their testimony was internally consistent and consistent with the other witness' accounts. Their objective observations of the appellant's performance were confirmed by numerous contemporaneously-written documents. The documentary evidence corroborated that they attempted to extend the appellant's working test period and that an extension was procedurally impermissible. The witnesses demonstrated a sincere desire to see the appellant succeed and communicated with her about her performance throughout the year. However, none could permit the appellant to place herself, her fellow officers and citizens at risk due to her difficulty handling stressful, non-routine situations. I **FIND** each witness' testimony to be credible.

The appellant testified credibly, as she acknowledged that the officers with whom she worked raised concerns about her ability to perform under stressful circumstances and counseled her throughout the year of her working test period, including after her Field Training Program was finished. Even if she was not given written documentation of her deficiencies each time the issue was addressed, she acknowledged that she was routinely counseled and received extra training opportunities. She also acknowledged that her performance problems were significant and could lead to problematic outcomes.

Therefore, based upon the testimonial and documentary evidence, and having the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following additional **FACTS**:

The Department determined the appellant's performance was unsatisfactory in crucial performance areas such that it could not appropriately permit her to continue with the Department after her working test period ended. After months of observing and counseling the appellant, and based on objective criteria, the Department found that she

performed poorly when confronted by non-routine, stressful situations. She "froze" or made poor decisions and demonstrated poor judgment on several occasions under such circumstances. This continued throughout her working test period, including an incident that required an internal affairs investigation and about which the Lieutenant expressed his concern that she still had not improved her job performance in areas that are among the most critical parts of a police officer's job.

The Department sought to help the appellant improve and pass her working test period. It provided her additional opportunities to improve her skills, including two remedial training sessions, scenario-based training, in which her supervisors participated, and additional training at the Academy. Officers and supervisors counseled her throughout her working test period, both during and after her Field Training Program. Toward the end of her working test period, she was assigned to another officer who was tasked with observing and counseling her. The Department even sought to provide the appellant additional time to successfully complete her working test period, notwithstanding her history of problems with stressful situations, poor decision making, and failing to comply with Department procedures.

The Department generated numerous reports throughout the appellant's working test period in which it documented its concerns. The appellant saw and signed several of the documents.

The appellant had ample notice of the Department's concerns. She did not contest that she was counseled by her supervisors throughout the year-long working test period. She acknowledged that the Department was concerned about her decision making and the possibility of her "freezing up in stressful situations." She also acknowledged that she was advised of these concerns during and after the Field Training Program and that the Department attempted to help improve her performance where it was lacking.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

A working test period is intended to "permit an appointing authority to determine whether an employee satisfactorily performs the duties of [his or her] title." N.J.S.A. 11A:4-15. The probationary period is not intended to provide an opportunity for further training to qualify for the position. "Rather, it is part of the testing process, given in addition to the examination conducted by the Civil Service Department. During that period the employee must demonstrate that he is competent to discharge the duties of the position." Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 355 (App. Div. 1960). Termination at the end of the working test period may occur for unsatisfactory performance. See N.J.S.A. 11A:2-6(a)(4); N.J.A.C. 4A:2-4 and 4A:4-5.4(a); In re Voigtsberger, 2017 N.J. Super. Unpub. LEXIS 2599, *5-6 (October 17, 2017).

In an appeal from an employee's termination at the conclusion of a working test period, the employee shoulders the burden of proving that the appointing authority's "action was in bad faith." N.J.A.C. 4A:2-4.3(b). If bad faith is found, the employee is entitled to a new full or shortened working test period and, if appropriate, other remedies. N.J.A.C. 4A:2-4.3(c). The basic test is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position. See Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 356 (App. Div. 1960); Devine v. Plainfield, 31 N.J. Super. 300, 303-04 (App. Div. 1954); Lingrell v. New Jersey Civil Serv. Comm'n, 131 N.J.L. 461 462 (1944). In general, good faith has been defined as meaning "honesty of purpose and integrity of conduct with respect to a given subject." Smith v. Whitman, 39 N.J. 397, 405 (1963). As stated in Schopf v. New Jersey Department of Labor, 96 N.J.A.R. 2d 853 (CSV 1996):

> If the opinion is formed based upon actual observations of the employee's performance of the duties of the position, and is an honest assessment as to whether the employee will be able to satisfactorily and efficiently perform those duties if the appointment becomes permanent, it must be considered to have been made in good faith.

See also Valerie Hurling-Hall v County of Union, 2003 N.J. AGEN LEXIS 162, *1.

N.J.A.C. 4A:4-5.3(b) requires appointing authorities to prepare a progress report on law enforcement employees at the end of six months and a final report at the conclusion of the working test period. It has been held that "[a] fair evaluation period is further evidenced by the giving of guidance and advice due to a probationer, as well as a notification of any deficiencies in performance." Sokolowsky v. Twp. of Freehold, 92 N.J.A.R.2d (CSV) 155, 157.

A new working test period has been ordered when an appointing authority failed to provide progress or final reports. In Sokolowsky, the Merit System Board concurred with the ALJ's conclusion that the appellant should be afforded a new working test period because the appointing authority failed to fulfill the evaluation requirements. Although the appellant had received verbal criticism from his supervisor during his working test period, the ALJ found he never had the impression that his supervisor was unsatisfied with his work. While the appellant's supervisor had prepared an interoffice memorandum stating that he was dissatisfied with the appellant's work approximately two months into the employee's working test period, the supervisor did not discuss the contents of this memorandum with the appellant and the evidence did not establish that the appellant received it. In concluding that the appellant was entitled to a new full working test period, the ALJ noted that a "fair evaluation period" is "evidenced by the giving of guidance and advice due to a probationer, as well as a notification of any deficiencies in performance." Sokolowsky, 92 N.J.A.R.2d (CSV) at 157. The ALJ held that "the appointing authority failed to fulfill the . . . requirements for a fair evaluation period." Ibid. Specifically, although the appellant "was verbally advised concerning deficiencies in his performance," "he received no written report concerning his progress," and "[t]he consequence of the appointing authority's failure to provide the appellant with timely written notification of deficiencies was denial of a fair evaluation of his work performance." Ibid.

In In the Matter of Jose Maldonado, Passaic County Board of Social Services, OAL Dkt. No. CSV 0773-04 (Adopted, Final Decision, July 30, 2008), the ALJ ordered the appointing authority to provide a new working test period to the appellant because it had

not adequately informed the appellant of the deficiencies in his work performance during his working test period. The appellant was provided two written reports before he was released from employment: a training report, which contained positive reviews of his progress, and a partially unsatisfactory final evaluation. Prior to the final evaluation, his supervisors neither met with or counseled him to advise him of his progress or notice of deficiencies. The only written criticism provided by a supervisor concerned his cologne usage. The ALJ found that other comments made to the appellant by his supervisors did not provide him "fair notice of any deficiencies so as to afford him the opportunity to correct problems before the end of his working test period." Id. at 3. The ALJ found credible the appellant's testimony that he was not apprised of deficiencies in his performance. Accordingly, the ALJ found that "the appellant's release for deficiencies in his job performance that were not adequately brought to his attention through the required progress report evidenced a lack of good faith." Ibid.

The Commission adopted the ALJ's opinion. However, it noted, "[I]it must be emphasized that the lack of written notice, standing alone, does not evidence bad faith." Id. at 4. For an appellate to succeed on appeal, he must demonstrate bad faith on the part of the appointing authority. Ibid.

In In the Matter of James Matus, OAL Dkt. No. CSV5065-07 (Adopted, Final Decision, December 21, 2007), the Commission reiterated that "procedural violations of N.J.A.C. 4A:4-5.1 *et. seq.*, including the non-receipt of progress reports, may create a presumption of bad faith. However, that presumption can be rebutted via evidence that the employee was otherwise aware of work performance and other deficiencies during the working test period."

In Matus, the appellant was provided no progress reports during his working test period. Nonetheless, the ALJ and Commission found that the appellant had been advised of his performance deficiencies and disciplined during the working test period. He was also warned about his excessive use of leave time. Thus, the determination concerning the appellant's continued employment was based on "legitimate, work-related reasons" and was made in good faith, notwithstanding the absence of progress reports. Id. at 2.

Here, although the appellant argued that she was "kept in the dark"[6] about how her work performance was viewed, there is ample evidence that she had actual notice of the Department's view of her performance. The evidence, including the appellant's testimony, demonstrated that she was advised of the Department's concerns throughout the working test period, including after she had completed the Field Training Program. Furthermore, there is no evidence indicating that the Department was motivated by bias or ill motive. Rather, there is substantial evidence that the appellant's colleagues liked her and wanted her to succeed. Indeed, they created additional training opportunities for her and sought to extend her working test period. Ultimately, the additional training did not correct the appellant's deficiencies and the Department was not permitted to extend the working test period. The appellant's supervisors could not legitimately conclude that she passed the working test period when she demonstrated that she still lacked fundamental skills. Accordingly, I **CONCLUDE** the appellant has not met her burden of proving, by a preponderance of the credible evidence, that the Department[7] acted in bad faith when it released her at the end of her working test period.

ORDER

Based on the foregoing, I hereby **ORDER** that the Gloucester City Police Department's release of the appellant at the end of her working test period be **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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[6] Appellant's brief at 30.

[7] In her post-hearing brief, the appellant argued that Gloucester City is a party to this matter and that it had an ill intent toward her. She contended the City had an "interested motive in not complying with the Civil Service Rules and Regulations." Brief at 24. In support of this, she argued Gloucester City failed to train the Department's command-level staff concerning civil service rules and that this "equates to willful blindness." The appellant offered no evidence concerning the training provided by the City to the Department. Chief Morrell testified concerning his misunderstanding about the need for progress reports and acknowledged that it would have been fair to provide a timely progress report. Lt. Burkhardt acknowledged that they should have met with the appellant at the time her first progress report should have been issued. There was, however, no evidence that these omissions were caused by the absence of training or inappropriate training. Accordingly, the appellant did not present evidence in support of this claim.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 19, 2018 — Judith Lieberman

DATE — **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: 11/19/18

Date Mailed to Parties: 11/19/18

vj

APPENDIX

List of Witnesses

For appellant and respondent:

Cassy Pollander

Sergeant James Little

Sergeant Johnson

Lieutenant Stephen Burkhardt

Chief Brian Morrell

Sergeant Jason Flood

List of Exhibits

J1: Gloucester City Memo Dated March 31, 2016

J2: Gloucester City Memo Dated August 17, 2016

J3: Gloucester City FTO Program Manual

J4: Gloucester City FTO Acknowledgement Forms

J5: Gloucester City DOR Reports

J6: Gloucester City Bi Weekly Progress Charts

J7: Cycle Quizzes

J8: Gloucester City End of Phase Evaluation

J9: Gloucester City Remedial Training Report

J10: Gloucester City Formal Notice of Unsatisfactory Performance

J11: Gloucester City Field Training Final Report

J12: Certificates Earned by Appellant

J13: MVA Report Involving Appellant

J14: Gloucester City Memo Dated August 14, 2017

J15: Gloucester City Memo Dated August 20, 2017

J16: Report on Progress Prepared August 3, 2017 (First)

J17: Report on Progress Prepared August 3, 2017 (Second)

J18: Report on Progress Prepared August 24, 2017

J19: Gloucester City Memo Dated August 24, 2017

J20: Gloucester City Memo Dated January 9, 2017

J21: Gloucester City Report Dated August 11, 2017

J22: Internal Affairs File for Case 2016-2

J23: Internal Affairs File for Case 2017-16

J24: Redacted Email Chain of August 23, 2017

12-19-18

A-1

STATE OF NEW JERSEY

In the Matter of Linda A. Sowell-Washington
Burlington County,
Department of Corrections

CSC DKT. NO. 2018-3077
OAL DKT. NO. 06939-18

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 19, 2018 BW

The Civil Service Commission, at its meeting of December 19, 2018, acknowledged the attached settlement in the above matter.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF DECEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 06939-18
AGENCY REF. NO. CSC 2018-3077

IN THE MATTER OF LINDA A. SOWELL-WASHINGTON, BURLINGTON COUNTY DEPARTMENT OF CORRECTIONS.

Mark W. Catanzaro, Esq., for appellant, Linda A. Sowell-Washington, (Law Offices of Mark W. Catanzaro, attorneys)

Primitivo J. Cruz, Esq. for respondent, Burlington County Department of Corrections, (Capehart Scatchard, P.A., attorneys)

Record Closed: November 28, 2018 Decided: November 30, 2018

BEFORE **ELAINE B. FRICK,** ALJ:

Appellant, Linda Sowell-Washington, received a disciplinary action of a seven-working-day suspension, regarding alleged improper conduct on August 31, 2017. She appealed the matter and it was transmitted to the Office of Administrative Law (OAL) where is was filed on May 14, 2018, for determination as a contested case. N.J.S.A. 52:14B-1 to 14B-15 and 14F-1 to 14F-13.

The parties appeared on November 5, 2018, for a scheduled in-person settlement conference. They reached a settlement on that date of all issues in dispute, which settlement was to be memorialized in writing and executed by the parties. The parties presented a fully executed "Stipulation of Settlement and Release of Claims" agreement (J-1) on November 28, 2018, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve of the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, who by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11/30/2018
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 12.4.18

Date Mailed to Parties: 12.4.18

/dm

APPENDIX
LIST OF EXHIBITS

Jointly Submitted:

J-1 Stipulation of Settlement and Release of Claims

J-1
11/28/2018
EB Frick

LINDA A. SOWELL-WASHINGTON, Petitioner, v. BURLINGTON COUNTY JAIL, Respondent.	**OAL NO.: CSV 06939-2018 S** **AGENCY REF. NO.: CSC NO. 2018-3077** **TRANSMITTING AGENCY:** **DEPARTMENT OF PERSONNEL** **JUDGE: ELAINE FRICK**
IN THE MATTER OF LINDA A. SOWELL-WASHINGTON AND BURLINGTON COUNTY DEPARTMENT OF CORRECTIONS	**DEPARTMENTAL DISCIPLINARY ACTION** **NOTICE DATE: SEP. 6, 2018**

RECEIVED
2018 NOV 28 P 2:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STIPULATION OF SETTLEMENTAND RELEASE OF CLAIMS

THIS STIPULATION OF SETTLEMENT AND RELEASE OF CLAIMS is made and entered into by and between Linda Sowell-Washington ("Employee"), and the Board of Chosen Freeholders of Burlington County, operator of the Burlington County Department of Corrections ("County"):

WHEREAS, on September 11, 2017 the County served Employee with Preliminary Notice of Disciplinary Action in relation to Employee's alleged conduct towards a supervising officer on or about August 31, 2017;

WHEREAS, on March 13, 2018, a 31A hearing was held in relation to the foregoing discipline, and after hearing on March 26, 2018, a departmental hearing officer sustained violations against Employee for violations of N.J.A.C. 4A:2-2.3(a)(2) Insubordination; (a)(6) Conduct unbecoming a public employee; and (a)(12) Other sufficient cause, for violations of Burlington County Jail Policies 1031, 1036 and 1140;

WHEREAS, on April 17, 2018, the County served a Final Notice of Disciplinary Action issuing a seven (7) day suspension for the foregoing violations, which Employee appealed to the New Jersey Civil Service Commission ("CSC") on April 25, 2018;

WHEREAS, during the pendency of the above-captioned appeal before the Office of Administrative Law ("OAL"), on September 6, 2018, the County served employee with a separate Preliminary Notice of Disciplinary Action in relation to Employee's alleged conduct on

or about August 7, 2018, which involved (i) the unauthorized carrying of a weapon off-duty without obtaining the necessary approval and qualification from the Burlington County Jail, and (ii) abuse of sick leave privileges for alleged use of sick leave after being excused from jury service;

WHEREAS, the parties to this Agreement have engaged in settlement discussions and appeared with counsel at a court-ordered, in-person settlement conference before the Honorable Elaine B. Frick, A.L.J. on October 5, 2018, and desire to voluntarily resolve all of the foregoing disputed matters;

WHEREAS, the County and Employee enter into the following Stipulation of Settlement, and Release of Claims ("Agreement") which fully disposes of all issues in controversy between Employee and the County relating to the (i) Employee's pending appeal to the CSC captioned Sowell-Washington v. Burlington County Jail, OAL NO.: CSV 06939-2018, and (ii) the pending charges noticed in the September 6, 2018 Preliminary Notice of Disciplinary action;

NOW THEREFORE, in consideration of the mutual benefits accruing to the parties, the parties hereby agree to the following:

1. Employee accepts the charges set forth in the Final Notice of Disciplinary Action dated April 17, 2018 and agrees to dismiss her appeal Sowell-Washington v. Burlington County Jail, OAL NO.: CSV 06939-2018, pending before OAL. Employee agrees that she will serve a one (1) day suspension, which will be considered a minor disciplinary action.

2. Employee accepts the charges set forth in the Preliminary Notice of Disciplinary Action dated September 17, 2018 for violations of N.J.A.C. 4A:2-2.3 (a)(12) for violations of Burlington County Jail Policy 1160 (Off-Duty Weapons Policy) relating to Employee's unauthorized carrying of an off-duty weapon on August 7, 2018. Employee agrees that she will serve a nine (9) day suspension, which will be considered a major disciplinary action for the foregoing charges.

3. The County agrees to withdraw the remaining pending charges noticed in the Preliminary Notice of Disciplinary Action dated September 6, 2018 relating to alleged violations of N.J.A.C. 4A:2-2.3 (a)(1), (a)(3), (a)(6), (a)(7) and (a)(12) for violations of Burlington County Jail Policies 1026, 1028, 1079, 1081 relating to unauthorized and/or abuse of sick leave, and will cause a Final Notice of Disciplinary Action to be issued for only those charges set forth in Paragraph 2 above.

4. Employee also agrees to the following:

   A. In consideration of the terms and conditions as set forth in this Agreement, Employee agrees to waive any and all pending and anticipated claims against

the Burlington County Board of Chosen Freeholders and any of its employees or agents with respect to any and all claims of any kind or nature whatsoever based upon the facts or claims underlying the disciplinary matters set forth above concerning Employee's employment with the County, regardless of whether such claims are now known or are later discovered, including, but not limited to all claims or causes of action which were or might have been asserted in any civil action; all rights, claims or causes of actions under any other federal, state, or local law; and all other claims or causes of action (whether at common law or otherwise), regardless of whether such claims are now known or are later discovered including, but not limited to, all claims for damages, back pay, injunctive relief, counsel fees or any other relief, monetary or otherwise in any forum.

B. Employee agrees to waive all rights of appeal regarding these matters set forth above only, which are the subject of this Agreement, to any forum, including, but not limited to, arbitration as specified in the applicable collective bargaining agreement, to the Department of Personnel/Civil Service Commission, the Public Employment Relations Commission, New Jersey Division on Civil Rights, the Equal Employment Opportunity Commission, the Office of Administrative Law, the Superior Court of New Jersey or the United States District Court.

C. Employee agrees to withdraw any request for a departmental hearing, appeal, request for a hearing and/or grievance arbitration (if any), in these matters set forth above, that may be pending before the Civil Service Commission, the Public Employment Relations Commission or any other state, federal, local agency or arbitrator.

5. Employee agrees that neither she nor her union representative or counsel will voluntarily disclose the existence or nature of this Agreement, including the terms thereof, nor will Employee or her union representative or counsel voluntarily disclose any communications or negotiations leading up to the Settlement Agreement reached by the parties. Employee and/or her union representative or attorney agree that if the disclosure of the terms of this Agreement is necessary to comply with a court order, statute, or law, Employee and/or her union representative or attorney will provide the County with notice of such order or request for disclosure, and only disclose that information that is necessary to comply with such order, statute or law, without further comment or opinion.

6. Employee acknowledges her representation by counsel throughout this process, who has fully explained the terms of this Agreement to her and that she is satisfied that such representation has been adequate and appropriate. Employee further acknowledges that she understands the terms of this Agreement and willfully, knowingly, and voluntarily enters into this Agreement, free of coercion or duress.

7. This Settlement shall not be relied upon as precedent, for any reason.

8. This Agreement will become effective upon signature by all parties whose names appear on the last page of this Agreement.

9. This Stipulation of Settlement and Release of Claims represents the complete agreement between the parties and all terms and conditions relating to the matters set forth herein and agreed to by the parties.

WHEREFORE, the parties hereby execute this Agreement intending to be legally bound thereby:

For the Employee:

LINDA A. SOWELL-WASHINGTON
County Corrections Officer

DATED: 11-20-19

LEROY HANDBERRY
President, PBA Local 249

DATED: 11/20/18

For the Board of Chosen Freeholders of Burlington County:

Matthew Leith
Warden
Burlington County Department of Corrections

DATED: 11/21/18

12-19-18

A-3

STATE OF NEW JERSEY

In the Matter of Serena Swaggerty Atlantic County, Department of Community Development and Economic Assistance CSC DKT. NO. 2017-2989 OAL DKT. NO. CSV 05604-17	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: DECEMBER 21, 2018 BW

The appeal of Serena Swaggerty, Clerk 1, Atlantic County, Department of Community Development and Economic Assistance, resignation not in good standing effective February 21, 2017, on charges, was heard by Administrative Law Judge Jeffrey R. Wilson, who rendered his initial decision on November 20, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on December 19, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the resignation not in good standing to a resignation in good standing.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. However, the Commission modifies the resignation not in good standing to a resignation in good standing and dismisses the appeal of Serena Swaggerty.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF DECEMBER, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05604-17
AGENCY DKT. NO. 2017-2989

IN THE MATTER OF SERENA SWAGGERTY,
ATLANTIC COUNTY DEPARTMENT
OF COMMUNITY DEVELOPMENT
AND ECONOMIC ASSISTANCE,

Joseph Waite, Field Representative, American Federation of State, County and Municipal Employees New Jersey, AFL-CIO (AFSCME), for appellant, Serena Swaggerty, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Jennifer P. Starr, Esq., Assistant County Counsel, for respondent, Atlantic County Department of Community Development and Economic Assistance, (James F. Ferguson, County Counsel, attorney)

Record Closed: October 9, 2018 Decided: November 20, 2018

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Appellant, Serena Swaggerty, a Clerk-1, appeals the designation of "resignation not in good standing", effective February 21, 2017, because she was a "no call/no show" on February 14, 15, 16, 17 and 20, 2017.

PROCEDURAL HISTORY

The Preliminary Notice of Disciplinary Action (PNDA) was filed on February 27, 2017. The Final Notice of Disciplinary Action (FNDA) was filed on April 10, 2017, with the single sustained charge that alleged violation of N.J.A.C. 4A:2-2.3(12) – Other Sufficient Cause. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed on April 24, 2017. The matter was heard on October 9, 2018, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

The appellant began employment with the respondent in 2015, classified as a Clerk-1. Her primary duties were answering phones and filing. The appellant requested a leave of absence and submitted a prescription blank from Robert Williams, Jr., M.D., that listed the dates of leave from February 7, 2017, to March 5, 2017[1]. (R-4.)

On February 9, 2017, Birdie Cody, Chief of Administrative Services, issued a letter to the appellant that acknowledged receipt of the prescription blank but informed her that such requests for medical leave must be submitted on a "Request for Leave of Absence" and "Medical Certification" forms. (R-5.) The letter went on to inform the appellant that she did not have a minimum of 1,250 service hours in the prior twelve months under the Family and Medical Leave Act (FMLA) to qualify for a leave of absence and that the appellant was expected to return to work on February 14, 2017. The letter further indicated:

> Should you not return to work on February 14th, you will not be approved for additional leave time and will be subject to

[1] It was stipulated that the prescription blank was mistakenly dated "2/7/16". The actual date of the prescription blank was February 7, 2017.

> the conditions of the County's attendance policy P.S. 5.11 Unauthorized Absence, which states "Unauthorized absences for five consecutive days without notice and approval, or the failure to report to duty within five days after the expiration of any authorized leave, shall be considered a resignation not in good standing, consistent with New Jersey Department of Personnel regulations." (R-5.)

The appellant was a no call/no show on February 14, 15, 16, 17 and 20, 2017. However, on February 17, 2017, the appellant faxed a Medical Certification to Pat Rowan, in the Human Resources Department. (R-6.) She did not provide a copy to Ms. Cody or anyone else in her unit as required. There was no evidence that Ms. Rowan ever forwarded the Medical Certification to Ms. Cody or anyone on the appellant's unit.

The respondent did not question the authenticity of the Medical Certification submitted on February 17, 2017. However, the respondent indicated they had no objection modifying the resignation not in good standing to a resignation in good standing.

LEGAL ANALYSIS AND CONCLUSIONS

Pursuant to Atlantic County Policy P.S. 5.11 – Unauthorized Absence:

> Unauthorized absences for five consecutive days without notice and approval, or the failure to report to duty within five days after the expiration of any authorized leave, shall be considered a resignation not in good standing, consistent with New Jersey Department of Personnel Regulations.

Accordingly, N.J.A.C. 4A:2-6.2(b) states:

> Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

Here, it is undisputed that the appellant was informed that her request for medical leave under the FMLA was denied on February 9, 2017, and that her failure to report to

work on February 14, 2017, would meet with specific consequences. It is further undisputed that the appellant failed to report to work on February 14, 15, 16, 17 and 20, 2017. There was no competent evidence provided that the appellant's request for a medical leave under the FMLA was unreasonably denied because it is also undisputed that the appellant did not have a minimum of 1,250 service hours in the prior twelve months under the FMLA to qualify for a leave of absence.

The appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As detailed above, the appellant's conduct was such that she violated this standard of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue. I **CONCLUDE** that appellant's actions violated N.J.A.C. 4A:2-2.3(a)(12).

DISCIPLINARY ACTION

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A2-1.4(a); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 et seq. New Jersey's Civil Service Act is construed liberally in order to protect employees from arbitrary discipline. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965); Prosecutors, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952).

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11:2-6; N.J.S.A.

11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Grounds for discipline include, among other things, insubordination, chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and other sufficient cause. See N.J.A.C. 4A:2-2.3(a)(2), (4), (6), and (12).

I **CONCLUDE** that the appellant's failure to report to work as directed and failure to provide proper notice of her absence was sufficient to warrant disciplinary charges. The respondent had a right to expect that the appellant would be present at work, willing and able to work. Unauthorized and "no call / no show" absences cause disruption in the public work place and create a hardship for the remaining employees, who must absorb the job duties of a person who cannot or will not perform them. I, therefore, **CONCLUDE** that the respondent has met its burden of proof regarding other sufficient cause in this case.

PENALTY

Principles of progressive discipline should be considered in the disciplinary actions of civil service employees. The determination of whether a specific act supports discipline requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976). The frequency, number and continuity of the employer's warnings indicate the progression of the discipline. Ibid. On appeals from disciplinary action, the Merit Board may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Board is empowered to substitute its own judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Id. at 579. The Board must consider an employee's past record, including both mitigating factors and prior discipline when determining the appropriate penalty to be imposed. The frequency, number and continuity of the employer's warnings, previous discipline and other measures indicate the progression of the discipline.

Here, there was no evidence provided that there were any prior disciplinary actions against the appellant or that her work performance was in any way lacking. It must be noted that the respondent did not question the authenticity of the Medical Certification submitted on February 17, 2017, or call into question the doctor's diagnoses listed in the same. Furthermore, the respondent indicated they had no objection modifying the resignation not in good standing to a resignation in good standing.

N.J.A.C. 4A:2-6.2(f) authorizes that the appointing authority or the Commission may modify the resignation not in good standing to an appropriate penalty or to a resignation in good standing

ORDER

It is hereby **ORDERED** that the resignation not in good standing shall be modified to a resignation in good standing.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11-20-18
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: November 20, 2018

Date Mailed to Parties: November 20, 2018 (Emailed)

JRW/dm

APPENDIX

WITNESSES

For Appellant:

Serena Swaggerty, appellant

For Respondent:

Birdie Cody, Chief of Administrative Services

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action, dated February 27, 2017
R-2 Final Notice of disciplinary Action, dated April 10, 2017
R-3 Atlantic County Policy P.S. 5.11 – Unauthorized Absence
R-4 Doctor's Note, dated February 7, 2016
R-5 Birdie Cody Letter, dated February 9, 2017
R-6 FMLA Certification, dated February 16, 2017
R-7 Birdie Cody Letter, dated September 15, 2016
R-8 Birdie Cody Letter, dated February 1, 2016
R-9 FMLA Hour Eligibility as of August 25, 2016
R-10 FMLA Hour Eligibility as of February 7, 2017

12-19-18

A-5

STATE OF NEW JERSEY

In the Matter of Ramone Wilson
City of Newark, Department of Public Safety

CSC DKT. NO. 2018-1519
OAL DKT. NO. CSV 00233-18

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 21, 2018 BW

The appeal of Ramone Wilson, Police Officer, City of Newark, Department of Public Safety, removal effective March 14, 2016, on charges, was heard by Administrative Law Judge Barry E. Moscowitz, who rendered his initial decision on November 23, 2018 reversing the removal. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 19, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Public Safety*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position in order to complete the remainder of his working test period.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Ramone Wilson.

Since the charges against the appellant have been dismissed, the appellant is entitled to mitigated back pay, benefits and seniority and reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12. However, the appellant is not entitled to receive back pay, benefits and seniority for the entire period from the date of his removal to the date of his reinstatement. In this regard, the Commission notes that the appellant was still in his working test period when he was removed. Specifically, he received a regular appointment effective September 17, 2015 and was removed effective March 14, 2016. Since it cannot be assumed that the appellant would have completed his working test period, he should only receive back pay through September 16, 2016, which is the remainder of the working test period he did not complete. *See In the Matter of Justin Miller* (CSC, decided June 18, 2014); *In the Matter of Terrell Twiggs* (MSB, decided May 9, 2007); *In the Matter of Jennifer Mortimer* (MSB, decided April 26, 2006) and *In the Matter of Rosalind Candelaria* (MSB, decided November 10, 1998). Therefore, the appellant should be returned to work to complete the remainder of his working test period. Accordingly, the appellant is entitled to receive back pay, benefits and seniority from March 14, 2016 through September 16, 2016. Any time from that date to his actual reinstatement shall be considered a leave of absence without pay. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF DECEMBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00233-18

IN THE MATTER OF RAMONE WILSON, CITY OF NEWARK, DEPARTMENT OF PUBLIC SAFETY.

CSC DKT# 2018-1579

Michael A. Peluso, Esq., for appellant Ramone Wilson

Michael A. Cifelli, Esq., for respondent City of Newark (Florio, Kenny, Raval, LLP, attorneys)

Record Closed: October 8, 2018 Decided: November 23, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

The Newark Police Department (Newark) brought disciplinary charges against Ramone Wilson, temporarily appointed as a police recruit, before he completed his police training and began his working test period. Do these disciplinary procedures even apply to him? Yes. Under N.J.A.C. 4A:4-5.2(d)(1), major disciplinary procedures applicable to employees serving in a working test period are also applicable to police officers from the date of appointment until the completion of their police training.

PROCEDURAL HISTORY

On March 14, 2016, the Newark served Wilson with a Preliminary Notice of Disciplinary Action. In its notice, Newark charged Wilson with violation of Chapter 18:24 of its rules and regulations, which states that department members shall not violate any criminal law, any provision of the Disorderly Persons Act, or any of its city ordinances. In addition, Newark charged Wilson with violation of Chapter 3:1.1 of its rules and regulations, which states that police officers in both public and private shall conduct themselves to avoid impugning the reputation of the department. Finally, Newark charged Wilson with violation of N.J.A.C. 4A:2-2.3(a)(6), which states that a public employee may be subject to discipline for conduct unbecoming a public employee.

Newark specified that on March 12, 2016, Wilson violated these rules and regulations when he was arrested by the Irvington Police Department for receiving a stolen car in violation of N.J.S.A. 2C:20-7.

As a result, Newark suspended Wilson without pay pending the resolution of the criminal charges against him.

On April 7, 2016, Newark served Wilson with a Final Notice of Disciplinary Action. In its notice, Newark sustained all the charges and specifications in the preliminary notice. As a result, Newark suspended Wilson from his position as a police recruit without pay indefinitely.

On January 26, 2017, the criminal charge was dismissed.

On February 15, 2017, Newark served Wilson with another Preliminary Notice of Disciplinary Action. In its notice, Newark charged Wilson again with violation of Chapter 3:1.1 of its rules and regulations, and violation of N.J.A.C. 4A:2-2.3(a)(6). Newark specified that on December 25, 2015, Wilson falsified an official record when he said, during an interview, that the lease to his apartment was in his name when he knew, "in truth and in fact," that the lease to his apartment was in the name of Shastri Boyd Persad. Newark also specified that on January 3, 2016, Wilson created false documents, letters

dated April 27, 2015, and June 14, 2015, to a superior officer, Sgt. Louis Forst, to justify an argument Wilson had with his neighbor. As a result, Newark removed Wilson from his position as a police recruit.

On November 9, 2017, Newark served Wilson with a Final Notice of Disciplinary Action. In its notice, Newark sustained all the charges and specifications in the preliminary notice. As a result, Newark removed Wilson from his position as a police recruit.

On November 27, 2017, Wilson appealed the determinations.

On January 9, 2018, the Civil Service Commission transmitted these appeals to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On June 19, August 16, and August 31, 2108, I held the hearing on both appeals.

By October 8, 2018, the parties had submitted their post-hearing briefs for these appeals, and I closed the record upon the receipt of the final submissions.

DISCUSSION AND FINDINGS OF FACT

I.

Louis Forst is a lieutenant with the Newark Police Department. He has been employed by Newark since 1999 and was a sergeant in 2015 when he first met Wilson. During that time, Forst was the liaison between the Newark Police Department and the Passaic County Police Academy and Wilson was a police recruit at the academy. Previously, from 2008 to 2011, Forst worked in Internal Affairs and as an academy instructor in Newark, when Newark had its own police academy. Forst has been a

lieutenant since 2016 and is currently the tour commander for the first precinct. He just became the tour commander this year.

A.

Forst testified that he had received a civilian complaint, which he called a "demeanor complaint," about Wilson from Wilson's downstairs neighbor, a Sunni Muhammad. Forst explained that he spoke to Muhammad; the property manager, a Jason Delgado; and Wilson about it. Forst continued that his findings are contained in his investigative report. The investigative report was admitted into evidence as Exhibit H.

Forst asserted that when he interviewed Wilson on December 25, 2015, Wilson told him that his name was on the lease for the upstairs apartment, but that Wilson had lied because his name was not on the *lease* for the upstairs apartment but on the *sublease* for the upstairs apartment.

Forst maintained that Wilson had lied even though Delgado had faxed him on January 21, 2016, a letter dated January 19, 2016, which stated that Wilson was a tenant in the upstairs apartment and a sublessee of Shastri Boyd Persad. Delgado also included the lease. Incredibly, Forst maintained that Wilson had lied to him even after he received a copy of the sublease from Wilson and saw that the sublease was in his name. The fact that neither Forst nor Wilson made a distinction between a lease and a sublease during the interview, and the fact that they talked only of "a lease" or "the lease" throughout their interaction, made no difference to Forst. According to Forst, Wilson had lied to him because Wilson said his name was on the lease and it was not.

Meanwhile, Persad testified that he did in fact sublease the apartment to Wilson, that he had gotten verbal approval from Delgado to do so, and that someone in his office ultimately provided a copy of the sublease to Delgado, who had later asked for it. Persad further explained that he was aware of the problem Wilson had with Muhammad. In fact, Persad testified that he had "run-ins" with Mohammad too, and that he had just had a "run-in" with Mohammad recently.

Delgado corroborated that Muhammad was a problem, testified that he explained this to Forst, and noted that Forst agreed with him that Muhammad was a problem. Delgado further testified that he did give permission to Persad to sublease the apartment to Wilson—just as he had given permission to Persad in the past to sublease such properties. Delgado continued that he did not maintain a copy of the sublease because it was not his lease, but that he did inform Forst that Wilson was the sublessee and not the lessee when he provided a copy of the lease to Forst. More significantly, Delgado noted that Forst did not ask for the sublease with any sense of urgency.

Wilson explained that he had found out about the apartment because he knew Persad, he had been doing office work for him, and had asked Persad if he would sublease the apartment to him. Wilson continued that he moved into the apartment in September 2014, and that he entered the academy in June or July 2015. Wilson also noted that he had achieved one of the highest scores on the civil service exam—which is the reason why he had been recruited by Newark to join its police department.

The trouble with Muhammad, however, began February or March 2015. Wilson explained that he first mentioned it to Persad, who told him to bring his complaint to Delgado, who told him that he was aware Muhammad was a problem and to put his future complaints in writing, just in case he needed to take legal action against him. Moreover, Wilson plainly stated that he told Forst that he was on the lease and not the sublease because the sublease was the only lease he had, the only lease he contemplated, and he simply made no distinction between the two.

B.

Forst testified that during his interview with Wilson on December 25, 2015, Wilson told him that he would also provide him with letters evidencing the ongoing trouble he had been having with Muhammad, and that he would provide Forst with those letters in a couple of days. On January 3, 2016, Wilson provided Forst with those letters in an attachment to an email Wilson sent to Forst that very day. The body of the email states, "As per our last conversation, I assured you that I would forward you the letters I sent to the property management regarding discrepancies with my neighbor. Attached are the

letters, please let me know if there is anything in addition to the letters needed." The email and its attachments were admitted into evidence as Exhibit A.

Forst, however, asserted that the letters were written just before they were sent. Forst explained that Wilson sent him the email on January 3, 2016, at 8:28 p.m.; that he opened the letters and "right-clicked" on "properties" to reveal their "metadata"; and that the "metadata" evidenced that they were created on January 3, 2016, at 8:03 p.m. and 8:23 p.m., respectively. In his report, Forst writes that this was a "forensic check through the statistical properties" of the letters.

Regarding the first letter, Forst wrote:

> A forensic check through the statistical properties was conducted by the undersigned on January 16th. The Microsoft Word file sent on January 3rd at 8:28 p.m. shows that the first letter dated 4/27/15 was created on January 3, 2016 at 8:03 p.m. by author [Ramone] Wilson and last saved on January 3rd at 8:15 p.m. Wilson spent 14 minutes composing and editing this letter on January 3rd. The statistical page also shows that the file was printed by the undersigned on January 16th at 10:21 a.m.
>
> [Ex. H.]

Regarding the second letter, Forst wrote:

> A forensic check through the statistical properties was conducted by the undersigned on January 16th. The Microsoft Word file sent on January 3rd at 8:28 p.m. showed that the second letter dated 6/14/15 was created on January 3, 2016 at 8:23 p.m. by author [Ramone] Wilson and last saved on January 3rd at 8:23 p.m. Wilson spent only 1 minute composing and editing this letter on January 3rd as opposed to 14 minutes for the first letter. The statistical page also shows that the file was printed by the undersigned on January 16th at 10:21 a.m.
>
> [Ex. H.]

Forst later describes the letters as "original" Word files.

Approximately one month later, on February 5, 2016, Delgado emailed the same letters to Forst. They were admitted into evidence as Exhibit G. In his letter, Delgado states that he had them on file in his office.

But Forst did not believe Delgado. Forst explained that he had interviewed Delgado on January 18, 2016, and that Delgado had told him that he did not have any documentation about the dispute between Wilson and Muhammad on file. So, when Delgado emailed the two letters to him, he did not believe that the letters were genuine. Moreover, Forst implied that Wilson and Delgado had conspired to submit them.

Forst, however, is mistaken. First, a preponderance of the evidence does not exist that by clicking on the "properties" icon of a Word document the "metadata" of the Word document is revealed. Second, a preponderance of the evidence does not exist that Forst conducted a "forensic check through the statistical properties" of the letters. As such, a preponderance of the evidence does not exist that Forst either reviewed the metadata of the letters or conducted a forensic check of their statistical properties—especially when no foundation was laid that Forst possesses such specialized knowledge.

Third, a preponderance of the evidence does not exist that the letters were "original" Word documents.

Fourth, a preponderance of the evidence does not exist that Wilson and Delgado conspired to do anything. While it is understandable why Forst may think so—based on his mistaken belief that he had discovered the metadata of the files—this conspiracy is not real but imagined. What is clear from the evidence is that Forst wanted to reach a certain conclusion in his investigation about Wilson.

To be sure, Delgado testified that when he first spoke to Forst (January 18, 2016), Forst only asked him for the lease, which he faxed to Forst on January 21, 2016, and noted that Wilson was a sublessee, not a lessee, and that when he next spoke to Forst (February 5, 2016), Forst first asked him for the letters, which he emailed to Forst on the same day, and noted that the letter dated April 27, 2015, should have been dated June 27, 2015, because that is the date he received it.

Wilson corroborated that the letter dated April 27, 2015, should have been dated June 27, 2015, because that is the date that he dropped the letter off for Delgado. Wilson explained that he had only retained copies of the letters on his computer, but that he no longer had copies of the letters on his computer when Wilson asked for them on December 25, 2015, because his computer had crashed and he had to replace the hard-drive. Wilson even offered copies of the receipt for the hard drive when asked for proof on cross-examination. Wilson further explained that he had taken pictures of the letters with his daughter's cellphone because he did not own a printer or a copier, and that Forst agreed he could retype the letters from his daughter's cellphone so there would be no discrepancies in the record. On cross-examination, Wilson asserted that his exact duplication of the letters is why the original typographical errors, including the incorrect date of April 27, 2015, were repeated in the duplicate letters he typed and then attached to the email he forwarded to Forst.

As such, Forst's assertion that Wilson composed and edited the letters dated April 27, 2015, and June 14, 2015, on January 3, 2016, to perpetuate a fraud, is not a fact of this case.

C.

On February 5, 2016, Forst closed the citizen's complaint. The result of his investigation was "not sustained," and no other issues or complaints had been reported since. But Forst still brought charges against Wilson for not having submitted the two letters timely. Forst asserted that he had expected them in "a couple of days," and that he received them later than that. In fact, Forst testified that he was annoyed that he did not get the letters sooner because he had asked Wilson for them more than once. Forst advised that if he were Wilson, and he had access to the letters, he would have provided them immediately.

Yet, on cross-examination, Forst acknowledged that he had interviewed Wilson on Christmas Day, December 25, 2015; that Wilson later told him that he did not have immediate access to the letters but could still get him the letters; and that Wilson did in fact provide him with the letters after the holidays, on January 3, 2016.

Still, the fact that December 25, 2015, was Christmas Day, the fact that Wilson did not have immediate access to the letters, and the fact that Wilson provided him with the letters after the holidays, just eight days later, did not matter to Forst because Forst still charged Wilson with failing to provide him with the letters within two days, which simply underscores his bias against Wilson.

Nevertheless, this charge of untimeliness was not included in the notices of disciplinary action, only the charge of falsification.

D.

On January 29, 2016, Forst wrote to Wilson that he had "fully investigated" his complaint about the lease and the letters, and that he had interviewed "all related witnesses and the Newark Police Department personnel involved in this matter to obtain all the facts surrounding the complaint." This letter was admitted into evidence as Exhibit F. Yet, Forst, by his own admission, had not "fully investigated" his complaint and he had not interviewed "all related witnesses." In fact, Forst completed no investigation and interviewed no witnesses.

Forst had learned from Delgado on January 21, 2016, that Wilson was on the sublease, not the lease. Yet Forst did not follow up with either Wilson or Delgado to question them about it. When asked on cross-examination why he never asked either Wilson or Delgado about the sublease on either of these occasions, Forst simply answered, "I don't know."

Earlier, Forst had received the letters from Wilson on January 3, 2016, but did not check their "properties" until January 16, 2016, and he did not follow up with either Wilson or Delgado to question either of them about the letters.

Likewise, when Delgado submitted the letters on February 5, 2016, Forst never followed up to ask how he had them, since Delgado had just told him on January 18, 2016, that he did not have them.

Moreover, Forst had spoken to Delgado on February 5, 2016, to advise him that he had closed the citizen's complaint filed by Mohammad. As such, Forst had the immediate opportunity to ask this follow-up question. When asked on cross-examination about what additional investigation he did do, Forst answered, "None," which both Delgado and Wilson corroborated during their direct examinations. Thus, Forst, by his own standard, should have been disciplined for falsifying an official record, because "in truth and in fact," he had not fully investigated his complaint and he had not interviewed all witnesses.

Indeed, throughout his cross-examination, Forst was uneasy about the pointed questions asked. He started to fidget in his seat, lean backward, and slouch. And he began to answer questions with either his hands or reading glasses in front of his mouth. In other word, he became defensive.

II.

Given this discussion of the facts, I **FIND** that Newark has not proven by a preponderance of the evidence any of the salient specifications in the Final Notice of Disciplinary Action dated November 9, 2017. First, a preponderance of the evidence does not exist that on December 25, 2015, Wilson falsified an official record when he said, during an interview, that the lease to the apartment was in his name when he knew, "in truth and in fact," that the lease to his apartment was in the name of Shastri Boyd Persad. The fact that Wilson was on the sublease and not on the lease is a distinction without difference. That Wilson did not make the distinction was perhaps unartful, but it certainly was not deceitful. The fact that Forst maintains that Wilson lied about it is the only thing I would characterize as deceitful. Indeed, taking together what Fort said and how he said it, I did not find Forst to be a credible witness.

In addition, I **FIND** that a preponderance of the evidence does not exist that on January 3, 2016, Wilson created false documents, namely, letters dated April 27, 2015, and June 14, 2015, to justify an argument he had with his neighbor.

Likewise, I **FIND** that a preponderance of the evidence does not exist that Wilson failed to provide these letters to Forst in a timely manner.

Finally, I **FIND** that Wilson failed to complete the police training course but remained employed by Newark as a radio dispatcher while he waited for the next police training course to begin.

DISCUSSION AND CONCLUSIONS OF LAW

The OAL shall acquire jurisdiction over a case only after an agency head has determined that the matter is a "contested case." N.J.A.C. 1:1-3.2(a). A contested case is an adversarial proceeding in which "the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing." N.J.A.C. 1:1-2.1. To determine whether a case is a contested case under this regulatory scheme, the agency head must determine three things: (1) whether the hearing is required by statute or constitutional provision; (2) whether the hearing will result in an adjudication concerning rights, duties, obligations, privileges, benefits, or other legal relations; and (3) whether the hearing involves specific parties rather than a large segment of the public. Bd. of Educ. of Upper Freehold Reg'l Sch. Dist. v. State Health Benefits Comm'n, 314 N.J. Super. 486, 494 (App. Div. 1998) (citing 37 New Jersey Practice, Administrative Law and Practice § 119, at 137 (Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty) (1988)).

In this case, the Civil Service Commission transmitted this case to the OAL as a contested case. Newark, however, argues that it is not. More specifically, Newark argues that the hearing is not required and that the hearing will not result in the adjudication of any right, duty, obligation, privilege, benefit, or some other legal relation because Wilson is not a permanent, full-time member of the police department.

To become a permanent, full-time member of a police department, a person must complete a police training course. N.J.S.A. 52:17B-69.2. During this time, the person shall hold a probationary or temporary appointment. See N.J.S.A. 52:17B-69. And during this time, the person shall be in the title of "trainee," "apprentice," "recruit," or "intern," among others. See N.J.A.C. 4A:3-3.7(a).

In this case, Wilson was in the title of "recruit," that is, "police recruit." Both the preliminary and final notices of disciplinary action identify him as such, and even Forst, in his complaint against Wilson, identified him as such. The question, then, is whether Wilson, as a temporary appointee, is subject to the same disciplinary procedures as a permanent appointee. As the notices of disciplinary action already suggest, the answer is yes.

Upon regular appointment, trainees must successfully complete a working test period, N.J.A.C. 4A:3-3.7(c), and in local service, law enforcement officers who are required to complete a police training course shall not begin their working test period until the Police Training Commission notifies the appointing authority that the law enforcement officer successfully completed the police training course, N.J.A.C. 4A:4-5.2(d)(1).

Nevertheless, major disciplinary procedures applicable to employees serving in a working test period are also applicable to police officers from the date of appointment until the completion of police training. Ibid.

That is this case. Since Wilson did not successfully complete the police training course, his working test period never began. But his employment did not end. Instead, Wilson remained employed as a radio dispatcher, while he waited for the next police training course to begin. And that is why he was served with notices of disciplinary action.

The fact that Newark argued for the first time, at the start of the hearing on June 19, 2016, just before the first witness was to take the stand, that these disciplinary procedures do not apply to Wilson, and that this tribunal does not have jurisdiction over this case, is disconcerting—especially since this case was transmitted to the OAL on January 9, 2018, numerous prehearing telephone conferences were held to discuss both

the procedural and substantive issues of this case, and never once did Newark even suggest that this issue was a threshold issue in this case.

So, given this discussion of the law, I **CONCLUDE** that the disciplinary procedures applicable to employees in a working test period are also applicable to Wilson in this case, and that this tribunal has jurisdiction to hear this case and make its determination.

I also **CONCLUDE** that Newark has not proven by a preponderance of the evidence any of the charges against Wilson in the Final Notice of Disciplinary Action dated April 7, 2016. Although Wilson was arrested by the Irvington Police on March 12, 2016, the charges against him were dismissed on January 26, 2017. To conclude that Wilson engaged in conduct unbecoming for merely having been arrested under charges that were later dismissed would mean that all police recruits who are arrested have engaged in conduct unbecoming a public employee regardless of whether the charges against them are dismissed. Accordingly, the charges against Wilson in this disciplinary action should be dismissed.

Likewise, I **CONCLUDE** that Newark has not proven by a preponderance of the evidence any of the charges against Wilson in the Final Notice of Disciplinary Action dated November 9, 2017. I note that this follows because I had found that Newark had not proven by a preponderance of the evidence any of the salient specifications in the Final Notice of Disciplinary Action dated November 9, 2017. As such, Wilson should be restored to his employment in Newark in the title of police recruit, and the charges against him in this case in this disciplinary action should be dismissed as well.

Finally, I **CONCLUDE** that Wilson should be awarded all requisite back pay, costs, and attorney fees.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Wilson be restored to his employment in Newark in the title of "police recruit," and that he be awarded all requisite back pay, costs, and attorney fees.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/23/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 11/23/18

Date Mailed to Parties: _____

dr

APPENDIX

Witnesses

For Appellant:

Shastri Persad

Jason Delgado

Ramone Wilson

For Respondent:

Louis Forst

Documents

For Appellant:

Wilson 1	Rental Agreement dated September 28, 2014
Wilson 2	Letter from Forst to Wilson dated January 21, 2016
Wilson 3	Fax from Delgado to Forst dated January 21, 2016
Wilson 4	Final Notice of Disciplinary Action dated November 1, 2017
Wilson 5	Judgment of Dismissal dated January 26, 2017
Wilson 6	Final Notice of Disciplinary Action dated April 7, 2016

For Respondent:

Ex. A	Email from Wilson to Forst dated January 3, 2016
Ex. B	Fax from Delgado to Forst dated January 21, 2016
Ex. C	Investigation Report by Forst dated January 22, 2016
Ex. D	Letter from Forst to Wilson dated January 25, 2016
Ex. E	Complaint by Forst against Wilson dated January 27, 2016
Ex. F	Letter from Forst to Wilson dated January 29, 2016
Ex. G	Email from Delgado to Forst dated February 5, 2016
Ex. H	Investigative Submission by Forst dated February 8, 2016
Ex. I	Investigative Review by Newark dated February 8, 2016
Ex. J	Preliminary Notice of Disciplinary Action dated January 27, 2017

Ex. K	Department Witness Notification dated February 25, 2016
Ex. L	Final Notice of Disciplinary Action dated November 1, 2017